

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO:

A379/12

DATE:

12 October 2012

5 In the matter between:

MASIXOLE KAFILE

Appellant

and

THE STATE

Respondent

JUDGMENT

GAMBLE, J

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15 On 16 July 2007 four men approached a shack in the informal settlement of Brown's Farm on the Cape Flats. Their intention was evidently to rob one of the occupants, Xolani Kafile (the brother of the appellant) of his firearm and to give that firearm to the appellant.

20 Two of the men entered the house while the other two lurked outside. A struggle ensued and Xolani was shot twice. He was fortunate to survive the attack. Young Asipe Kafile, the appellant's niece, was truck by a stray bullet and died on the way to hospital.

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The four men involved in the attack were said to be Buntu Binta, Athi Pholose, and two others referred to in evidence as "Mzi" and "Bongani". In a separate trial Binta pleaded guilty to charges of attempted robbery, attempted murder and murder
5 and was sentenced to an effective 18 years imprisonment. Mzi and Bongani evidently died before they could be brought to book for their involvement in the crimes.

In May 2010 Pholose and the appellant appeared in the regional
10 court and were also charged with three counts, namely attempted robbery, attempted murder and murder. In November 2011 each was convicted as charged and sentenced to an effective term of imprisonment of 15 years. The appellant appeals today against conviction only, with the leave of the
15 regional magistrate.

The State's case against the appellant was that he had never entered the shack but that he was outside a short distance away. It was contended that he was the mastermind of the
20 attack which was aimed at him procuring his brother's firearm. The appellant denied his involvement in the offences, but did admit that he had told Binta, who was also known to him as Centani, that his brother had a firearm. The appellant claimed that he had done so in jest, he also said that he knew that the
25 four men were going to the house to rob Xolani and told them

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that they should not fire any shots but just take what they want.

The appellant took no steps to prevent the four men from carrying out their plan. The issue before the trial court was
5 then whether the appellant was the mastermind behind the plot.

The State adduced the evidence of Binta in this regard and he explained in detail how the plan was hatched. He said that in July 2007 he found a firearm in a passage between some
10 shacks which he then hid in a toilet. Binta said he told the appellant of the firearm and the appellant in turn confided in him that his brother Xolani also had a firearm. The appellant also told Binta that Pholose, whom he called Artie, also had a
firearm.

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On the night of the shooting said Binta he, Artie, Mzi, and Bongani were drinking at a nearby tavern when the appellant arrived. The appellant suggested to them that they should go to the Kafile's family home and "take" Xolani's firearm. The four
20 agreed and the appellant went along to show them where the house was, since they did not know. They stopped on a corner about twenty metres away from the house where the appellant pointed the place out to them.

25 Binta said that he and Artie went into the house while Mzi and

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Bongani waited outside. Binta took out his firearm and pointed it at Xolani, demanding Xolani's firearm. A struggle ensued and a short went off from Binta's firearm as they fell to the ground. Artie then stepped closer and shot Xolani in the side. The men
5 ran off without stealing anything. They later heard about the tragic death of Asiphe who died on the way to hospital of a single gunshot wound to the head.

Binta said that he ran away from the scene and threw his
10 firearm into a rubbish bin. He thereafter left the Cape Peninsula for the Eastern Cape where he stayed for about three weeks. When he returned he went to live with family in the township of Du Noon, which is many, many kilometres away from Philippi. Binta said that he and the appellant were school
15 friends and had known one another for about four years at the time.

Under cross-examination Binta said that the appellant had told him that Xolani usually hid his firearm under his mattress. He
20 also said that when they left the tavern the appellant accompanied to within 20 metres of the house and pointed it out to him and the others. The family house was some 500 metres or so from the tavern. None of this was disputed by the appellant under cross-examination.

On 19 July 2007 the appellant made a statement to Superintendent Griffiths Adonis which was handed in and received by the trial court under Section 219A of the Criminal Procedure Act, 51 of 1977. There was some dispute at one
5 stage about its admissibility, but it was eventually accepted that the admissions contained in the document were made freely and voluntarily.

In that statement the appellant said that on 16 July 2007 Binta
10 had asked him whether his brother had a firearm, to which he had replied yes. He said that this was said jokingly, and it was only when they spoke again later that evening at a different tavern that he realised that Binta was serious. The appellant said that he then pleaded with the four men to be very careful
15 and not to fire any shots but only to take what they needed. He went on to say in the statement that the men had asked him what he wanted in return in the event that they managed to steal the firearm. The appellant said that he expected nothing but when prevailed upon by the others said that R1 000 would
20 do.

The State also called three members of the Kafile family, including Xolani, all of whom were present when the shooting took place. They took the case no further against the appellant,
25 given that he was not present at the time of the shooting.

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However the evidence of both Xolani and his sister, Andiswa Kafile, was to the effect that when Bintu walked into the shack he only asked one question - who was the appellant's brother? There was no enquiry as to the presence of a firearm in the
5 house. In fact the evidence suggests that the men may have gone into the house to shoot Xolani rather than to steal his firearm.

The appellant gave evidence in his own defence but called no
10 witnesses. He said that he was still at school at the time. He said he arrived home from school at about ten o'clock in the morning and met up with some friends. Bintu was amongst those friends. He said that they talked about this and that and that Bintu had said that he "wanted some music". This evidently
15 meant that he wanted a music centre or some other sort of appliance that made music.

The appellant told Bintu that "he can't get that music because my brother is there". When Bintu asked the appellant what his
20 brother would do if he went to his house the appellant told him that Xolani would shoot him as he had a firearm. When Bintu asked the appellant whether Xolani had a firearm the appellant confirmed this. The appellant said that when Bintu said that when Bintu said that he was going to go and "fetch" the firearm
25 he did not really believe him.

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Thereafter said the appellant the others went to Kenilworth to do some shopping. They met up later than evening at another tavern known as "Madiba's". When they arrived at Mzi's place
5 the appellant said that Bintu called him aside and told him they were going to the Kafile home to fetch the firearm. The appellant said that he had told Bintu that he was actually just joking about the firearm but Bintu persisted nevertheless.

10 The appellant disputed the suggestion that he had guided Bintu and the others to the shack, and said that he remained at Madiba's tavern drinking. About 45 minutes later Bintu came rushing in and told him that there had been a shooting. The appellant ran to his home and found that the police were
15 already there. He was arrested shortly afterwards as it was suggested that he had been involved in the episode.

The appellant said in his evidence in chief that when the four men had left to go to the shack to rob Xolani Mzi had shouted to
20 him that they would give him R1 000. Appellant said that he did not need the money and in any event he didn't receive anything subsequent to the crime.

The cross-examination of the appellant was not particularly
25 penetrating and I cannot say that he was seriously tripped up.

Nevertheless Ms van der Westhuizen for the appellant conceded that there were contradictions between the accused statement in terms of Section 219A and his evidence before the trial court and she accepted that these contradictions were material. Ms
5 van der Westhuizen conceded too that the evidence established that the appellant was an accomplice on count 1, which is the count of attempted robbery. In my view these concessions were well made and were correctly made.

10 In respect of counts 2 and 3 Ms Van der Westhuizen argued that the evidence established that the accused did not have the necessary intent to commit these offences. She referred specifically to the appellant's evidence that he had told the four perpetrators when they set off to go to the house not to shoot
15 during the robbery.

Mr Moeketsi for the State argued that by sending them to the house to rob with loaded firearms rather than going and telling the occupants of the impending danger, the appellant
20 demonstrated the necessary degree of association to bring his conduct within the ambit of *dolus eventualis*. I must say that the circumstances are suspicious. Indeed, as I have said, assassination rather than robbery may have been the motive. However, I am persuaded that the evidence shows beyond
25 reasonable doubt that the appellant actually foresaw the use of

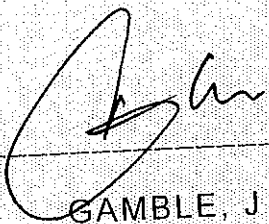
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the firearm by Bintu and it's disastrous consequences. That is the test for *dolus eventualis*: that the appellant must have subjectively foreseen the use of the firearm and that he associated himself therewith. As I have said he evidently did not wish to associate himself with any subsequent shooting.

I therefore consider that it has not been established beyond reasonable doubt that the appellant had the necessary intention in the form of *dolus eventualis*. He should therefore have received the benefit of the doubt before the trial court on counts 2 and 3.

In the circumstances I make the following order:

1. The APPEAL AGAINST CONVICTION ON COUNTS 2 AND 3 SUCCEEDS and the convictions on those counts are set aside.
2. The APPEAL ON COUNT 1 FAILS AND THE CONVICTION ON COUNT 1 IS CONFIRMED.


GAMBLE, J

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I agree,

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MANTAME, AJ

It is so ordered:

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GAMBLE, J