IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: A500/2012

In the matter between:

THEMBILE DEYI First Appellant

ANELE THELANE Second Appellant

and

THE STATE Respondent

JUDGMENT DELIVERED ON 27 AUGUST 2013

BOQWANA AJ

Introduction

[1] This is an appeal against conviction and sentence of the appellants by the Bellville Regional Court. On 11 May 2011, the appellants were convicted of attempted robbery with aggravating circumstances, murder, attempted murder, two counts of possession of an unlicensed firearm and unlawful possession of ammunition. The first and second appellants were convicted as accused number one and two in the court below respectively. They were both sentenced to 25 years direct imprisonment on 14 July 2011. They both

sought leave to appeal against both conviction and sentence which was granted by the magistrate.

[2] On 13 May 2013 we had before us only the appeal of the second appellant and no satisfactory explanation was given as to why the first appellant had not delivered his appeal. It became apparent that he had not been properly notified about the enrolment of this appeal by the State. We were concerned about the likelihood of the first appellant lodging an appeal in a different Court and we postponed the matter to 07 June 2013 directing the State to serve notices of set down as contemplated in Rule 51(1) on the first appellant and Rautenbach attorneys who represented him in the court below.

[3] We now have received appeals for both appellants. The second appellant's counsel indicated in his heads of argument that the appeal on conviction against count 5, which is the count of attempted murder of Inspector Dubell, is not being proceeded with.

Background facts

[4] The evidence in this case was the following. On 18 June 2007, an attempted robbery occurred at Diskom in Parow which resulted in the murder of one Zuko Mdemka, a Coin Security crew member who had gone to Diskom to collect cash and leave change. The deceased had two cash boxes with him. There was no direct evidence as to who the perpetrators of those crimes were. However, gunshots were heard by one Willem Fourie ('Fourie'), who was the driver of the cash van, who had been waiting for the deceased in the van, and by one Michelle Schoeman ('Schoeman'), a community member who had been shopping at the nearby shoe-shop. A firearm, bullet-proof jacket, cartridges, bullets and a cash box were collected from the scene as exhibits and sent for forensic examination.

[5] Schoeman's evidence was particularly important in this case because when she got into her vehicle, which had been parked nearby, she observed a white Toyota Corolla not too far from the scene stopping for a man, whom

she identified as the second appellant, who was limping and holding his right upper arm. Schoeman also testified that there were three occupants in the Toyota Corolla, being the driver, one passenger at the left front of the vehicle and one passenger sitting at the back (the second appellant). She testified that she followed the vehicle and witnessed the second appellant looking back at her, which caused her to be frightened and pull her vehicle into the Engen garage. She took the registration number of the Toyota Corolla and alerted the police. The registration particulars were transmitted by radio to police vehicles driving in the area.

[6] Police spotted the said vehicle and started chasing it. During the chase the second appellant fired shots at the police vehicle which led to the police retaliating by firing back. At some point during the chase the driver of the Toyota Corolla lost control of the vehicle and collided with a bridge. The second appellant got out and continued to shoot at Inspector Dubell who had stopped his vehicle and returned fire. Inspector Smit and Voigt also stopped their vehicle and returned fire. The second appellant was wounded and as a result his firearm fell to the ground. The driver of the vehicle attempted to run away.

[7] The first appellant, who was the front left passenger, the second appellant and the driver were apprehended on the scene. The driver of the vehicle passed away before the start of the trial.

[8] Two firearms, one used by the second appellant and one that was lying on the floor of the driver's side of the vehicle, were confiscated. Those firearms as well as cartridges and bullets were collected as exhibits from the scene and sent for examination.

[9] Exhibits collected from the two scenes of the crime showed that a firearm presumably used by the deceased security crew member, Mdemka (firearm 1), was used at scene one (the scene of the attempted robbery and murder) and had fired several shots. The examination also showed that the two firearms found on scene two (the scene where the appellants were arrested), one inside the Toyota Corolla on the right floor board ('firearm 2') and

another found outside the Toyota Corolla, presumably used by the second appellant ('firearm 3'), were also used at scene one. Firearm 2 had fired at a bullet-proof jacket that was collected from that scene, whilst firearm 3 was used at both scene one and scene two as evidenced by the cartridge cases and bullets found on both scenes.

Grounds for appeal

[10] The grounds of appeal submitted on behalf of the appellants are that there was no direct evidence before the trial court indicating that the appellants were on the scene of the crime at Diskom and that they attempted to rob and killed Mdemka. Furthermore, Schoeman's evidence was unreliable and uncorroborated and should have been rejected by the magistrate. It was further submitted on behalf of the first appellant that it was not proven beyond reasonable doubt that the correct people were arrested, as those involved in scene one had escaped. Counsel for the first appellant further submitted that it could not be concluded that those who fled from scene one were the occupants of the Toyota Corolla as the scene was not captured by a surveillance camera. The Toyota Corolla was only seen by Schoeman, and not at the crime scene. Furthermore, he argues, Schoeman did not identify the front passenger as the first appellant. Accordingly, the trial court should have applied the cautionary rule in dealing with her evidence.

[11] As regards ballistic evidence, counsel for the second appellant argued that there is reasonable doubt as to whether the firearm which the second appellant used was the one on which the ballistic examination was conducted . According to him the fact that the second appellant was found in possession of a firearm in the second scene did not prove beyond reasonable doubt that he was in possession of the same firearm at the first crime scene. Mr de Villiers submitted that there was no evidence to prove that the Toyota Corolla was at the first crime scene. If the vehicle was at the first scene, a reasonable possibility existed that the driver of the Toyota Corolla, who had fled at the second scene, was in possession of the firearm used at Diskom. Mr de Villiers proposes that the driver could have used this firearm at Diskom to

shoot the deceased and given the second appellant a lift thereafter. This, according to him, is strengthened by the fact that Schoeman did not see the firearm. Mr de Villiers further submits that the gunshot wounds that the second appellant had sustained could have been sustained at the second crime scene.

[12] Counsel for the first appellant relied on the heads of argument prepared by the appellant's attorney in the court below in relation to ballistic evidence.

[13] With regard to sentence Mr Theunissen submits on behalf of the first appellant that the magistrate did not deviate sufficiently enough from the minimum sentence, notwithstanding the fact that he found that substantial and compelling circumstances existed and imposed a lesser sentence of 25 years imprisonment.

Analysis

[14] The State's case rests on direct and circumstantial evidence. The principles of how to deal with circumstantial evidence were set out in the much quoted decision of ***R v Blom 1939 AD 188 at 202 to 203*** where Watermeyer JA held the following:

> 'The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn. The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.'

[15] Another important principle to be considered is that the evidence must be looked at in its totality and not piecemeal. In this regard the Court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt and, similarly, it does not look at the exculpatory evidence in isolation to determine whether it is reasonably possibly true. In this regard **see *R v Hlongwane* 1959 (3) SA 337 (A).**

[16] The question that arises in this case is whether a reasonable inference could be drawn from the proven facts that the appellants, together with the driver of the Toyota Corolla, were at the first scene of crime and had participated in the commission of the attempted robbery and murder and whether they acted with common purpose by being in unlawful possession of unlicensed firearms and ammunition and by using those firearms to attempt to rob and murder Mdemka and for the attempted murder of Inspector Dubell. The proven facts must be such that they exclude all other reasonable inferences. In dealing with common purpose the Court has to look at the respective participation of the appellants in committing those crimes as borne out by evidence. I will first deal with the evidence in relation to the second appellant for the sake of convenience.

[17] The facts proved by the State were that the Toyota Corolla, which initially had two occupants, was seen by Schoeman, not far from the scene of the crime, stopping for the second appellant who was limping and holding his upper right arm. Schoeman again identified the second appellant as a passenger who looked back at her as she was following the Toyota Corolla. She described him as a black man who was wearing a beanie. Her description of the appellant was confirmed by the photographs of the second appellant that were taken after the incident. Schoeman once again identified the second appellant at the second crime scene and in Court during the trial. The second appellant was further identified by the police officers Voigt, Smit and Dubell as being the back passenger who fired shots at the police officers during the chase and when the vehicle had stopped after the collision. Identification of the second appellant has therefore been proven beyond reasonable doubt. The second appellant's behaviour in looking back while the Toyota Corolla drove away from the vicinity of scene one was, in my view, consistent with an apprehension by him that he and his co-accused might be followed. It is improbable that he would have acted in this manner if he was not involved in the preceding event. It is also unlikely in the context of the version put forward on his behalf, but not confirmed by him in evidence, that he would have come into possession of the firearm used at the scene of

the murder and robbery during the short drive to the place where the three occupants of the vehicle were arrested. If he were not seeking to escape liability for what he had done at the murder and robbery scene, why would he fire at the pursuing police officers? Furthermore, the firearm that the second appellant used was linked ballistically to the scene of the murder and attempted robbery at Diskom.

[18] The second appellant decided not to testify. Accordingly, the only evidence before the trial court was that which was presented by the State. It has been held by the Courts that an accused's failure to testify in the face of damning evidence leaves the *prima facie* case presented by the State to speak for itself because there is nothing to gainsay it. **See S v Chabalala 2003 (1) SACR 134 (SCA) in paragraphs 20 and 21**. In my view the State's case called for an answer from the second appellant and his failure to do so left the State's case to speak for itself. In **State v Boesak [2000] ZACC 25; 2001 (1) SACR 1 at paragraph 24** the Constitutional Court stated as follows:

> 'If there is evidence calling for an answer and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused.'

[19] Notwithstanding the fact that the appellants did not testify, the trial court considered the reasonable possibility of an explanation that the appellants innocently got a lift from the driver of the Toyota Corolla after the robbery incident. The magistrate found it to be highly improbable that the driver of the Toyota Corolla who sped away from an armed robbery would stop within a few blocks to give a lift to some innocent people. I agree with this conclusion insofar as the second appellant is concerned. I am satisfied that the state has discharged its onus insofar as the second appellant is concerned and proved its case beyond reasonable doubt.

[20] The evidence against the first appellant is that he was one of the three occupants of the Toyota Corolla having been the front left passenger of the vehicle from the time it was seen by Schoeman up to when the three of them

were apprehended at scene two by the police. The actions of the second appellant and the driver were imputed to the first appellant by virtue of him being in the Toyota Corolla together with his co-accused and by virtue of the ballistic evidence found in the Toyota Corolla. The magistrate did not look at the individual conduct of each of the occupants of the Toyota Corolla in his assessment of the evidence. In **S v Le Roux 2010 (2) SACR 11 (SCA)** at paragraph 17 the Supreme Court of Appeal said it was important to assess the individual conduct of a particular accused person to determine whether there was sufficient basis to hold such accused liable on the ground of active participation in the achievement of a common purpose.

[21] The requirements of common purpose were outlined in the decision of **S v Mgedezi 1989 (1) SA 687 (A) at 705I-706B** where the Court, referring to the accused, said the following:

'In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. 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, he must have had 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.'

[22] There was no indication that the first appellant did anything else other than being in the Toyota Corolla. He neither shot at the police, nor was he identified with a firearm nor was any other evidence found on him linking him to the crimes committed at both scenes. Furthermore, unlike his fellow occupants he sat in the vehicle and did not run away when the police were chasing the Toyota Corolla and the vehicle crashed. Overturning the decision of the trial Court in the matter of **Toya-Lee van Wyk v The State (575/11) [2012] ZASCA 47 (28 March 2013),** the Supreme Court of Appeal said the following at paragraph 16:

'While the inference of such an association can sometimes be drawn from what occurred or was said during or after the event, care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group.'

[23] The Court found that the trial judge erred by concluding that the appellant's conduct was indicative of him having associated himself with the actions of the rest of the group in killing the deceased in that he did not specify which actions of the appellant led him to that conclusion. The Court held that the trial judge misdirected himself in light of the fact that there was no evidence of any act of association by the appellant with the actions of those who assaulted and murdered the deceased. Furthermore, the Court rejected the State's argument that the appellant did not disassociate himself from the actions of the others. In this regard see paragraphs 16 to 18 of that decision.

[24] *In casu*, the magistrate, in my view, misdirected himself by finding the first appellant guilty of the crimes committed on the basis of common purpose in the absence of any evidence of the first appellant performing some act of association with the conduct of others. Furthermore, no ballistic evidence linked him to scene one other than exhibits which were found not on his person but rather in the Toyota Corolla which he occupied.

[25] In T**hebus and Another v S 2003 (6) SA 505 (CC)** decision at paragraph 34 the Constitutional Court said the following:

'The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence.' (Own emphasis)

[26] The first appellant in my view could not be held to have actively associated himself with the conduct of the perpetrators and to have had the required intention in respect of the crimes committed without any evidence of some participation from him. The fact that the first appellant did not testify could not be held against him in this instance. He would have been obliged to answer

accusations that implicated him and in this case the State's version did not implicate him. Therefore, the **S v Boesak's** conclusion referred to above cannot apply to him. In light of the above, the magistrate should have held that the State had failed to prove the first appellant's guilt beyond reasonable doubt. He accordingly erred by finding the first appellant guilty of the offences he convicted him on. The first appellant's conviction must therefore be set aside.

[27] Turning to sentence. No submissions were made on behalf of the second appellant regarding the appropriateness or otherwise of the sentence imposed by the magistrate Nevertheless, my view is that the trial court exercised its discretion properly and judicially and there is no reason for this Court to interfere with the sentence imposed. The magistrate found that there were substantial and compelling circumstances necessitating deviation from the minimum sentence of life imprisonment prescribed by the Criminal Law Amendment Act, 105 of 1997. Having taken a balanced view of all the relevant factors the magistrate imposed a sentence of 25 years direct imprisonment.

[28] In the circumstances I propose an order in the following terms:

1. The appeal of the first appellant is upheld. The conviction and sentence imposed by the magistrate on the first appellant are set aside and replaced with the following order:

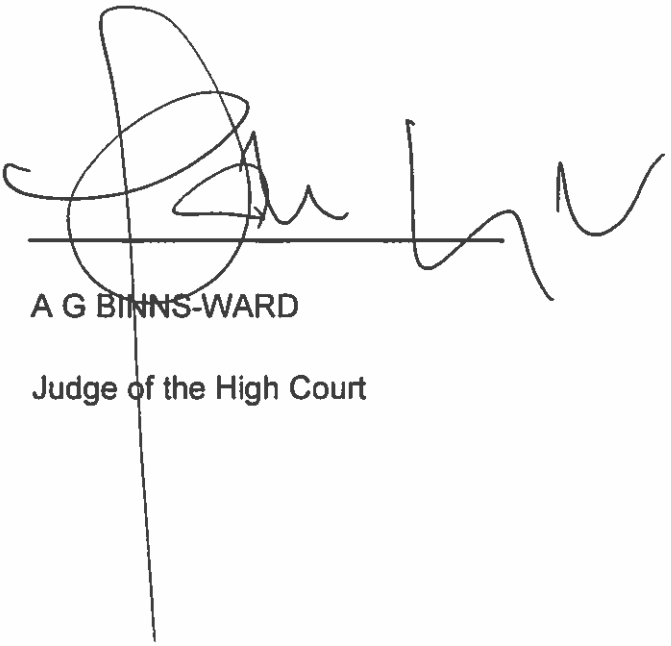
   'Accused No.1 is acquitted and discharged on all counts.'

2. The appeal of the second appellant is dismissed.

N P BOQWANA

Acting Judge of the High Court

I agree, and it is so ordered



A G BINNS-WARD

Judge of the High Court