

REPORTABLE

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA

JOHANNESBURG

CASE NO: A129/2010

DATE: 2010-11-23

In the matter between

10 **THEMBA GODFREY NENE AND OTHERS**

Appellants

and

THE STATE

Respondent

J U D G M E N T

WILLIS J:

[1] The prosecution of the appeal in this matter has had a torrid history.
20 There have been considerable difficulties in obtaining a proper record.
The record has been voluminous, and there has, in the meantime, been much confusion.

[2] On 19 August 2010 my learned brother, Mr Acting Justice Hoffman and I made the following order:

"1. The appeals of all the appellants (save for Godfrey Nene and Amos Shange accused 1 and 2 in the trial) are postponed *sine die*.

2. The appeals of Godfrey Nene and Amos Shange are struck from the roll.

3. The appeals of Godfrey Nene and Amos Shange are not to be reinstated without a substantive application for reinstatement.

10 4. The applications for reinstatement are to be filed by no later than 30 September 2010, failing which their rights to apply for reinstatement of the appeal of Godfrey Nene and Amos Shange would fall away (i.e lapse).

5. The appeals of all the appellants are not to be enrolled for hearing until the application referred to in paragraph 4 had finally been disposed of.

6. The bail of Godfrey Nene and all other appellants currently on bail is revoked.

20 7. Godfrey Nene is to report to the Orlando Police Station in Soweto by no later than 30 September 2010 for the purpose of commencing his jail sentence.

8. The applications for reinstatement for Godfrey Nene and Amos Shange and the appeals of all appellants shall be heard jointly by Willis J and

Hoffman AJ on dates to be arranged."

[3] The arranged date, referred to above, is today, the 23 November 2010. The applications for reinstatement were indeed filed by 30 September 2010. In order to avoid confusion further, rather than referring to the appellants by number, I shall refer to them by name. It would appear that the only appellants before us today are Bongani Makhoba, Sylvester Mosetsi, Livingstone Mncube and Stephen Ramagaga.

[4] In summary, the appellants were convicted on various counts of unlawful possession of some 18 different firearms and vast quantities of 10ammunition. One of the items found by the police in a raid that occurred consequence of on a tip off was a toy firearm. These firearms include AK47's, AK54 assault rifles, Norinco semi-automatic pistols, Beretta semi automatic pistols, a Victor semi-automatic pistol, C2 model 75 semi automatic pistols, a Victor model 788 semi-automatic pistol. There were also Norincos, another type of model of a Beretta pistol and a 9 millimeter parabellum calibre firearm, model B.

[5] In addition, there were vast quantities of ammunition to be used in the respective firearms. The appellants, save for Godfrey Nene, did not testify in their defence. They were all found at the premises where the arms and 20ammunitions were found in various places in the building, including being concealed behind furniture and in the ceiling of the home occupied Godfrey Nene at the time.

[6] Each of the accused in the trial received an effective sentence of 13 years imprisonment, even though they were liable to a minimum sentence of 15 years for each count of unlawful possession of arms and

ammunition. It seems that the learned magistrate decided to impose less than the compulsory minimum sentence required by the Criminal Law Amendment Act, precisely because the appellants had spent a long time awaiting trial.

[7] Only Godfrey Nene and Amos Shange were granted leave to appeal against both conviction and sentence. The others were granted leave to appeal against sentence only.

[8] The appellants were fortunate to have received such a lenient sentence. In effect, what was found was an arms cache could arm a 10small army with firearms. We all know what a scourge the unlawful possession of firearms in this country is. We are all aware of the fact that the high rates of murder and robbery that take place in South Africa is result of unlawful possession of arms and ammunition of this kind.

[9] The consequences of crime are dire indeed, not only for the immediate victims, namely those who are murdered and robbed, but for everyone else in the society. Unlawful possession of arms and ammunition used in crimes like murder and robbery deters billions, literally billions of rands worth of investment away from the country. It keeps literally hundreds of thousands if not millions of people out of work. We have all had a vivid 20example of how dangerous unlawful possession of arms and ammunition is, with the recent murder of a tourist visiting this country. The news has spread all around the world. Vast numbers of tourists have cancelled their plans to visit South Africa at massive cost for all of us. Just think, for example, of the immediate implications for the hotel industry and indeed the tourism industry as a whole.

[10] I have no hesitation whatsoever in emphasising that in my respectful opinion these appellants were fortunate in receiving a reduced sentence of 13 years. There is, in my view, no merit whatsoever in the appeal on sentence. It is clear that the learned Magistrate carefully considered the factual circumstances, including the personal circumstances of each accused. There was no misdirection. In the circumstances of this particular crime, it would not have made sense to individualise sentence. The reason is to be found precisely in the fact that they were all caught in the same circumstances and failed to testify in mitigation of sentence. *Ex facie* the record there are no strikingly variances in the individual circumstances of the accused to justify an individuation of sentence.

[11] Insofar as the appeal against conviction of Amos Shange is concerned, it needs to be pointed out that he did not testify in his defence and his circumstances were no different from those of any of the others. There is no merit in the appeal against conviction.

[12] Insofar as Godfrey Nene is concerned, his defence was that he was a *sangoma* administering *muti* in his house at the time when this raid took place. The difficulty for him is that, as I have already indicated, various of the arms and ammunition found were found in the ceiling and concealed in various parts of his house. Moreover, the record of his evidence is such that he is most unconvincing witness.

[13] The applications for re-instatement do not aver that Godfrey Nene and Amos Shange have reasonable prospects of success in the event of an appeal, but even if this omission is overlooked, both of us as judges have considered the matter carefully. We are satisfied that there are no

reasonable prospects of success for them in any appeal.

[14] Accordingly, I propose that the following order be made:

1. The applications for the appeals of Godfrey Nene and Amos Shange to be reinstated are dismissed.
2. The appeals of Bongani Makhoba, Sylvester Mosetsi, Livingstone Mncube and Stephen Ramagaga against sentence are dismissed.

HOFFMAN AJ:

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[1] I agree. There are just three main points upon which I wish to comment. The first is that there is some confusion in the documents in our possession as to the name of one of the appellants. He is referred to variously as Moses Sylvester Molemi and Moses Sylvester Mosetsi. It appears that he is one and the same person and he (Moses Sylvester Mosetsi aka Moses Sylvester Molemi) is the person that my learned brother has referred to in his judgment.

[2] The second is that insofar as the application for reinstatement of the appeal is concerned, I would also dismiss it. I will dismiss it on two bases.

20The first is by reference to the fact of its own terms. The appellants do not even deal with the merits of the convictions in the application for reinstatement. I believe is fatal to the application but, in any event, as my learned brother has just pointed out, I believe there is absolutely no prospect of success of appeal on the question of the convictions of the

two appellants Godfrey Nene and Amos Shange.

[3] The third is that I think the appellants can consider themselves very fortunate that the State did not cross-appeal on the question of sentence. Had it done so I for one would be very hard pressed to avoid coming to the conclusion that the sentence substantially in excess of 15 years was not justified.

[4] In the circumstances, I agree with the order proposed by my learned brother.

WILLIS J:

10 The order proposed by me a short while ago is the order of the court.

THE COURT ADJOURNS