

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: A399/2012

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

14 August 2014

Date

Signed

In the matter between:

BRYAN SIPHORO

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

RATSHIBVUMO AJ:

1. Mr. Siphoro, the appellant was convicted by the Orlando Regional Court on five criminal charges. Three of these were charges of robbery with aggravating circumstances, one of attempted murder and

another of possession of one live ammunition without a licensed firearm capable of discharging it, in contravention of section 90 of Act 60 of 2000. He was sentenced to a cumulative sentence of 30 years imprisonment. He appeals against the convictions and the ultimate sentence with leave of the trial court.

2. It was common cause that the appellant and his two companions took part in a spree of robberies on the 6th of August 2008 at around 22h00. The robberies were perpetuated within a short radius in Dube but in three different spots. The spree was over in just a few minutes following the arrest of the appellant by two Metro police officers after they saw him and another person dragging the last victim of robbery towards a railway line. This was after robbing her of her belongings.
3. The first victim Mr. Seloane Bongani was robbed of a cell phone and a wallet containing R327 in cash and cards after he was pointed with a firearm. Moments later and just a short distance away, the next victim, Mr. Lucky Hadebe was robbed of a cell phone and R300 in cash. The last victims were Mr. Mandla Skenjana and his partner Ms. Monica Dlamini. Robbery of these two was formulated into one charge in which two cell phones, a watch and R300 in cash were robbed. Mr. Skenjana was also shot twice, on his right heel and on his right knee. It was from this that a charge of attempted murder emanates.
4. It was also common cause that when Mr. Skenjana and Ms. Dlamini were attacked; Mr. Skenjana crossed the street and was pursued by one of the three assailants, leaving the appellant and another with Ms. Dlamini. It was at the stage that Ms. Dlamini was being dragged towards the railway line that Mr. Skenjana was shot while

being pursued on the other side of the road. When the Metro police officers arrived shortly thereafter, the appellant and his companion who were still dragging Ms. Dlamini fled. The police officers gave chase but they focused on the appellant because it was easy to follow him since it was dark and he was wearing a white top; unlike his companion whose dark clothes made him to vanish in the dark. The appellant got tired as he ran up the hill and the police apprehended him. He was thus the only one of the three who was arrested.

5. The appellant's admission that he was part of the three only came out late in cross examination of the first State witness. One of the victims, Mr. Seloane pointed the appellant at an identification parade while another, Mr. Hadebe pointed him out through a photo parade. The last victims of robbery, Mr. Skenjana and Ms. Dlamini confirmed the identification of the appellant after he was brought back to them by the police officers moments after they gave chase. The first two victims testified that the man who pointed them with a firearm was the appellant whereas his two companions simply searched and took their belongings. The appellant denied this saying his role was merely to search the victims. The police officers also testified that when they arrested the appellant, he had with him a firearm and a cell phone. This cell phone was later identified by Mr. Hadebe as his. The appellant denied he had any of these items with him when he was arrested.
6. The version of the appellant was to the effect that he too was a victim of robbery by his companions who he claimed he did not know them. When they found he had only R20 with him they demanded that he

should join them in a spree of robberies. They had promised to release him only after making R800 in loots that night. He testified that his participation in robberies was as such under duress.

7. It is a well-known principle of our law that the factual findings of a trial court are presumed to be correct unless a misdirection on the part of the trial judge can be pointed to in order to justify interference with those findings on appeal. For instance, in *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at para 5, Zulman JA expressed the approach as being that while an appeal court 'is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong' – see *Roux v Hattingh* 2012 (6) SA 428 (SCA).
8. The appellant's version was rejected as being improbable and the court *a quo* accepted the State's version of events. The appellant's version was found to be irreconcilable with the undisputed version of events by the learned magistrate. With the improbabilities highlighted in the judgment by the court *a quo*, I cannot find any misdirection on its part in accepting the State's version. The appellant's version leaves much to be desired. If his version is to be accepted as true, there would not be an explanation as to where the police officers found the firearm and the cell phone which was robbed from its owner, moments earlier. While the State's version gives clear answers to this question, the appellant's version does not offer any.
9. The conviction of the appellant on a charge of attempted murder was further challenged on the basis that the appellant was not warned at any stage of the trial of the State's intentions to rely on the doctrine of

common purpose. In the alternative, it was submitted that the appellant should have been convicted of assault with the intent to do grievous bodily harm given the fact that the victim was shot on the leg.

10. The later argument lacks legal or medical basis and cannot take the matter any further. One is guilty of attempted murder irrespective of what happens to the person he aims a gun at and shoots. Even if he misses, as long as there is an intention to kill, the crime would be completed. There are several cases wherein suspects were convicted of attempted murder after the victims were shot in the leg – see for example *S v Tombe* [2003] JOL 11678 (E). While an injury to a leg may not be as risky as an injury to the upper part of the body, both can be fatal if one receives no immediate medical assistance.

11. **Charge sheet silent on State's intention to rely on common purpose.**

The charge sheet made no mention of the State's intention to rely on the doctrine of common purpose on the charge of attempted murder. The first time that the common purpose was ever mentioned in relation to the charge of attempted murder was when judgment was being delivered. Although the appellant was legally represented, there is no basis upon which it could be suggested that his legal representative could have anticipated that there would be such reliance. In fact from the evidence of the first witness – a Metro police officer, he testified that when they took the appellant to where Mr. Skenjana was, he told them the appellant personally fired a shot that injured him. The defence throughout the trial and in its closing argument focused on disproving this.

12. In *S v National High Command* 1963 (3) SA 462 (T) at p. 464 the court held,

“Now it is clear that where a common purpose is alleged, the State has to supply particulars of the facts on which it will rely in order to ask the Court to draw the inference that each and every one of the accused was a participant in the conspiracy, or party to the alleged common purpose.”

In *S v Mphetha and Others* (1) 1981 (3) SA 803 (C), the court ordered the State to furnish further particulars to the accused adhering to the set of guidelines it ordered. It went on to quote with approval from *R v Adams and Others* 1959 (1) SA 646 (SCC) at 656F:

“It is a well-known principle in our law that an accused person is entitled to such particulars as he properly requires for the purpose of preparing his case before he is called upon to plead and enter upon his defence, and he is entitled to such particulars even if it entails a disclosure of Crown evidence.”

13. In *S v Ndaba* 2003 (1) SACR 364 (W) at para 102, Labe J said,

“I am satisfied that the allegation of common purpose has to be made by the State in the indictment, or at least in the summary of substantial facts furnished in terms of s 144 (3) (a) of the Act.”

At least in *Ndaba*, the State realized that the accused was not properly informed of the charge he faced and immediately brought an application to have the charge sheet amended to reflect its intention to rely on the doctrine of common purpose. In *casu*, the Public Prosecutor’s one line closing argument in asking for a conviction had nothing to do with the shortcomings of the charge

sheet in not appraising the accused of his intentions. It can also be noted that the reason the appellant was acquitted on a charge of possession of prohibited firearm was because the State did not hand in an affidavit prepared in terms of sec 212 of Act 51 of 1977 by an expert who examined the said firearm. Upon questioning by the magistrate, the Public Prosecutor admitted that the said statement was in the docket, but by then it was too late to hand it in.

14. Whereas the appellant conducted his defence to the end under the impression that the allegation was that he pulled the trigger and attempted to kill Mr. Skenjana, the finding to the effect that he was guilty based on the doctrine of common purpose must have come as a surprise to him. I am of the view that failure to inform the appellant of the charge he faced adequately and the possibility of conviction on the doctrine of common purpose prejudiced him and resulted in an unfair trial in respect of that charge and the resultant conviction.

15. **The sentence.**

It was also submitted that the learned magistrate failed to take into account the cumulative effect of the sentence. The court *a quo* acknowledged that the minimum sentences were applicable as provided in sec 51 (2) of Act 105 of 1997. It proceeded to impose the sentences as follows: on each of the three counts of robberies, “eight years in terms of section 25 (1) (a) Act 105 of 1977, five years in respect of the attempted murder and one year in respect of possession of ammunition.” I suppose the learned magistrate meant sec 51 (2) of Act 105 of 1997.

16. Section 51 (2) & of Act 105 of 1997 provides,

“51 Discretionary minimum sentences for certain serious offences

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in-

(a) Part II of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 15 years;

...

(c) Part IV of Schedule 2, in the case of-

(i) a first offender, to imprisonment for a period not less than 5 years.

Sec 51 (3) of the same Act provides,

“(3) (a) If any court referred to in subsection (1) or (2) is satisfied that *substantial and compelling circumstances* exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, *it shall enter those circumstances on the record* of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.”
[own emphasis]

17. It is not clear from the record as to why the learned magistrate deviated from the prescribed sentence of 15 years imprisonment per each count of robbery. From Act 105 of 1997, the only inflexible way through which to deviate from the prescribed sentences is if there are substantial and compelling circumstances that justify such deviation and the same should be recorded. No circumstances were recorded by the learned magistrate in this case, although he deviated

from the prescribed sentences. There has been since clear interpretation of what substantial and compelling circumstances are by the courts – see *S v Malgas* 2001 (1) SACR 469 (SCA).

18. The learned magistrate mentioned the 45 years imprisonment the appellant would have to serve if he was to impose the prescribed sentences as being excessive. If this was the concern that led him to not imposing the prescribed sentences, he could have achieved this within the legislative framework. If the court finds that the cumulative sentence would be disproportionate to the crime convicted of, it can enter the same as substantial and compelling circumstances and then impose such a lesser sentence – see *S v Madikane* 2011 (2) SACR 11 (ECG). Another alternative was for the court *a quo* to order portions of the sentences to run concurrently in terms of sec 280 of Act 51 of 1977.
19. Failure to adhere to the legislative framework was a serious misdirection on the part of the court which calls on the court of appeal to also interfere with the sentence.
20. Although the court *a quo* verbalised that serving 15 years per each count (totalling 45 years) would be shocking; a cumulative sentence of 30 years imprisonment for crimes that took place within few minutes of each other in which the appellant appears to have benefitted just one cell phone, is in my view still excessive. In *S v Dlamini* 2012 (2) SACR 1 (SCA), the SCA confirmed that there was no duplication in the conviction of the suspect of three counts of robberies even though they were committed at the same time since three different victims were each robbed of their motor vehicles.

Whereas the trial court had imposed a sentence of 15 years imprisonment per count totalling 45 years, the court of appeal ordered the sentences in the two counts to run concurrently with the first. I think this is what should have been done in this case.

21. In the result I would make the following order:

1. Appeal is upheld in respect of the conviction on count 2.
2. The accused is acquitted in respect of count 2 (attempted murder).
3. The sentence of one year imprisonment in respect of count 4 (possession of ammunition) is confirmed.
4. The sentence in respect of counts 1, 5 and 6 (robbery with aggravating circumstances) is set aside and replaced with the following:
5. Accused is sentenced to 15 years imprisonment per count (counts 1, 5 and 6).
6. The sentences in counts 5 and 6 to run concurrently with the sentence in count 1.
7. The effective sentence to be served is 16 years imprisonment.
8. The sentence is antedated to 25 January 2011.
9. No order is made in terms of section 103 (1) Act 60 of 2000 (accused is unfit to possess a firearm).

TV RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.

M VICTOR
JUDGE OF THE HIGH COURT

FOR THE APPELLANT	: ADV M BOTHA
INSTRUCTED BY	: JOHANNESBURG JUSTICE CENTRE JOHANNESBURG
FOR THE RESPONDENT	: ADV P FUTSHANE
INTRUSCTED BY	: DIRECTOR OF PUBLIC PROSECUTIONS JOHANNESBURG
DATE HEARD	: 11 AUGUST 2014
JUDGMENT DELIVERED	: 14 AUGUST 2014