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

Case No: A11/2019

In the matter between:

ZWELENKOSI TSOLO Appellant

and

THE STATE Respondent

Coram:	Justice A Le Grange *et* Justice J Cloete
Enrolled for hearing:	4 March 2022 – determined on the papers and heads of argument with consent of counsel
Delivered electronically:	4 March 2022

JUDGMENT

CLOETE J (LE GRANGE J concurring):

Introduction

[1] The appellant was initially one of eight accused persons who appeared in the Wynberg Regional Court on a total of 7 charges arising from incidents which occurred on 1 and 6 April 2009. The one that occurred on 1 April 2009 is not

relevant to this appeal.[1] All of the remaining counts pertained to the incident on 6 April 2009 and I will thus refer to this as "the incident".

[2] On 13 October 2010 the State withdrew the charges against the appellant's co-accused numbers 7 and 8. The trial eventually commenced on 7 May 2012. At the close of the State's case the appellant's remaining co-accused (numbers 2 to 6) were all discharged in terms of s 174 of the Criminal Procedure Act ("CPA").[2]

[3] The appellant appeared as accused no 1 in the trial. He pleaded not guilty to all counts and exercised his right to decline to give a plea explanation. He was ultimately convicted on 30 August 2019 on counts 2 (robbery with aggravating circumstances of R487 000 cash); 3 (murder of Mr Onke Magoqoba); 4 (attempted murder of Mr Klaus Johnson); 5 (attempted murder of Mr Godwin Hala); and 6 (attempted murder of Mr Welcome Denisa).

[4] On the same date he was sentenced to life imprisonment for the murder, 10 years imprisonment each for the three attempted murders, and 15 years imprisonment for the robbery with aggravating circumstances. These sentences all automatically run concurrently in terms of s 39(2)(a)(i) of the Correctional Services Act.[3]

[5] The appellant has exercised his automatic right of appeal in relation to the murder conviction and resultant sentence as provided in s 309(1)(a) of the

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1 Since the appellant was acquitted on the count he faced in respect thereof.
2 Act 51 of 1977.
3 Act 111 of 1998.

CPA. The court *a quo* granted leave to appeal the convictions on the other counts on 3 February 2020.

Common cause facts

[6] Mr Johnson and the late Mr Magoqoba ("the deceased") were both employed as security personnel by SBV Cash Services in Epping, a cash-in-transit protection service company. On 6 April 2009 at approximately 11h40 Johnson and his colleagues, including the deceased, arrived in their vehicle at the loading zone of the Nyanga Junction shopping centre in Manenberg. Johnson's role was to check that the immediate area was safe before the cash was taken to be handed over for use, it would seem, in certain ATM machines in the centre. The deceased was to physically transport the cash from the vehicle to the bank once Johnson gave him the go-ahead.

[7] Having checked the immediate area and having found it to be clear, Johnson instructed the crew that they could proceed. The deceased exited the vehicle with the cash with Johnson following behind him. They moved through a small passage into the centre itself, which Johnson described as a bigger passage which was busy and well lit. There they were accosted by male persons wielding firearms. One shot Johnson in the neck. The bullet passed through his neck, hit the wall behind him and ricocheted back onto his shoulder. Johnson collapsed onto the ground.

[8] The same male person grabbed Johnson's rifle and small firearm. He looked around and saw the deceased also lying prone on the floor. The deceased

had sustained 16 gunshot wounds, to the neck, left shoulder, chest, back, lower abdomen, buttock, right leg and left thigh. Although wearing a bulletproof vest the deceased succumbed to his injuries at the scene.

[9] Mr Hala and Mr Denisa were in the immediate vicinity. Hala happened to be standing close to the deceased and was shot on the left wrist by a stray bullet. Denisa, who was standing in front of the Standard Bank ATM machines, heard gunshots and then realised he too had been shot by a stray bullet in his right toe.

Grounds of appeal

[10] As far as the convictions are concerned, the grounds are whether (a) the appellant was correctly identified by Johnson as the person who shot him and by implication participated in the other crimes; (b) his alibi defence was correctly rejected; (c) a confession the appellant made after his arrest was correctly ruled admissible; and (d) if the trial court was correct in relation to (a) to (c), whether he was correctly convicted on the basis of the doctrine of common purpose.

[11] As far as the life sentence imposed is concerned, in the appellant's notice of appeal the complaint was that, given his personal circumstances, it was shockingly inappropriate and unduly harsh.[4] In heads of argument filed in this appeal it was also submitted that given the period he spent as an awaiting trial prisoner, his status as a first offender, and the degree of his participation in

[4] Notice of Appeal para 17.

what was essentially one transaction, there are substantial and compelling circumstances which, coupled with the disproportionate nature of the sentence, make it incumbent upon this court to interfere. It was also submitted that *dolus eventualis* may, in certain circumstances, be regarded as a mitigating factor.

Identification and alibi defence

[12] Johnson testified that as they entered (or were about to enter) the "bigger passage" he saw the appellant who had been his colleague at the same company for about a year prior to his dismissal. Johnson greeted the appellant by waving his hand and as he moved past him he heard the appellant shout *'voetsek'*. He turned and saw the appellant standing in front of him about 1.5 metres away, pointing a firearm directly at him. The appellant then shot him in the neck before grabbing his two weapons. He estimated that it was 3 to 4 seconds after he turned around that the appellant fired the shot.

[13] Johnson could not recall how the appellant was dressed or if he had been wearing a hat or sunglasses. The appellant confirmed through his legal representative that he and Johnson knew each other and had previously worked together *'for a long time'*. He agreed with Johnson that he had been dismissed from that company, but maintained that his dismissal was unfair. All that the appellant placed in dispute was his presence on the day and at the time of the incident, and thus his involvement. He maintained that Johnson was mistaken in his identification. Johnson however remained unshaken in his testimony on the issue. The record reflects that he was an exemplary witness.

[14] In his evidence the appellant persisted in his denial of any involvement in the incident, or having been present at Nyanga Junction on the day thereof. He also denied having ever possessed a firearm other than during his employment with the company. It appears that when the police searched his house after his arrest (seemingly two days after the incident) no weapons or stolen cash were found. The appellant raised an alibi, which was that over the period when the incident occurred he was looking after his younger brother, Mr Sibongiseni Tsolo, a construction worker who had apparently been injured in a fall from the seventh floor of a building on 23 March 2009. According to the appellant, his brother had been discharged from hospital on 31 March 2009 and came to stay with the appellant while he recovered.

[15] During cross-examination the appellant conceded that Johnson knew him *'very well'*. It would seem that the appellant had been dismissed from the company at which they were both employed shortly before the incident, since he testified that his dismissal dispute was pending before the Bargaining Council at the time he was arrested. It also emerged that prior to his dismissal the appellant had been employed by the company for about two years, and it is thus fair to accept that he would have received the appropriate training and sufficient experience in the use of firearms.

[16] The appellant also admitted that while still employed by the company, Nyanga Junction was one of the places where he had performed his duties as a member of the security detail, and he was thus familiar with it and its layout. As regards his alibi defence (which had not been put to Johnson when he

testified) the appellant conceded that he did not disclose this to his erstwhile attorney (who cross-examined Johnson on his behalf). He attributed this to having had insufficient time to consult, although he accepted that this was a very important instruction to have given. The consultations, according to him, had been brief and took place both at the prison facility and in the court cells prior to his various appearances.

[17] The record reflects that the appellant was arrested on 8 April 2009;[5] prior to the trial commencing on 7 May 2012 (which is also the date upon which Johnson testified) there were a total of 33 court appearances; and the appellant's erstwhile attorney is reflected as having appeared for him from 3 September 2010 at 26 of those appearances. To my mind it is inconceivable that despite this the appellant did not have the opportunity to inform his erstwhile attorney of this crucial information.

[18] The appellant's younger brother also testified in support of his alibi defence. He confirmed his accident, admission to hospital and that upon his discharge he had stayed with the appellant.

[19] He explained that he sustained injuries in the fall to his jaw, leg and neck. He described how the appellant had needed to assist him in preparing his meals and helping him to move about and attend to his ablutions. This, he said, continued until 8 April 2009 when he was able to attend to these on his own (which, it so happened, was the date by which the appellant was arrested).

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[5] During the evidence of certain witnesses it was stated that he was arrested on the same day of the incident, i.e. 6 April 2009.

[20] He maintained that on the day of the incident the appellant was at home with him the entire time, but could not explain why he had not reminded the appellant of this important fact when he visited him in custody two weeks after his arrest, or, indeed, during any subsequent visit. The appellant was released on bail during 2015 and stayed with his brother initially for two days, yet the subject of his alibi also did not come up at all since *'I did not have a chance to discuss it because I came late because at that time I was working and then I will come late from work'.*

[21] There were no other State witnesses who were able to identify the appellant as one of the perpetrators. Both Hala and Denisa testified that they had never seen him before. Mr Dillan Valentine witnessed the incident and testified that he saw a person shooting another in the neck, another three shooting another male in the head, and the four of them taking their firearms and the cash and then fleeing the scene. However Valentine was unable to identify the appellant since the incident occurred so quickly.

[22] The trial court was alive to the necessity of approaching Johnson's testimony with caution given that he was a single witness to the identification of the appellant. The test is that it is not enough for the identifying witness to be honest; the reliability of the observation must also be tested by reference to factors such as lighting, visibility, proximity, opportunity for observation, prior knowledge of the individual identified and the like: *S v Mthetwa*.[6]

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[6] 1972 (3) SA 766 (A) at 768A-C.

[23] These factors were taken into account by the magistrate in testing the reliability of Johnson's observation, having regard to the latter's undisputed evidence on these aspects and also, as was confirmed by the appellant himself, that they had previously known each other and worked together for some time.

[24] To this it should be added that, in my view, it is highly unlikely that Johnson would have raised his hand to greet a complete stranger, and it may also reasonably be inferred that the appellant, who himself had engaged in the same duties at the same centre while still employed by the company, would have known how the security personnel were likely to enter it. Certainly no evidence was adduced that would exclude or militate against such an inference.

[25] The magistrate also took into account the evidence of Valentine, an entirely independent witness, as to how the sequence of events played out. Valentine's version corroborated that of Johnson's in all material respects. In the result his finding that Johnson's testimony was credible and reliable cannot be faulted.

[26] As far as the alibi defence is concerned the trial court correctly summarised the applicable legal principles as set out *inter alia* in *S v Molefo*,[7] namely that (a) no onus rests on an accused to prove his or her alibi; (b) if there is a reasonable possibility that it may be true, the accused must be given the

[7] 1998 (1) SACR 127 (W) at 157i-158d.

benefit of the doubt; and (c) the defence must be assessed against the totality of the evidence.

[27] In the present matter it follows logically that if the trial court was correct in accepting Johnson's identification of the appellant (which in my view it was) then it correctly rejected his alibi defence. However the trial court also had regard to the appellant's confession in finding that the State had proven its case beyond a reasonable doubt.

The confession

[28] During the trial the appellant challenged the admissibility of his confession on two grounds, namely (a) that he was assaulted and tortured by police officers and thus made it under duress; and (b) that it was not taken in the presence of an isiXhosa interpreter (this language being his mother tongue). A related complaint was the suggestion that Col Mbulawa, who took the confession, might have recorded what was told to him by the appellant in isiXhosa incorrectly in English, but this was not pursued with any vigour.

[29] The notice of appeal and application for leave to appeal which served before the magistrate make no mention of the appellant's complaint of duress. The grounds were that the magistrate erred in admitting the statement in terms of s 217 of the CPA as a confession when it did not conform to the *'formal prescribed requirements'* therein, and there was no *'independent'* interpreter present to translate the statement.[8] He did however reserve his right to

[8] Paras 9 and 10 thereof.

amend or add to the notice upon receipt of the magistrate's reasons, and of course in exercising his automatic right of appeal in relation to the murder count he was not required to advance any grounds before the court *a quo.*

[30] That being said however the appellant could not logically have had different grounds of appeal in respect of the admission of the confession for the murder count on the one hand, and the other counts on the other, since only one confession was taken. There is also no suggestion before us that this was what he intended.

[31] In the heads of argument filed on his behalf the appellant sought to introduce the ground of duress on appeal. In *S v Pretorius*,[9] following *S v Khoza*[10] and *S v Willemse*,[11] it was held that it is not permissible for an appellant, absent a substantive application to this effect, to introduce a ground of appeal that he chose to abandon prior to the hearing of a successful application for leave to appeal before the court *a quo*. Since there is no substantive application before us, it is therefore only necessary to consider the sole remaining ground pursued on appeal, namely that pertaining to the interpreter.

[32] When the appellant testified in the trial-within-a-trial he confirmed that Mbulawa (whose fluency in isiXhosa was never placed in issue) had taken his confession in the absence of an interpreter. Although he maintained that Mbulawa had not explained the purpose of the confession (which the latter denied), all that the appellant claimed in relation to the taking of the

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9 2013 (1) SACR 261 (WCC) at paras [2] to [12].
10 1979 (4) SA 757 (N).
11 [2001] 3 All SA 6 (C).

confession itself was that *'afterwards he wrote on the form and then he asked questions and I also answered'.* Accordingly he did not suggest that he and Mbulawa were unable to understand each other, nor did he claim that Mbulawa had incorrectly recorded his answers.

[33] In Schwikkard *et* Van der Merwe: Principles of Evidence[12] the authors, relying upon *R v Tshetaundzi*,[13] state that a confession *'…will not be said to have been made to a peace officer… if a peace officer is used solely as an interpreter'.* There is no suggestion in the present case that Mbulawa was not a peace officer as envisaged in s 217(1) of the CPA. The evidence establishes that Mbulawa was not used solely as an interpreter, but that he acted simultaneously as an interpreter and a peace officer when taking the appellant's confession.

[34] Given the appellant's own version on the issue, I do not see how he can validly complain that his constitutional rights were infringed on this score. In any event, in *Key v Attorney-General, Cape Provincial Division, and Another*[14] the Constitutional Court stated unequivocally that since the advent of the Constitution criminal trials are required to be conducted in accordance with *'notions of basic fairness and justice'.*[15] Kriegler J went on to say:

> *'[13] In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring*

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12 3ed at 344.
13 1960 (4) SA 569 (AD).
14 1996 (4) SA 187 (CC).
15 At para [12].

> *that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its perpetrators. Nor does it mean a predilection for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in* Ferreira v Levin*, fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted.'*

[35] The magistrate reasoned, correctly in my view, that the very purpose of an interpreter is to overcome any language barrier difficulties, and that on the evidence before him the challenge to the admissibility of the confession on this ground was devoid of merit. For all the reasons set out above I am in agreement with his conclusion, and it follows that the confession was correctly ruled admissible.

Common purpose

[36] In a nutshell the appellant's complaint is that the charge sheet did not reflect that the State intended to rely on the doctrine of common purpose and as a result his right to a fair trial was infringed.

[37] His counsel relied on *S v Msimango*[16] in which, so it was submitted, the Supreme Court of Appeal held that the absence of such an averment in the charge sheet prior to conviction on this basis is inimical to the notion of the right to a fair trial. I do not understand the Supreme Court of Appeal to have found that, as a result, that is the end of the matter, since in that case the appellant's conviction was set aside, not only because common purpose was not alleged in the charge sheet, but also because it was not proven in evidence and as such never formed part of the State's case:

> *'It is common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose, even though it was never either averred in the charge-sheet or proved in evidence. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3, as this never formed part of the state's case.'*

[38] In the present matter, the charge sheet refers to accused nos 1 to 6 in its heading. Count 1 (which related to the incident on 1 April 2009) alleged that *'the accused is guilty'* of the theft of a motor vehicle. Counts 2 to 7, which all relate to the 6 April 2009 incident, reflect the allegation that *'the accused are guilty'.* However nothing turns on this since it is clear from the record that all six accused were required to plead to count 1 as well.

[39] In explaining the counts that attract the prescribed minimum sentences, the magistrate informed the accused as follows:

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[16] 2018 (1) SACR 276 (SCA).

> *'There are numerous counts against you, they involve robbery with aggravating circumstances, hijacking, as well as murder, that seemingly has happened during the course of robbery…'*

[40] It is also clear from the record that, as the trial progressed, the accused (all of whom had legal representation) must have been aware that the State's case rested on the crimes having been committed in the execution or furtherance of a common purpose. I have also been unable to find anything in the record to indicate that the accused were at any stage taken by surprise that they were alleged to have been involved in one or other way with the robbery and murders. As previously stated, the trial commenced on 7 May 2012 and continued (albeit with postponements) for a period of 2 ½ years. The record alone runs to 744 pages before the magistrate delivered his judgment on conviction. This excludes the addresses of counsel which are not part of the record.

[41] It is also clear that part of the State's case was the confession which the magistrate ruled admissible on 24 May 2017, and the appellant only testified in the main trial on 2 November 2018. He could therefore have been under no illusion, by the time he gave evidence, that the State was relying, and had indeed adduced evidence, on the crimes having been committed during the execution or furtherance of a common purpose.

[42] Indeed, in the appellant's notice of appeal and application for leave to appeal the appellant limited his complaint to the charge sheet containing no reference to common purpose and submitted that the magistrate erred in applying this

doctrine *'in the absence of the state's intention to rely on such at the beginning of the trial'.* Accordingly, not even the appellant at that stage contended that the State had failed to adduce any evidence to support such a finding.

[43] It is clear from the appellant's confession[17] that he was involved in the planning of the crimes along with others; he and six others were armed with firearms; he was the one who accosted Johnson and shot him; other gunshots were fired at the *'group carrying money'* and that the spoils of the robbery were shared between him and his co-perpetrators.

[44] Section 209 of the CPA provides that an accused may be convicted of any offence on the single evidence of a confession by such accused that he or she committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not so confirmed, the offence is proved by other evidence to have been actually committed.

[45] Again the magistrate found the necessary safeguards in the testimony of Johnson and Valentine and pointed out, correctly in my view, that whether or not there were three or eight participants was immaterial since the evidence established beyond a reasonable doubt that more than one person was involved. He was alive to the fact that the evidence did not reveal who fired

[17] Exhibit "E".

the fatal shot(s) at the deceased. However he correctly considered the evidence in light of the principles laid down in *S v Mgedezi and Others.*[18]

[46] In *Mgedezi* it was held that even in the absence of proof of a prior agreement, an accused who the State has not proved contributed causally to a crime can still be held liable if certain requirements are met. First, he must have been present at the scene where the violence was being committed. Second, he must have been aware of that violence. Third, he must have intended to make common cause with the perpetrator(s). Fourth, he must have demonstrated his sharing of a common purpose with the perpetrator(s) by himself performing some act of association. Fifth, he must have intended the outcome of the crime, or he must have foreseen its possibility and performed his own act of association with recklessness as to whether or not the result would ensue. In the present case, the State has proven these requirements beyond reasonable doubt.

[47] There are also three forms of criminal intention recognised in our law, namely direct intention, indirect intention and what is commonly referred to as legal intention or *dolus eventualis*. In a crime requiring intention it is sufficient for the State to prove that the accused had any one of these forms of intention: see *C R Snyman: Criminal Law*.[19] In my view, *dolus directus* applies to the robbery with aggravating circumstances and, at the very least, it is *dolus*

[18] 1989 (1) SA 687 (A) at 705I-706C.
[19] *6ed* at 177.

eventualis which is applicable to the counts of murder and attempted murder. The latter is defined by *Snyman*[20] as follows:

> *'A person acts with intention in the form of* dolus eventualis *if the commission of the unlawful act or the causing of the unlawful result is not his main aim, but:*
>
> *(a) He subjectively foresees the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, and*
>
> *(b) He reconciles himself to this possibility.'*

The life sentence imposed

[48] It is trite that an appeal court may only interfere with the sentence imposed by a lower court if it is satisfied that there was a material misdirection or the sentence imposed is shocking, startling or disturbingly inappropriate (having regard to the proportionality principle). I do not intend to repeat the magistrate's reasoning. Suffice it to say that I am persuaded that he correctly took into account the gravity of the offences, the circumstances in which they were committed, the personal circumstances of the appellant (including his awaiting trial period), the interests of society, and the very purpose for which the prescribed minimum sentences contained in the Criminal Law Amendment Act[21] were enacted by the Legislature.

[49] This was a heinous crime committed in broad daylight in a highly populated area. Apart from the shooting of Johnson and the deceased, two innocent

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[20] at 178.
[21] 105 of 1997.

bystanders were also injured by stray bullets. A substantial amount of cash was stolen. The deceased was riddled with 16 bullets. Johnson may consider himself lucky to have survived. The appellant showed no remorse. He took advantage of his prior knowledge of the operations of his erstwhile employer for pure criminal gain. There is nothing which indicates that he has any realistic prospect of early or medium-term rehabilitation. There is no basis for this court to interfere with the sentence of life imprisonment imposed.

[50] **In the result the following order is made:**

1. **The appellant's appeal against his convictions on counts 2, 3, 4, 5 and 6 are dismissed.**
2. **The appellant's appeal against the sentence of life imprisonment imposed on count 3 is dismissed.**
3. **All of the convictions on counts 2 to 6 and the sentence of life imprisonment in respect of count 3 are confirmed.**

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J I CLOETE

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A LE GRANGE