IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

REPORTABLE

CASE NO: CC68/2018

In the matter between:

THE STATE

and

PATIENCE KWAZA	**ACCUSED 1**
LOYISO LUDIDI	**ACCUSED 2**
THANDO CHWAYI	**ACCUSED 3**
SIVUYILE SHASHA	**ACCUSED 4**

Bench: P.A.L. Gamble J

Heard: 31 August 2022

Delivered: 6 September 2022

This judgment was handed down electronically by circulation to the parties' representatives via email and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on Tuesday 6 September 2022.

JUDGMENT – LEAVE TO APPEAL

GAMBLE, J:

INTRODUCTION

1. The accused in this matter were all convicted on 19 May 2022 of the murder of Mr. Pasika Kwaza. In addition, accused no 1 was convicted of defeating or obstructing the course of justice, while accused no's 2 and 4 were also convicted of robbery with aggravating sentences and the unlawful possession of a firearm and ammunition.

2. On 22 July 2022 accused 2, 3 and 4 all received life sentences in respect of their murder convictions while accused no 1 was sentenced to 12 years' imprisonment on that count and 18 months' imprisonment on the count of defeating or obstructing the course of justice, with the sentences being ordered to run concurrently. In addition to the life sentences, accused no's 2 and 4 were each sentenced to 15 years' imprisonment on the robbery count, 3 years' imprisonment for unlawful possession of a firearm and 18 months' imprisonment for unlawful possession of ammunition.

3. On 11 August 2022 accused no's 3 and 4 lodged applications for leave to appeal their respective convictions and sentences, while accused no 2 did likewise the following day, 12 August 2022. Leave to appeal was sought to the Full Bench of this Division.

4. The applications were heard jointly on 31 August 2022, with the parties represented as before. At that hearing, Ms. Levendall informed the Court that she had established informally from counsel who had represented accused no 1 at trial (Ms. Verster) that her client did not intend lodging an application for leave to appeal. In the result, the application proceeded in respect of accused no's 2, 3 and 4 and for the sake of convenience I shall refer to them as such.

THE CONVICTION OF ACCUSED NO 2

5. On behalf of accused no 2, Ms. Levendall accepted that there was no misdirection by the Court upon which he could rely for purposes of challenging his conviction. Rather, it was submitted that there was room for error on the part of Kwaza jnr in the identification of no 2 at the scene of the shooting which rendered the conviction assailable on appeal.

6. On that score, it was submitted, as was argued in the main case, that the situation was charged with emotion, lasted for "only" about 10 minutes and was very mobile. Maybe Kwaza jnr just got it wrong, was the suggestion made by Ms. Levendall. This argument was dealt with in the Court's judgment and, furthermore, given that there is no attack on the Court's favourable credibility finding in respect of Kwaza jnr, I do not believe that there is a reasonable prospect that another Court may find otherwise on this aspect.

7. Ms. Levendall then turned to the alibi defence of accused no 2. It was submitted that the alibi defence put up before this court was adequately corroborated by accused no 2's witness, Fanele. That submission is only partly correct in that Fanele differed from the accused on arguably the critical aspect of the alibi – the reason that the dance crew (of which he and no 2 were members) left for the Festival so early. This allegation clearly called out for a cogent explanation by the accused and his witness and yet their evidence was clearly divergent on that score.

8. But the main problem with the alibi put up by accused no 2 is that it has changed materially over time. Until the time that he appeared before this Court, no 2's version regarding his whereabouts on 23 June 2016 was consistently that he was in Cape Town. Although he did, on occasion, mention that he went to Grahamstown to attend the Festival – on a date after the commission of the offence - accused no 2 consistently relied on a different alibi to that ultimately put up in Court. For this reason the Court dismissed his alibi as not reasonably possibly true (S v Thebus [2002] 3 All SA 781 (SCA) at [13]). I consider that a court of appeal is unlikely to interfere with this finding.

9. Lastly, I consider it unlikely that a court of appeal is likely to interfere with the findings made in respect of accused no 2's interactions with Nobuntu Tikilili both before and after the crime. Further, the identification of accused no 2 by Tikilili during the photo ID parade was fairly conceded by Ms. Levendall as problematic for the defence, particularly in the circumstances where the Court's positive credibility and demeanour findings in regard to Tikilili are not sought to be attacked on appeal.

10. In the circumstances, I am of the considered view that accused no 2 has not shown that he has reasonable prospects of success on appeal and his application thus cannot succeed on the issue of conviction.

THE CONVICTION OF ACCUSED NO 3

11. The thrust of Mr. Koester's submissions was that the evidence did not establish any direct participation of accused no 3 in the commission of the offence of murder. It was suggested that he had in fact been instrumental in thwarting a fatal attack on accused no 1, before "the tables were turned". It was further submitted that the guilt of accused no 3 had not been established beyond reasonable doubt on the basis that he was an accessory, either before or after the fact. Further, it was said that the Court's finding that he was the kingpin in the killing was wrong and that this constituted a misdirection.

12. The State answered this argument by pointing out that, in effect, were it not for the involvement of accused no 3, there would not have been a trial in respect of this victim. It was said that it was, after all, no 3 who told no 1 of the plot to kill her, that it was he who arranged for the meeting between Tikilili, no 1 and the killers and, importantly, after that meeting no 1 was told by no 4 to deal further with no 3 and not him.

13. I agree with the Prosecutor that accused no 3 was very much involved in the planning of the offence in the aspects just referred to and, importantly, that he played a prominent role after the killing in that he collected the money from accused no 1 and also attempted to dissuade Tikilili from testifying. Further, there is no attack

by no 3 on the credibility finding in respect of Tikilili who testified so persuasively about the role of no 3 behind the scenes. Against that there is the pitiful performance of accused no 3 in the witness box, particularly with regard to the manner in which he attempted to dissociate himself from Tikilili and accused no 1.

14. In my view, the evidence conclusively establish that accused no 3 was very much part of the plot to do away with the deceased and that he is clearly linked to the commission of the killing through the doctrine of common purpose. In the result, I am not persuaded that accused no 3 has established reasonable prospects of successfully appealing his conviction on the count of murder.

THE CONVICTION OF ACCUSED NO 4

15. The submissions of Mr. Koester in relation to the conviction of accused no 4 were limited to two aspects. Firstly, there was the general submission that the identity of the accused had not been established beyond reasonable doubt. I have already dealt with the submission above in relation to Ms. Levendall's submission on identification. The same findings apply in respect of accused no 4.

16. In addition, there is the compelling evidence of Tikilili regarding meeting accused no 4 before the killing, their contact thereafter where he attempted to scare her off from testifying and her identification of him at the photo ID parade. In the result, I do not believe that there is a reasonable prospect of another court coming to a different conclusion on the question of the identification of accused no 4.

17. The second submission was in relation to the conviction of accused no 4 on the firearm and ammunition charges. While there was certainly an inference to be drawn, on the strength of the authority set forth below, that accused no 4 took a proper firearm with him to the scene, on the basis that no self-respecting killer would take anything but a functioning firearm along with him in order to commit a planned murder, accused no 4 was given the benefit of the doubt regarding actual possession of a firearm as defined under the relevant legislation.

18. As para 451 of the judgment reflects, the conviction of accused no 4 on these counts was based on the principles of common purpose and joint possession: that he and accused no 2 went to the home of the deceased with the direct intention to assassinate him and that they jointly possessed the firearm used by no 2. The evidence of Tikilili was that before the killing she and no 1 met accused no's 3 and 4 at Endlovini and that no 4 had introduced no 2 to them as a person with whom he worked. We know, too, as pointed out above that no 2 admitted to Tikilili after the shooting that he was the gunman who had killed the deceased.

19. In advancing a case for leave to appeal these convictions, Mr. Koester relied in argument on the decisions in Mbuli[1], Molimi[2] and Makhubela[3] for the submission that it could not be inferred from the facts of this case that the firearm with which the deceased was killed was possessed by accused no 2 on behalf of the group of killers and, further, that the State had failed to prove that the group jointly intended to exercise possession of no 2's firearm.

20. All of those cases confirmed that the test for joint possession of firearms and ammunition was correctly set out in Nkosi[4] which is to the following effect.

"The issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can probably be inferred by a Court that:

> (a) the group had the intention (*animus*) to exercise possession of the guns through the actual detentor and
>
> (b) the actual detentors had the intention to hold the guns on behalf of the group.

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[1] S v Mbuli 2003 (1) SACR 97 (SCA)

[2] S v Molimi 2006 (2) SACR 8 (SCA)

[3] S v Makhubela and another 2017 (2) SACR 665 (CC)

[4] S v Nkosi 1998 (1) SACR 284 (W) at 286H - I

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns."

21. In particular, counsel referred to Makhubela in which the Constitutional Court found, after reviewing a number of the relevant decisions (including Mbuli and Molimi) that -

"[55] These cases show that there would be very few factual scenarios which meet the requirements to establish joint possession set out in Nkosi. This is because of the difficulty inherent in proving that the possessor had the intention of possessing a firearm on behalf of a group. It is clear that according to established precedent, awareness alone is not sufficient to establish intention of jointly possessing a firearm or the intention of holding a firearm on behalf of another in our law."

The enquiry regarding joint possession of a firearm is thus factually based.

22. It must be borne in mind that the cases which the Supreme Court of Appeal ('SCA") considered, and the decisions with which the Constitutional Court dealt, were all cases involving robbery where the some of the robbers were armed and where there was the loss of life in the course of the robberies: the intention was to rob and the murders were essentially incidental thereto. Here we are dealing with the just the opposite: the intention was to kill and the robbery of a bystander (Kwaza jnr) was incidental thereto. The instant case is thus distinguishable on the facts.

23. While there was no evidence to establish just how the killers planned the attack, the Court was entitled to draw an inference in that regard. In so doing the following *dictum* of Brand JA in Humphreys[5] is apposite.

"[13] …Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and

[5] S v Humphreys 2013 (2) SACR 1 (SCA)

circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population."

24. In the circumstances, it was thus reasonable to infer that, given his leading role in organizing the plot to kill the deceased, accused no 4 either conspired with accused no 2 that the latter would be the shooter or, at the very least that no 4 knew that no 2 was armed with a firearm as defined under the legislation and foresaw that he would use it in the planned attack on the deceased. Further, considering his utterances after the fact to Tikilili, it cannot be disputed that accused no 2 not only associated himself with the group but, importantly, he actively advanced the interests of the group for purposes of executing the contract killing.

25. In the result, I am satisfied that the conviction of accused no 4 on the firearm and ammunition charges is sound, both in law and on the facts, and that the accused has not shown a reasonable prospect of success on appeal in regard to those convictions.

SENTENCE

26. Both Ms. Levendall and Mr. Koester focused on the lengthy period of pre-sentence detention in respect of their clients as constituting substantial and compelling circumstances under the Criminal Law Amendment Act, 105 of 1997 ("the CLAA") for the avoidance of the imposition of the life sentences on them. Ms. Levendall urged the Court to follow the line of reasoning in the SCA in Kruger[6] rather than Radebe[7] upon which the Court had relied.

27. In respect of accused no 2 it was suggested that, notwithstanding that his moral blameworthiness was of the highest order, his clean record and lengthy period of pre-sentence detention were substantial and compelling circumstances to avoid the mandatory sentence of life imprisonment.

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[6] S v Kruger 2012 (1) SA 369 (SCA)

[7] S v Radebe 2013 (2) SA 165 (SCA)

28. In respect of accused no 3, Mr. Koester submitted that his client's age, clean record, lesser degree of moral blameworthiness and lengthy period of pre-sentence detention were factors which, when considered collectively, constituted substantial and compelling circumstances warranting avoidance of the mandatory sentence under the CLAA.

29. In respect of accused no 4, counsel candidly accepted that there was little by way of mitigation other than the period of pre-sentencing detention and his chronic ill-health as a TB sufferer.

30. The cases which have served before the SCA on the aspect of the relevance to sentence of pre-sentencing detention all related to instances of finite sentences, where adjustments to the imposed sentences were notionally possible. This Court was unable to find any instances where that factor was considered by the SCA in respect of an indeterminate sentence such as life. As the judgment reflects, this Court followed the decisions in Solomon[8] and Kammies[9] in declining to find that the pre-sentence detention period *per se* qualified as a substantial and compelling reason to avoid the prescribed sentence under the CLAA. Those are both judgments of single judges in Provincial Divisions and provide guidance rather than binding precedent.

31. The period of pre-sentence detention in this matter was extraordinarily long – close on 6 years – and the Court was unable to find any comparable period of time which had been considered by any other court. Notwithstanding the proclamation by some that this is the best run Division of the High Court in the country, long delays in the conclusion of criminal trials in particular have become endemic in the Western Cape and delays of between two to three years and more are not uncommon; in fact they are by and large the norm. The question of the plight of awaiting trial accused who have not been granted bail and who must thus remain incarcerated before their sentences actually commence is thus a matter of very real concern.

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[8] S v Solomon and others 2021 (1) SACR 533 (WCC)

[9] S v Kammies and another [2019] ZAECPEHC 86 (13 December 2019)

32. In my considered view, the sentences imposed on each of accused no's 2, 3 and 4 were appropriate in the circumstances and would otherwise not warrant the consideration on appeal. But in light of the fact that the SCA has not yet spoken on the consideration of pre-sentencing detention in cases where the sentence ultimately imposed was life imprisonment warrants, in my respectful view, that leave be granted in this matter only against the sentences of life imprisonment imposed on accused no's 2, 3 and 4.

33. In light of the provisions of s315(1)(a) read with s315(2)(a) of the Criminal Procedure Act, 51 of 1977, I consider that this aspect of the case should enjoy consideration by the Supreme Court of Appeal.

IN THE CIRCUMSTANCES THE FOLLOWING ORDERS ARE MADE:

A. Accused No 2, Loyiso Ludidi

1. Leave to appeal against the convictions is refused.

2. Leave to appeal to the Supreme Court of Appeal is granted against the sentence of life imprisonment imposed in respect of the conviction for murder on count 3.

3. Leave to appeal against the remaining sentences is refused.

B. Accused No 3, Thando Chwayi

1. Leave to appeal against conviction is refused.

2. Leave to appeal to the Supreme Court of Appeal is granted against the sentence of life imprisonment imposed in respect of the conviction for murder on count 3.

C. Accused No 4, Sivuyile Shasha

1. Leave to appeal against the convictions is refused.

2. Leave to appeal to the Supreme Court of Appeal is granted against the sentence of life imprisonment imposed in respect of the conviction for murder on count 3.

3. Leave to appeal against the remaining sentences is refused.

GAMBLE, J