Republic of South Africa

In the High Court of South Africa
(Western Cape High Court, Cape Town)

In the appeal between: Case No: A603/10

Phumla Qunta — Appellant Number 1
Xoliswa Alice Mavalaliso — Appellant Number 2

Versus

The State — Respondent

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Judgment delivered on: 11 February 2011

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LOUW J

[1] The two appellants, who were accused numbers two and three respectively, were charged with three male accused in this court before Klopper AJ and two assessors on eleven counts arising from a series of events which took place at the Wild Fig Restaurant in Observatory, Cape Town, on the evening of Tuesday 29 June 2004. Counts one to eight are charges of robbery with aggravating circumstances, count nine is a charge of murder, and counts ten and eleven are charges under the Arms and Ammunition Act, 75 of 1969 and relate to the unlawful possession of three firearms and ammunition.

[2] I shall refer herein to the appellants as such or, for ease of reference when the context so requires, to them as accused numbers two and three.

[3] The trial commenced on 16 April 2007, some two years and ten months after the events. The five accused who were all represented by counsel, pleaded not guilty to all eleven charges. Save for accused number one who stated that his defence was an alibi and that he was not at the scene where the crimes were allegedly committed, the appellants and the remaining accused all elected not to provide an explanation of their plea of not guilty.

[4] On 30 September 2008 the court a quo:

1. acquitted accused number one on all eleven counts; and
2. convicted the four remaining accused (including the two appellants) on five counts of robbery with aggravating circumstances (the state led no evidence on counts three, four and seven and they were acquitted on these charges) and on the remaining counts of murder and the unlawful possession of firearms and ammunition.

[5] On 12 December 2008 the two appellants and the two remaining male accused were each sentenced as follows:

1. The five counts of robbery were taken together for purposes of sentence and a period of ten years imprisonment was imposed;

2. On count nine, the count of murder, they were sentenced to twenty years imprisonment;
3. On count eleven, the unlawful possession of the firearms, a sentence of eight years imprisonment was imposed;
4. On count twelve, the unlawful possession of ammunition, a sentence of two years imprisonment was imposed;
5. Finally, it was ordered that the sentences on count ten and eleven be served concurrently with the twenty year sentence imposed on count nine, the murder charge.
6. In the result the four accused who were convicted, each received an effective term of thirty years imprisonment.

[6] On 12 December 2008, the first appellant applied for leave to appeal against conviction and sentence. The second appellant applied for leave to appeal against conviction only. The court a quo granted the first appellant leave to appeal to this court against her convictions and the sentences imposed while the second appellant was granted leave to appeal against her conviction only. At the commencement of the appeal hearing on 24 January 2011, Mr. Barnard on behalf of the second appellant applied belatedly, for leave to appeal also against sentence. This application was not opposed by Mr. Julius on behalf of the State. Their position is virtually identical as far as sentence is concerned and we considered it fair and proper to condone the late application and grant the second appellant leave to appeal also against sentence.

[7] There is an issue regarding the record on appeal that must be dealt with first. The transcript of the proceedings in lower court (excluding the transcript of the bail application brought by all five accused) was placed before the court a quo by agreement as exhibit 'M' (Vol 18/1746; 1747, 11 – 13, Vol 19/1749, 3-15). Later, during the course of the trial, part of the transcript of the bail application was handed in by agreement as exhibit 'UU' (Vol 36/3387-3403; Vol 30/2852-5). Due to a mistake made when the record was compiled the full proceedings in the magistrates' court which included the full bail application, was made part of the main record (Vol 1/1-109). It is common cause on appeal that that part of the bail application in Vol 1 which does not correspond to exhibit 'UU' must be excluded from consideration on appeal. We have had no regard to that part of the record.

[8] Counsel for the state and counsel for the two appellants have agreed that the appeal may proceed on the basis of the record and that the appellants will not be prejudiced in their appeal.

[9] The charges against the accused arose from the following events that are not in dispute. During the course of the evening of Tuesday 29 June 2004 a number of persons had dinner at the Wild Fig Restaurant, in Liesbeekpark way, Observatory. At one of the tables, sat the family group consisting of Warren and Jane Boardman-Smith and Jane Boardman-Smith's parents, Mr John and Mrs Marian Boardman. The occasion was the birthday of Mrs Boardman senior. At another table, Dr Steve Cornell and his wife were entertaining two American visitors Mr Glenn Garland and his wife Ruth

Garland. At approximately 10:30 pm a group of persons armed with three handguns and some, if not all of whom had previously entered the restaurant as guests and had been served meals at two tables in the restaurant, proceeded to rob the two parties of their personal possessions. In addition, the manager of the Restaurant, Graeme Hendry was robbed of approximately R7 000.00 in cash takings of the Restaurant and Petrus Bestbier the Chef at the restaurant was robbed of his cellphone. During the course of the robbery Mr. Boardman senior was shot and seriously wounded in his upper body. He was eventually taken to hospital but died of his injuries early the next morning.

[10] The group of robbers, who made off in a metallic blue Opel Monza motor vehicle, were pursued by police in a number of police vehicles with blue lights and sirens along the N2 national road in the direction of Somerset West. Shots were exchanged between the occupants of the Monza and the police. At the Mew way off ramp the Monza was brought to a halt when police managed to shoot out the left back tyre. Three men armed with hand guns jumped out of the vehicle and a shoot out with the police ensued. The men ran away. Shortly thereafter three men, accused one, four and five were arrested near the Monza and three handguns were retrieved. Both accused four and five suffered gunshot wounds and accused number one was bitten by a police dog used by the police during the arrest. The precise circumstances of the arrest of accused one, four and five are in dispute. Two women, accused two and three, were found in the Monza and were arrested. Most of the property taken during the robbery was retrieved from the vehicle.

[11] While it is common cause that accused two and three were in the restaurant with the male persons who carried out the robbery, they deny that they were participants in the robbery. Their version is that they were present in the restaurant under duress and that they took no part in the robbery.

[12] Accused number one testified that the Monza belonged to his sister and that he used the Monza while his vehicle was being repaired. He explained that he had been hijacked and locked in the boot of the Monza by unknown assailants earlier during the day. He was held in the boot until the vehicle was stopped by police at the Mew way off ramp. He managed to free himself from the boot by pushing the backseat forward. He was arrested on the scene soon after he had freed himself.

[13] Accused numbers two and three testified. Their versions were virtually identical. They were accosted by armed men at Wynberg about 5pm that afternoon and were forced into the Monza at gunpoint. They were taken to the restaurant where they were forced to partake of a meal with some of the perpetrators. They were present during the robbery, in which they took no part. Afterwards, they were taken back and were forced into the vehicle. The perpetrators then drove off with the police in pursuit. When the vehicle was stopped by the police at the Mew way off ramp, the three perpetrators ran away, while the appellants remained in the vehicle where they were arrested. They did not know the three male accused at all. They were not the persons who had carried out the robbery and they first saw their male co-accused when they first appeared in court.

[14] The court a quo found that the evidence of the accused number one that he was an innocent hijack victim, was reasonably possibly true and he was acquitted on all charges.

[15] The court a quo rejected the appellants' version that they were innocent bystanders who were present in the restaurant under duress. The court a quo found that the appellants were active participants in the robbery and on the basis of the doctrine of common purpose, and although they did not personally handle any of the firearms, they were also found guilty of the murder and of the unlawful possession of the three firearms and ammunition.

[16] The evidence that the appellants were active participants is both direct and circumstantial.

[17] The circumstantial evidence is that the group of robbers consisted of a number of males and two women. It is common cause that the appellants were with the robbers. There is no evidence that there were any other women with the robbers. A number of eyewitnesses described the active roll played by the two women who were with the robbers. The direct evidence lies in the identification of the appellants by some of the eyewitnesses.

[18] The three surviving members of the Boardman family group testified and their description of what happened at their table is in essence the same. They arrived shortly before 8pm and after moving from the table originally

allocated to them, they finished their meal at approximately 10:30 pm. While they were preparing to pay the bill, Jane Boardman's wallet which had been placed on the table was taken by a male robber who held a handgun by his side. Warren Boardman who was not aware of the fact that the man had a firearm in his one hand, grabbed hold of the man and pushed him against the wall. Another man who also had a firearm in his outstretched hand, then approached their table. At the same time a shot went off and Mr. Boardman senior was wounded in his upper body. The witnesses do not know who fired the shot but the only reasonable inference is that it was fired by one of the robbers. While the Boardmans were all lying on the ground the two men went through Mr. Boardman senior's pockets. A woman then approached and proceeded to take things off the table. She took a handbag hanging over the back of a chair and put it into a bag she held in her hand. She went through Warren Boardman's jacket hanging over the back of his chair. Warren Boardman asked the woman whether he could phone for an ambulance but according to him the woman 'very cruelly and calmly said ' ... No, you're going to phone the police. Give us a few minutes, we will be gone, then you can phone your ambulance.' The three Boardman witnesses were not able to identify the appellants as participants in the robbery.

[19] Dr. Cornell testified that he noticed two men and a woman sitting at a table near to his party who 'did not look completely comfortable.' Soon after the three must have got up from their table, he heard a very load shout, saw figures struggling, heard a loud bang and saw a flash whereafter he saw someone falling. He managed to flee from the restaurant but upon finding

that his wife was still inside, he returned and was told by a man holding a firearm to lie down and keep quiet. While lying down close to the entrance to the office, he heard a woman's voice coming from the office shouting repeatedly and very loudly 'he's lying, he's got the keys.' He also said that he thought that he remembers the woman saying 'shoot him, shoot him', but that he would not be telling the truth if he said that he was sure.

[20] Graeme Hendry was the manager at the restaurant. He testified that accused one and two arrived at the restaurant at approximately 8pm. They were asked to wait for a table. According to Graeme Hendry they had been at the restaurant about two weeks earlier. About fifteen minutes later, the other three persons arrived. They were also asked to wait to be seated. They waited in the lobby as a group and they were eventually seated. At approximately 10:30 pm Graeme Hendry went into his office to start cashing up. According to him accused number three walked into the office and said 'give me the keys or I'm going to shoot you'. She was followed by a man who hit him over the head with a firearm.

[21] Graeme Hendry was not a reliable witness as far as identification is concerned. He initially said that the man who came into his office was accused number five. Under cross-examination it appeared that he thought that the man in the office was in fact accused number one and not accused number five.

[22] After being hit over the head by the man, Graeme Hendry handed over the keys and the man left the office with the keys only to return a few seconds later saying 'you are lying. I'm going to shoot you. Give me the keys' and hit him over the head again. He appealed to accused number three to tell the man that he already has the keys in his hand. Accused number three however responded by saying 'he's lying, shoot him.' According to Graeme Hendry he then heard two click sounds which he assumed to come from the man pulling the trigger of the firearm. The man then used the keys to open the safe which was under his desk and he removed the cash box and took out approximately R7 000.00 in cash. The man and the woman then left the office.

[23] It is common cause that the appellants were in the restaurant at the time the robberies took place. This is confirmed as far as accused number three is concerned by the fact that her fingerprint was found on a glass in the restaurant. It is also common cause that the two appellants left the scene of the robbery in the get away car with the men who had carried out the robberies and that they were later found in the vehicle after it had been forced to stop by the police. The eyewitnesses to the robberies testified that the two women who were with the male robbers actively participated in carrying out the robberies with the male perpetrators.

[24] The one woman took part in robbing the members of the Boardman group and refused them permission to telephone an ambulance. Marian

Boardman stated that the woman was obviously assisting the two men who wielded the firearms and that they communicated in an excited way.

[25] The other woman entered the office with a male perpetrator. Accused number three admits that she was in the office with a male perpetrator who took the contents of the safe, but says that she was there under duress and that she did not participate in the threats and in the taking of the contents of the safe. A number of other eyewitnesses also testified to the conduct of the woman who went into the office. The chef, Petrus Bestbier testified that one of the women had a bag in her hand and that he saw her jumping up and down repeatedly shouting 'shoot him, shoot him.' Dr Cornell testified that he was approximately one metre from the entrance to the office and that he heard the woman repeatedly shouting very loudly 'He is lying. He's got the keys.' The manager Graeme Hendry, who was in the office at the time testified that accused number three came into the office saying ' ... give me the keys or I'm going to shoot you', and that she said to the man with her 'He's lying, shoot him.'

[26] Three identification parades were held by the police:

1. On 22 August 2004 at the Bishop Lavis Police station where only males were in the line up;
2. On 30 July 2006 at the Rondebosch Police station where only females were in the line up;

3. On 25 March 2007 at the Rondebosch Police station where there were only males in the line up.

[27] The only identification parade which is relevant to this appeal is the one held on 30 July 2006 at which the appellants were present in the line up. The three surviving members of the Boardman family group were not able to identify the appellants. However, the restaurant manager Graeme Hendry pointed out both the appellants as being involved in the robbery. According to him he recognised accused number two because she had been at the restaurant with accused number one about two weeks before the incident. Accused number three was the woman who had come into his office and had told the man who was with her to shoot him. Dr. Cornell identified accused number three as a participant in the robbery. She was the woman who sat with two men at a table close to his party.

[28] The court a quo made the following comments about the identification of the appellants:

> 'During the identification process of both Graeme Hendry and Dr Steven Cornell, who made positive identifications, events took place, which focused attention on the accused after it initially appeared that the witnesses could not identify them without hesitation. We are of the view that this parade can carry very little weight to indicate that these witnesses were able to accurately identify accused 2 and 3. In the same token it must not be disregarded that the witnesses, however,

are not incorrect when they indicated that accused 2 and 3 were present. We know this from the facts that are common cause and admitted.'

[29] Since it is common cause that the appellants were in the restaurant with the male perpetrators and that accused three was in the office when the safe was opened, their identification by the witnesses as being present on the scene of the robbery, does not take the matter further and can be disregarded.

[30] I agree with the submission by Mr. Julius on behalf of the state that there is no basis upon which the evidence of the eyewitnesses as to the conduct of the two female perpetrators can be rejected. These witnesses told the story of what had happened to them and in the process they independently gave similar accounts of what the female perpetrators did. The minor differences that there are in their evidence are not material and are clearly to be explained by the fact that the witnesses observed a fast changing series of traumatic events from different vantage points.

[31] The question is whether the appellants' version that they were innocent bystanders who were compelled to be present and that they took no part in the robberies is reasonably possibly true. In this regard counsel for the appellants pointed out that they both, within 48 hours of the events taking place, made written 'warning statements' to Inspector Ontong, the investigating officer, setting out in summary what they testified to four years

later at the trial. Both the appellants were in custody and were held together before accused number two made her statement at 11:09am on 1 July 2004 and accused number three made her statement shortly thereafter at 12:25pm on the same day. Counsel further point out that it is common cause that the two appellants did not attempt to flee once the vehicle came to a stop at the Mew way off ramp. It is in dispute whether the appellants attempted to explain to the police what had happened to them. According to them they tried to do so, but the police refused to listen to them. The two policemen who found the appellants in the vehicle, Inspector Davids and Sergeant Sehas deny that they attempted to give any explanation. According to Davids the two appellants spoke to one another in Xhosa which he did not understand and according to Sergeant Sehas, the appellants did not reply when they were asked about the bags in the vehicle and what they were doing in the vehicle.

[32] The court a quo made adverse credibility findings against the appellants. The trial court has an advantage over a court of appeal when it comes to evaluating the performance of witnesses. On a reading of the record, the adverse credibility findings appear to be justified. The question ultimately remains, however, whether their version, seen against all the evidence, is reasonably possibly true. Their version that they were innocent victims of a kidnapping that were forced to be present at a robbery seems improbable. Further, according to the appellants, their kidnappers, who were also the robbers at the restaurant, somehow escaped from the place where the Monza was brought to a standstill and accused four and five were

mistakenly arrested instead by the police. This version is not only improbable, but in the light of the objective fact that the fingerprint of accused five was found on a glass in the restaurant, untrue. Add to this the fact that firearms were retrieved in the vicinity of the male accused and also, the eyewitness evidence of the active participation of the two women who were with the robbers. The appellants version can in my view in the light of all the evidence not be reasonably possibly true.

[33] In convicting the appellants on counts ten and eleven, the unlawful possession of three firearms and ammunition, the court a quo referred to the reasoning of Marais J in S v Nkosi 1998 (1) SACR 284(W) at 286 which was confirmed by the SCA in S v Mbuli 2003 (1) SACR 97 (SCA) and S v Molini + Anor 2006 (2) SACR 8 (SCA) at 21. I agree with counsel on behalf of both appellants that the court a quo was wrong in convicting the appellants on counts ten and eleven. The court pointed out that the evidence established that the three male robbers each wielded a firearm and that the two women did not physically hold any of the firearms, but nevertheless convicted the appellants of possession. In doing so, the learned judge reasoned as follows:

> 'In accepting that the group acted in concert in perpetrating the robberies and that the tools used to overcome any resistance and to threaten violence were the said firearms, we are of the view that the only reasonable inference is that the group as a whole, in furthering the aims of committing a series of robberies, had the intention to exercise

possession of the guns through the actual detentors, the three male members of the group.

We are furthermore of the view that the only reasonable inference to be drawn from the facts, are that the actual detentors, the three males of the group, had the intention to hold the guns on behalf of the group in the furthering of their aims to commit a series of robberies. We therefore, find that all the members of the group unlawfully possessed the firearms and ammunition.'

[34] I do not agree with this reasoning. The evidence does not justify the only reasonable inference that the appellants intended to possess the firearms either directly or through the male perpetrators. The fact that the group intended to use the firearms as 'tools' to carry out the robbery does not mean that the appellants intended to exercise possession of the firearms through the three male perpetrators and that the males intended to possess the firearms on behalf of the appellants. Since the evidence shows that only the males had physical control over the firearms, a reasonable inference is that the group intended to carry out the robbery with the use of the firearms which were to be held by the three males. It is therefore just as probable, if not more probable, that their intention was that only the males would possess the firearms in the furtherance of the common purpose to rob and that it was not intended by the appellants or by the males, that the firearms would be held by the appellants through the males.

[35] It follows, in my view, that while the appellants' appeal against their convictions on the five counts of robbery and the one count of murder cannot succeed, their appeal against the conviction on counts ten and eleven, the unlawful possession of firearms and ammunition, must succeed.

[36] I turn to consider the effective sentence of thirty years imprisonment.

[37] The appellants' circumstances relating to sentence are virtually identical. At the time of sentence, the appellants were thirty and thirty eight years old respectively. The first appellant was not married with a six year old daughter while the second appellant was divorced with three children between the ages of eleven and 21 years. They both came to Cape Town some years earlier and were in casual employment. The first appellant had completed matric while the second appellant completed standard seven. While the first appellant appears to have been in good health, the second appellant suffered of asthma and varicose veins. Most importantly, both were first offenders and had been in custody awaiting trial for four and a half years. They were both active participants in the robberies but neither of them was armed. They were convicted on the murder charge on the basis of the doctrine of common purpose. In the case of both the appellants their conviction on counts ten and eleven fall to be set aside.

[38] In a well reasoned judgment, the court a quo did not impose the prescribed minimum sentences, fifteen years in respect of the robbery charges and life imprisonment in respect of the murder charge and imposed

effective sentences of thirty years in respect of all the accused. Mr. Julius, with some understandable reluctance, conceded that the fact that the appellants, unlike their male co-perpetrators, did not wield the firearms and could therefore not decide whether to fire the shot that killed Mr. Boardman senior, perhaps justified a different sentence.

[39] In my view, the appellants' lesser role can be reflected in the sentence by giving effect to the fact that the appellants have spent four and a half years awaiting trial by making an order similar to the order made in S v Vilakazi 2009 (1) SACR 552 (SCA) at 575c. Such an order will result in the sentence of thirty years expiring four and a half years earlier than would ordinarily be the case. This in my view will sufficiently reflect the impact of the time spent awaiting trial, the lesser role played by the appellants in the commission of the crimes and the fact that they are to be acquitted on counts ten and eleven.

[40] In the result the following order is made in the appeal of both appellants:

1. The appeal against the convictions on counts one, two, five, six, eight (robbery) and nine (murder) is turned down and the convictions on these counts are confirmed;
2. The appeal against the convictions on counts ten and eleven (the unlawful possession of firearms and ammunition) succeeds and the convictions and sentences on counts ten and eleven, are set aside;

3. The appeal against the effective sentences of thirty years imprisonment on counts one, two, five, six, eight and nine succeeds, but only to the following extent:

the effective sentences of thirty years imprisonment remain in place save that four years and six months are to be deducted when calculating the date upon which the effective sentence of thirty years imprisonment in respect of each of the appellants is to expire.

**W.J. Louw J**

Judge of the High Court

I agree.

**T. Ndita J**

Judge of the High Court

I agree.

**M.I. Samela J**

Judge of the High Court