IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: CC 23 / 2019

In the matter between:

THE STATE

and

PATRICK MBANGULA	**Accused Number 1**
NKULULEKO GALENI	**Accused Number 2**
NKOSINATHI MBONJWA	**Accused Number 3**
SIPHELELE JENETE	**Accused Number 4**
MLINDELI TSEPO MKHENTANE	**Accused Number 5**
SIPHENATHI XAXANE	**Accused Number 6**

Coram: Wille, J

Heard: 8th of November 2021

Delivered: 18th of November 2021

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is a criminal trial about alleged charges of conspiracy to commit murder, attempted murder, murder and various counts of the alleged possession of unlicenced firearms and ammunition.

[2] There were initially six accused persons before court who were facing all the charges as set out in the indictment. They will be referred to as set out in the heading to this judgment. Subsequent to and during the commencement of the hearing of the trial, accused number (3) and accused number (5) were killed. Whether or not there untimely deaths were in any manner connected to or inextricably linked to any of the issues in this trial, at this stage, remains unknown. The remaining four accused before court will be referred to as the accused, unless otherwise specifically referenced.

BACKGROUND FACTS

[3] It is alleged that during the period June 2017 to November 2017[1], the accused conspired to murder the deceased and further attempted to murder the complainant on two separate occasions, by shooting at him with fire-arms. Connected to these charges were the allegations that some of the accused were in possession of unlicenced firearms and ammunition.

[4] In addition, it is alleged that the accused murdered the deceased by shooting him with a fire-arm. Similarly, connected to this murder charge are the allegations that some of the accused were in possession of unlicenced fire-arms and ammunition.

[5] Out of caution and prior to any of the accused tendering a plea to the charges as formulated, I engaged with the accused and their respective counsel so as to ensure that they clearly understood that, in connection with some of the charges as preferred by the prosecution, the minimum sentencing regime found application. All the accused confirmed that they understood and that they were in agreement that these minimum sentencing provisions had been explained to them and that these provisions were part and parcel of the charges as set out in the indictment.

ISSUES IN DISPUTE

[6] All the accused tendered a plea of not guilty to all of the charges preferred by the prosecution. The accused, via their legal representatives, offered up to the court a statement in terms of the applicable criminal code.[2] The prosecution advances that the motive or reasons for these crimes, allegedly committed by and on behalf of the accused

[1] The relevant period.
[2] Section 220 of the Criminal Procedure Act, 51 of 1977 (The 'CPA').

are the following: that certain taxi associations in the area[3], had newly created their own funeral policy scheme: that each owner was obliged to contribute R1500,00 towards this scheme: that in the event of non-payment, the owner's taxi would not be allowed to operate: that the complainant and the deceased refused to pay these newly imposed fees: that as a result the accused conspired to murder the complainant on (2) separate occasions: that the accused killed the deceased and that in so doing, the accused acted as a syndicate in the furtherance of a common purpose or conspiracy.

[7] The statement by the accused and list of admissions included the introduction of the following evidential material, by consent, namely: that a number of photographic albums with the 'keys' thereto describing the alleged crime scenes were not disputed: that the collection of certain evidence at the crime scene was not placed in dispute: that the exhibits that were recovered and retained were not tampered with in any manner: that the content of the ballistics reports were admitted for the truth of the content thereof: that the photographic identity parade album was admitted into evidence: that certain security footage was admitted into evidence: that the post-mortem report of the deceased was entered into the record and no dispute was raised in connection with the findings made therein.

THE CASE FOR THE PROSECUTION

[8] The prosecution tendered into evidence, the testimony of no less than seven witnesses in support of the charges preferred against the four remaining accused. The

[3] The area referred to was known as the 'Joe Slovo' informal settlement.

remaining accused before court were, accused number (1), accused number (2), accused number (4) and accused number (6).

MR PETERS

[9] Mr Peters testified about the content of certain emails between himself and other persons, including accused number (1). It may be so that some of these emails were unfortunate in and by their tone, but they do not in any manner constitute any 'evidence' against any of the remaining accused worthy of any probative weight or consideration with reference to the charges as preferred in the indictment. Mr Peters also gave some evidence relating to the administrative structures of the various taxi organizations in the area. This evidence however does not assist in any manner in connection with the core issues before the court.

MR NOMANYAMA

[10] He testified that he previously worked with the deceased and he is also familiar with accused number (1). Accused number (1) made contact with him and advised him to advise his employer (the deceased), to secure a meeting with him at the offices of the 'Ysterplaat' Taxi Association.[4] He is also member of the YTA. At that time, accused number (1) was the secretary general of the YTA, whilst accused number (2) and accused number (4) were also associated with the management of YTA.

MR MGOMANA

[4] The 'YTA'

[11] He is the complainant. He was also a taxi owner, a member of the YTA and a shareholder in a company[5] that comprised of no less than one hundred shareholders, who in turn, held a shareholding in the urban 'My CityBus' operation . He suffered financially when certain taxi routes were lost due to the introduction of the 'My CityBus' service. During this period, accused number (2) was the deputy chairman of the YTA, whilst accused number (1) was the secretary general of the YTA. He knew the deceased well and had known him for about (6) years prior to his death. He testified in connection with count (2) and count (5) of the indictment with reference to his attempted murder.

[12] Firstly, with reference to what transpired on the 14th of September 2017 at the offices of the YTA. He was shot at by two people. The one suspect was short and chubby, whilst the other suspect was taller and was darker in complexion.

[13] He had a prior occasion to briefly observe these two persons in the nearby vicinity, this before they shot at him. His car was riddled with bullets. He was shot at while he was seated in his motor vehicle. The bullets struck his motor vehicle mostly emanating from the direction of the rear of his motor vehicle.

[14] After he was initially shot at, he was approached by his two assailants. He alighted from his motor vehicle and drew his own firearm. His assailants beat a hasty retreat and ran away. The identification of his assailants, was based on the following namely: that one of the assailants was taller and darker in complexion: that his other assailant was shorter in stature and was chubby and that he had seen them briefly prior to their assault upon him.

[5] This company was styled 'Kidrogen'

[15] He thereafter identified his two assailants at an identification parade held at the police station. This process took place in January 2018. Most significantly, he denied that he went to the police station during November 2017 to identify his two assailants by way of a photographic album exhibited to him by the then investigating officer. More about this issue later in this judgment.

[16] As far as counts (5) and (6) of the indictment were concerned, he testified that he was about to exit certain offices[6], when a man appeared on the right hand side of his motor vehicle and shot at him and his passenger. His passenger was killed and he also suffered several gunshot wounds. He could not identify his assailant as the assailant was wearing a balaclava at the time of the shooting. He was admitted to hospital for his injuries and has not completely recovered, as he still suffers from intermittent nosebleeds. After this incident, he had an occasion to communicate with accused number (2) who then remarked that he was 'very strong', this with reference to him as the complainant.

MR SIGGOLANA

[17] In order to attempt to save valuable court time, I interposed the evidence of this witness, prior to the closure of the case for the prosecution. I exercised my discretion to call him on a very limited and discrete issue. The limited issue was the following, namely: that the complainant had testified that he did not attend upon the police station on the 26th of November 2017: that he did not point out any suspects with reference to any photographs on that day: that this simply did not happen: that the first time he pointed out

[6] The offices at 'Kidrogen'

any suspects with reference to any photographs was at the formal identification parade held on the 24th January 2018 and, that his statement under oath allegedly in support of this was incorrect and wrong.

[18] Mr Siggolana was the previous investigating officer in this matter and at this time he was a detective in the police. He joined the police in 2005 and left the employ of the police during the December of 2020. He referenced an exhibit[7] and identified his handwriting on this exhibit. According to him, the complainant signed this exhibit in his presence and under oath. This exhibit details how the complainant was shown some photographs and he identified two suspects, including accused number (4), during November 2017 at the police station.

[19] He added that this was a common 'practice' that existed at the police station during this time. By way of elaboration, this practice was followed due to a written instruction issued out by the cluster commander[8] at the time. Moreover, that this practice was one of the 'investigation tools' used by the police during this time at this specific police station.

MR STANDER

[20] He was called to testify on a co-lateral issue. He was the station commander at the police station[9] at the time. According to him no such written instruction had been issued out and he was not aware of any such practice at all. In his view, such a practice (if it indeed existed), would be unlawful. In his experience, the process and procedures in

[7] Exhibit 'P'
[8] General Jordaan
[9] The police station situated in Milnerton

connection with identification parades at this police station were treated as 'holy ground' in that, as far as he was aware, strict protocols were adhered to at all times.

MR MDOKWANA

[21] He is a policeman who took over the investigation of this case and is the current investigating officer. He is stationed with the taxi violence unit specifically established within the police. He was called to testify about his efforts to locate a witness, Mr Kiti. Despite his best efforts, he was unable to locate this crucial witness. I had previously during the course of the hearing of this trial, issued out a warrant for the arrest for Mr Kiti due to his non-appearance at court.

[22] Immediately prior to the hearing and during his ongoing investigation, he had been in almost daily contact with this witness. He had taken this witness to consult with the advocate for the prosecution on at least two prior occasions. Mr Kiti seemed to have gone into hiding immediately prior to the hearing and just before he was due to testify. He searched in vain for him and even attempted to trace his mobile phone by attending upon the police command centre.[10]

[23] In his view, Mr Kiti had been threatened and the chances of locating him in order for him to testify at the trial, were remote. In addition, prior to the trial, Mr Kiti had been offered 'witness protection' which he had declined because he was the sole breadwinner for his family and he was the sole proprietor of a business.

[10] The 'War Room'

THE REQUEST FOR A POSTPONEMENT

[24] The prosecution requested a further postponement for more time to locate Mr Kiti. Counsel for the accused opposed this request. The investigating officer, who was 'on the ground' so to speak, formed the view that he would not be able to locate this witness. In the circumstances, the granting of a postponement would have served no purpose. The application was refused and the prosecution was left with no option but to close its case. I must emphasize and place on record that in my view the prosecution did what it could to secure the attendance of the necessary witnesses so that the trial could progress without delay. It would have been extremely difficult, if not impossible, to foreshadow that one of its main and crucial witnesses would go into hiding and not present himself to court in order to testify for the prosecution.

THE APPLICATION IN TERMS OF SECTION 174 OF THE CPA

[25] The legal representatives for the accused chartered an application for a discharge of all the accused. Wisely, this was not opposed. The onus to convince the court that an accused should be discharged, logically rests with the accused. All that an accused is required to do is to convince the court that there is no evidence on record upon which a reasonable court will convict.

[26] The test is not whether a prima facie case has been proved against the accused. Further, credibility has no role to play in this respect, unless the evidence is absolutely false. The section is clear enough in that it provides that if the court 'is of the opinion that there is no evidence' against the accused, it may acquit the accused.

[27] Where sufficient evidence does not exist and there is no indication that these deficiencies may be overcome, the court should acquit the accused. Most importantly, the court does not have to wait for an application for acquittal, as it may acquit *mero motu*. Further, if there is no possibility of a conviction, besides having the accused testify themselves and themselves giving incriminating evidence, the accused are entitled to a discharge at the end of the case for the prosecution. Finally, whether or not a discharge falls to be granted at this stage, is clearly in the discretion of the trial court. This discretion must obviously be exercised judicially.

[28] The evidence presented by the prosecution only to a very limited extent references accused number (2) and accused number (4). This in connection with a single charge of attempted murder. No other evidence was offered up against any of the other accused linking any of them to any of the other charges, as contended for in the indictment. The highwater mark of the case for the prosecution in this connection was that some of the accused held positions of leadership within the YTA and sent certain communications. I have dealt with the probative weight of these communications. Accordingly, accused number (1) and accused number (6) are hereby acquitted and discharged.

[29] The core issue in connection with this matter as far as the other two accused are concerned, is that of identification. It certainly cannot be contended that the evidence of the witnesses for the prosecution, was in any manner, reliable or credible. Particularly, taking into account the alleged positive identification of accused number (2) and accused number (4). The version of events by the complainant may very well constitute a tailoring of his evidence in an attempt to explain his alleged identification of the perpetrators. Alternatively, he may be genuinely mistaken as to the identity of his assailants.

[30] I have given careful consideration to the evidence of the witnesses for the prosecution. There are indeed some inconsistencies in this evidence, which would render the veracity thereof suspect. By way of example. The complainant identified as one of the persons who shot at him, as a person who was fair in complexion and shorter and chubby. The person was identified by him and was arrested and indicted. These charges were subsequently withdrawn after it was established that this person so arrested and identified was incarcerated at the time on a totally discrete and unrelated charge. Clearly, in these peculiar circumstances, the complainant was genuinely mistaken.

[31] The evidence of the identification of the accused by the complainant was not sufficient. I say this because of the following, namely: that he only saw the accused for a very short time: that they fired shots into the rear of his motor vehicle: that they approached him from the rear and then ran away: that they were previously unknown to him and that the complainant himself had suffered a traumatic experience as his motor vehicle had been riddled with bullets.

[32] Further, in my view, no evidence was tendered to demonstrate that the remaining accused participated in the commission of any actions that were directly linked to the attempted murder of the complainant or the death of the victim as alluded to in the charges as formulated in the indictment.

[33] My reasoning on this latter aspect is that the evidence does not show that the remaining accused consciously associated themselves with the death of the victim or the attempted murder of the complainant. In my view, these accused do not fall into the

category of accomplices in respect of the charge of murder or attempted murder. Further, the evidence in this case, does not establish the doctrine of a common purpose between the actions of any of the accused and the death of the victim or the attempted murder of the complainant.

[34] *Burchell*[11] and *Snyman*[12], both define and elaborate upon the doctrine of common purpose in the following terms:

'Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their "common purpose" to commit the crime'

and

'...the essence of the doctrine is 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 in the execution of that purpose is imputed to the others'

[35] None of these requirements are met in the current matter. That having been said, the more modern legal approach to be adopted in connection with the doctrine of common purpose has now been eloquently formulated by Swain, AJA (as he then was) *in Maselani*[13], as follows:

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[11] Burchell, *Principles of Criminal Law* - 5 ed (Juta, Cape Town 2016) at 417
[12] Snyman, *Criminal Law* - 5 ed (Lexis Nexis , Durban 2008) at 269
[13] *S v Maselani* 2013 (2) SACR 172 (SCA)

'It is not necessary to prove that this consequence was foreseen by the members of the common purpose… provided it is established that one, or the other, or all of them inflicted such harm'

[36] Having considered all the evidential material, including, inter alia, the formal admissions, the informal admissions and the evidence presented on behalf of the prosecution, I find that there is no evidence on record upon which a reasonable court will convict the remaining accused in connection with the charges as formulated in the indictment. Put in another way, I find favour with the application on behalf of the accused for a discharge on all counts of the indictment.

[37] In the result, the following order is issued in connection with the charges as formulated in the indictment:

1. Accused number (1) is found not guilty and acquitted on all charges.

2. Accused number (2) is found not guilty and acquitted on all charges.

3. Accused number (4) is found not guilty and acquitted on all charges.

4. Accused number (6) is found not guilty and acquitted on all charges.

E D WILLE
(Judge of the High Court)