

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

Case No: CC11/12

Dates heard: 18-21/6/13; 15-17/10/13

Date delivered: 18/10/13

Not reportable

In the matter between:

THE STATE

and

LUNTU FREDDIE BULAWA

Accused 1

MASIXOLE SONTI

Accused 2

JUDGMENT

PLASKET, J:

[1] An incident occurred in the early hours of 31 October 2010 at Nyutura Street, NU 4B, Motherwell, Port Elizabeth that led to the accused being charged with robbery with aggravating circumstances, murder, two counts of attempted murder, the unlawful possession of a firearm and the unlawful possession of ammunition. Both accused pleaded not guilty to all of these charges.

[2] Although the witnesses who testified about the incident gave versions that differed as to detail, it is common cause that the incident occurred and that the offences referred to in the indictment were committed. The accused deny, however, that they took part in the commission of the offences despite being present when they were committed.

[3] According to Mr Bongani Kobo, the first witness called by the State, he had returned to his home in Motherwell, Port Elizabeth for a short while from Randburg in Gauteng where he now resides. He had made contact with friends and they had gone out for the evening. When they returned to his home in Nyutura Street in the early hours of the morning, they saw a group of four men standing on the side of the road. One of them approached their vehicle and spoke to one Siseko Frans, the deceased, who was seated in the front passenger seat.

[4] Without warning, the man who had approached the vehicle opened fire on Frans, who was struck by four bullets, three in the head and one in the chest. He died on the spot. Kobo jumped out of the vehicle and ran. He was shot in the back and rendered a paraplegic. His cousin, Xola Yantolo, who also tried to run away, was shot in the arm before he got out of the vehicle. Kobo was then searched and a wallet containing cash and a number of bank cards was stolen from him. The occupants of the vehicle were also searched and robbed of three cell-phones. Eleven shots were fired during the incident. All of them were fired from the same firearm.

[5] None of those present knew any of the four men. They were also not able to identify anyone. Not surprisingly, given the nature of the incident, none of the witnesses was able to ascribe any specific conduct to any of the four men, except for the man who shot the deceased, Kobo and Yantolo. While there are suggestions that more than one of the men took part in the searching and the robbing, the confused nature of this evidence, not to mention the discrepancies in the evidence of the various witnesses, makes it impossible to conclude that anyone other than the man who shot the deceased, Kobo and Yantolo was actively involved. Even if it is accepted that one of the men helped the armed man, it is not possible to identify who that might have been out of the two accused and the fourth man present on the version of the State witnesses. (The man who shot the deceased, Kobo and Yantolo is dead. He was referred to by his first name, Luvuyo. As I do not know his surname, I shall also refer to him as Luvuyo.)

[6] Apart from the evidence that I have outlined, the State also relied on the evidence of two further witnesses as well as warning statements and pointings out made by the accused. The admissibility of the warning statement of accused 1 was challenged and, after a trial-within-a-trial, I ruled that it was admissible. I shall return to that issue in due course.

[7] Mr Thembisile Msengana testified that during November 2010, accused 2 had spoken to him about a cell-phone that required repair. Although accused 2 had said that he would bring the cell-phone to him, he did not. Instead the cell-phone was brought to him by Mr Langa Mashelele, who said that he had brought it on the instructions of accused 2. It was a Nokia N95.

[8] After he had unlocked the security code – because that was the problem with the cell-phone – he informed accused 2 that it had been repaired but accused 2 never came to collect it. As a result, Msengana began to use it. He later received a message on the cell-phone from a policeman requesting that he make contact with him. He did so and the policeman told him that the police needed the cell-phone because it belonged to ‘a person who had been robbed and killed’. Msengana’s evidence was not disputed by accused 2.

[9] Mashelele confirmed that he had received the cell-phone from accused 2 and had given it to Msengana. Accused 2 was not present when he had done so. He also testified about certain admissions that, he said, both accused had made to him. He said that they had told him that they were present in a car with Luvuyo in the early hours of the morning in NU 4 B, Motherwell when a man approached them on foot and asked what they were doing there. Accused 2 told him that a shot was then fired and he got out of the car and ran away. Accused 1 told him that the person who approached them had provoked them by asking what they were doing there and that an exchange of gun fire ensued. It was apparent that both accused attributed the shooting to Luvuyo.

[10] At this point, Mashelele having deviated from his statement, was declared a hostile witness. When confronted with his statement, he identified it as his, confirmed that he signed it, that it had been read back to him and that he was satisfied with its contents. What emerged from the statement and the examination of Mr Mgenge (who appeared for the State) was that accused 2 told him that when the shooting started he ran away and that he was told by accused 1 that Luvuyo had searched people in a car and had stolen cell-phones, a wallet and bank cards. His statement also says that accused 1 told him that he had run away with two cell-phones while Luvuyo took the wallet and bank cards.

[11] I admitted a warning statement made by accused 1. The basis for the objection to its admissibility was that accused 1 had been assaulted and threatened in order to force him to make the statement and that his rights were not explained to him by Captain Deon Gerber, the policeman who took the statement.

[12] Four witnesses testified on behalf of the State in the trial-within-a-trial. They were Gerber, Captain Christo van As, Warrant Officer Monde Sithole and Warrant Officer Siyabonga Sidinile. While their evidence may be liable to criticism here and there, they all created a good impression as witnesses, giving evidence that was straightforward, frank and honest. The evidence of all four witnesses was consistent internally and with each other.

[13] It emerged clearly from the evidence of Gerber and Sithole, who had interpreted for Gerber from English to isiXhosa and vice versa, that accused 1 was apprised of his rights and that they were explained to him. It emerged from the evidence of Van As that accused 1 had also been apprised of his rights by him before he was taken to Gerber for the warning statement to be taken. It was also clear from the evidence of Van As in particular that accused 1 could not have been assaulted in the manner that he said he was. As the place where the warning statement was taken was one big open plan space, the assault would have taken place in plain view of everyone. Van As was

adamant that no one assaulted accused 1 and that if he had been assaulted he would have seen the assault.

[14] In my view, the criticisms that were levelled against Gerber do not carry much weight in so far as the issues in dispute are concerned. He can be criticised for not filling in the standard form before and after the taking of the statement with sufficient care and his methodology of doing so may have been somewhat idiosyncratic. That said, he was using a standard form that was not ideally suited for the purpose in that it was drafted on the assumption that the investigating officer would always be the person who took a warning statement, whereas Gerber had nothing to do with the investigation.

[15] I was not at all impressed with accused 1 as a witness. Certain of his evidence in chief had never been put to the witnesses for the State when it should most certainly have been, had it not have been a recent fabrication on his part. His version as put to the State witnesses differed in important respects from his evidence. He was evasive whenever he found himself in difficulty during cross-examination, as was the case when he was asked about his conflicting versions of who had assaulted him.

[16] When I had regard to the evidence as a whole, I was satisfied that given the inherent strengths of the State witness' version, the limited scope for criticism of it, the good impression that all four State witnesses made on me and the inherent probabilities, on the one hand, and the weaknesses of the evidence of accused 1, the improbability of his version and the criticisms I have levelled against his evidence, on the other, the version of the State witnesses was true beyond reasonable doubt and the version of accused 1 was not reasonably possibly true. In the result, I was satisfied that the State had discharged the onus that rested upon it to prove that accused 1's warning statement had been made freely and voluntarily, and that it was therefore admissible.

[17] That brings me to the contents of the warning statements made by both accused and the pointings out that they made.

[18] Accused 1 admitted in his statement that he was in the company of Luvuyo and accused 2 at NU4B, Motherwell when a car with five occupants stopped and they were asked what they were doing there; that Luvuyo drew a firearm and opened fire on the occupants of the car; that accused 2 ran away; that Luvuyo searched a person who he had shot who was lying on the ground, taking a wallet from him; and that he then searched the other occupants of the car, taking articles from them. Thereafter he and Luvuyo ran away.

[19] They ran to accused 2's house where Luvuyo showed them three cell-phones and a wallet containing cards. He asked accused 2 to throw the wallet and the cards away, which he did. Luvuyo said that he was going home. He left two Nokia cell-phones with the accused and took the third cell-phone with him.

[20] Accused 2 took both cell-phones. He opened one of the cell-phones and replaced its sim card. Both of the accused then went to sleep. Accused 1 was later summoned by Luvuyo and drove to his house in a car he had borrowed. He took Luvuyo and his mother to a supermarket to purchase groceries.

[21] In his pointing out, accused 1 pointed out: the place he had stood during the incident; where Luvuyo had stood; the place where the car stopped; the direction in which the three of them ran away; and the direction taken by the driver of the car while being shot at by Luvuyo. The explanations that are recorded are consistent with his warning statement.

[22] In his statement, accused 2 said that at the time of the incident he was in the company of Luvuyo and accused 1. A car stopped next to them. Luvuyo drew a firearm and opened fire. He then said:
'I ran to a distance as Luvuyo [was] shooting several shots. After the shots stopped I saw Luvuyo and Luntu [accused no 1] taking cell-phones and a wallet from the occupants of the car.'

[23] He then joined them again and they ran away. He was given two cell-phones. He put his own sim card into one of them but could not use the other because it required a security code. He took this cell-phone to Mashelele who took it to a person named Seven (the nick-name of Msengana) but he never received the cell-phone back from him.

[24] In his pointing out, accused 2 took Captain Stefanus De Bruin to the place where the incident happened. He pointed out a 'place next to an electrical box' and explained that 'it happened here'. He then said that he ran away and indicated the direction in which he had run.

[25] Accused 2 denied that he had implicated accused 1 in taking part in the robbery of the occupants of the car but both Van As and Sidinile, who had acted as interpreter, were adamant that what was contained in the statement was precisely what accused 2 had said. Both pointed out that the statement was read back to him – and this was not denied – and that he had signed when he had expressed himself as being satisfied with its contents.

[26] Both accused gave evidence. Accused 1 testified more or less in line with his statement. He confirmed that when the first shots were fired accused 2 ran away and that he – accused 1 – took a few steps back. From this position he was able to see that Luvuyo had a firearm and was shooting into the car. When Luvuyo stopped shooting, he put his head (and shoulders, I presume) into the car to search its occupants. He then searched the person lying on the ground. Having done this he told accused 1 that they had to run away.

[27] All three of them ran to the house of accused 2. Luvuyo took out cell-phones and a wallet. He removed cards from the wallet and told accused 2 to throw them away. He gave two cell-phones to accused 2 and asked him to 'unblock' one of them. Luvuyo then left. He later contacted accused 1 to ask him to borrow a car so that he could take him and his mother to a supermarket, which accused 1 did.

[28] Accused 2 testified that when he heard gunshots he ran away and watched what happened from a distance. He took no part in the shooting and the robbery. When the shooting stopped, Luvuyo told him to run away and all three of them ran to his house. When they arrived, Luvuyo gave him two cell-phones. He told him that he could have one of them and that he must 'unblock' the other. Luvuyo also, he says, gave him a plastic bag to throw away. He claims that he did not know what was in the plastic bag.

[29] I shall say more of the quality of the evidence of the accused when I assess the evidence. I turn now to that issue.

[30] I believe that it is fair to say that the evidence of the eye-witnesses was vague, short on detail and, in places, contradictory. That is not surprising: they had been out on the town and had consumed alcohol; and the sudden, extreme violence to which they were subjected caused understandable confusion in them. Their evidence does not identify their attacker or attackers and, for the most part, the acts they describe are the acts of a single person who must have been Luvuyo. Given the quality of their evidence and the fact that they all spoke of four people being present (and Kobo spoke of more than one person firing shots, which is at odds with the ballistic evidence), it would be unsafe to base a conviction of either of the accused on their evidence.

[31] Similarly, the evidence of Mashелеle that both accused had made certain admissions to him is so confused as to detail, and incorrect in relation to facts that are common cause, that little reliance can be placed on it or his statement to the extent that it seeks to implicate accused 1.

[32] The accuseds' pointings out contribute nothing more to the State's case: they only confirm what is common cause, namely that the accused were present when Luvuyo began to shoot at the occupants of the car. Their statements are, by and large, exculpatory: what emerges from both, and this is consistent with their evidence, is that when Luvuyo opened fire, accused 1 retreated from his position next to the car and accused 2 ran away; that

Luvuyo searched the occupants of the car; and that they all ran away together to accused 2's house.

[33] When accused 1 gave evidence, he deviated from his statement in certain respects. It is difficult to determine why he did this because he could derive no benefit from so doing and the deviation could only impact negatively on his credibility. He also added to his version and did so mendaciously. So, for instance, when he testified (during cross-examination) that Luvuyo had threatened to kill him and accused 2 as well as their children and parents if they breathed a word of what they had seen, he was clearly lying. Once again, I cannot imagine what benefit he hoped to derive from this lie.

[34] While there is certainly scope for criticism of the evidence of accused 1, I cannot reject his evidence as false beyond reasonable doubt: in the light of the paucity of acceptable evidence on the part of State witnesses, and the other deficiencies that I have alluded to, I cannot say that his version is not reasonably possibly true.

[35] Accused 2 was a pathetic witness. He too lied about matters that posed no danger to him, as well as some that did. Despite the fact that on both his and accused 1's evidence, he ran away and observed what happened from a distance, he saw it as necessary to try – vainly, as it happened – to disavow seeing and knowing anything about the incident. Despite his extremely poor showing in the witness box, I accept his evidence (supported as it is by accused 1) that when Luvuyo opened fire, accused 2 ran away and only joined Luvuyo and accused 1 when they ran away from the scene.

[36] There is no evidence before me that either of the accused formed a common purpose with Luvuyo to commit murder and attempted murder and there are no facts from which such an inference may be drawn. (As to the elements of common purpose, see *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706C.) The only evidence before me is that of the accused which is to the effect that neither of them were aware that Luvuyo was armed with a

firearm and that they were surprised and shocked when he drew it and opened fire. As they did not know that Luvuyo was in possession of a firearm and ammunition, there can be no question of them being in joint unlawful possession of the firearm and ammunition. (See in this respect, *S v Mbuli* 2003 (1) SACR 97 (SCA) para 71.)

[37] I have accepted that accused 2 ran away and accused 1 retreated from the car when Luvuyo opened fire, and that the State has failed to prove that either took part in the robbery. There is no evidence of any act of association with Luvuyo in respect of the robbery: indeed, the evidence points to active disassociation on the part of both accused.

[38] The findings that I have set out above mean that both accused must be acquitted of all of the charges against them. That, however, is not the end of the matter for accused 2.

[39] He admitted in his evidence that he took for himself one of the two cell-phones that Luvuyo had handed to him. He stated too that he did not know that the cell-phone had been stolen. It is clear from his statement that he knew that the cell-phones that were in Luvuyo's possession immediately after the robbery were stolen during the robbery. That aside, he must have known that Luvuyo's possession of the cell-phones was not lawful because he had to put his own sim card into one to make it work and he determined that the other needed a security code to make it work. Furthermore, according to accused 1, Luvuyo showed both of the accused the three cell-phones and the wallet when they arrived at accused 2's house, having run all the way from the scene of the robbery. As this was immediately after accused 2 had witnessed Luvuyo robbing people of their possessions, he must have known that the cell-phones were stolen. His denial of this fact is not reasonably possibly true and I reject it. It is clear that he appropriated the cell-phone with the intention of depriving its owner of possession permanently. That means that while he has been acquitted of robbery with aggravating circumstances, he is guilty of the competent verdict of theft of a Nokia 1100 cell-phone.

[40] Accused 2 admitted throwing away a plastic bag. He stated that he did not know what was in the plastic bag. Accused 1's evidence, however, is that accused 2 threw away cards that had been in the wallet that Luvuyo had stolen. Accused 1 said that Luvuyo had placed the cards and the wallet on a table, obviously in plain sight of accused 2, before he instructed accused 2 to throw the cards away. Given the poor quality of accused 2's evidence and the probabilities favouring accused 1's evidence on this aspect, I reject as false beyond reasonable doubt accused 2's evidence that he threw away a plastic bag and did not know that he may have been throwing away the cards. I find that he knew that what he disposed of were the cards that had been in the wallet and that these had been taken by Luvuyo in the robbery.

[41] An accessory after the fact is defined as 'someone who after the completion of the crime unlawfully and intentionally associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice' (See Jonathon Burchell *South African Criminal Law and Procedure* (Vol 1: General Principles of Criminal Law) (4 ed) at 527.) By disposing of the cards, accused 2 sought to dispose of items that were of no value to Luvuyo but which, if found in Luvuyo's possession would have been evidence linking Luvuyo to the robbery. By disposing of the cards, accused 2's intention must have been to assist Luvuyo to evade justice – to cover up evidence of his crime. Accused 2 is therefore an accessory after the fact to robbery with aggravating circumstances.

[42] To sum up, my verdict is that:

- (a) accused 1 is acquitted of all charges;
- (b) accused 2 is acquitted of all charges but is convicted of the competent verdicts to robbery with aggravating circumstances of–
 - (i) theft of a Nokia 1100 cell-phone; and
 - (ii) being an accessory after the fact to robbery with aggravating circumstances.

C Plasket

Judge of the High Court

APPEARANCES

The State: S Mgenge of the office of the Director of Public Prosecutions, Port Elizabeth

Accused 1: G Joubert, instructed by Legal Aid South Africa

Accused 2: E Theron, instructed by Legal Aid South Africa