

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC21/2014

THE STATE

And

NYANISO PATRICK ANELE MATINJWA

SIPHUMELELE PHETHELO

Accused

Coram: **Chetty J**

Heard: **19 April 2016 – 28 April 2016**

Delivered: **3 May 2016**

Chetty J:

[1] At approximately 10 p.m. on the evening of 16 December 2014 the sound of a gunshot shattered the peace along the Swartkops river in Port Elizabeth. Two anglers, Messrs *Rodney van der Mescht (van der Mescht)* and *Pieter Michael Rudolph Kitching*

(*Kitching*), standing on the Bluewater Bay bank of the river saw three persons converging at the high water mark on the opposite bank and rapidly proceeding to a black golf motor vehicle parked along the road above the river bank. The vehicle reversed for some distance without the lights being switched on and disappeared from view. The gunshot initially troubled the anglers. *Van der Mescht* telephoned a friend, one *Bruce*, who resided across the river, to enquire if everything was okay, and, placated by *Bruce's* answers, he and *Kitching* continued their pastime.

[2] The gunshot however heralded a portentous discovery later that evening. Prior to departing *Kitching* has occasion to walk along the jetty whence the gunshot had sounded earlier the evening and stumbled across the prone body of the deceased. From his observations, *Kitching* deduced that the cadaver had been shot and further observed that given the state of the deceased's fishing rod, the deceased had been shot before he had had an opportunity to prepare his rod for angling. It is not in issue that the police were summoned and the cadaver removed.

[3] It is furthermore common cause that shortly before midday on 17 December 2016, three (3) members of the South African Police services tactical response unit, responding to a complaint, encountered the stationary blue golf the bonnet of which was open. Constable *Mfundo Tola (Tola)*, the driver of the police vehicle observed a person with tinted hair standing in front of the golf and stopped to allow his colleagues, Constables *Owen Phangiso (Phangiso)* and *Mawande Tolom (Tolom)*, to alight. Whilst

parking the police vehicle *Phangiso* ordered the person occupying the driver's seat to exit the vehicle. It is not in issue that the vehicle had no number plates. *Tolom's* evidence that during the search of accused no.'s 1 and 2 he found a black wallet and firearm on their person respectively was corroborated by *Phangiso* and I accept their evidence hereanent unreservedly. In contradistinction the accused's denial that the aforementioned items were found on their person is, in conformity with the entire body of their testimony contrived and falls to be rejected as false.

[4] The sudden appearance of *Tola*, *Phangiso* and *Tolom* at the area where the golf had been parked was however not fortuitous. The radio report which had guided the police to the area had been precipitated by a complaint lodged with Warrant Officer Gerhard Ackerman whilst on patrol in Motherwell on the morning in question. He had been approached by two young boys, *Thandalwethu Mbanda* and *Xolani Pheta* who reported having been robbed a short while earlier by a gun wielding individual. It is not in issue that their description of the area where the offence had been committed led the tactical unit to the vicinity of the golf.

[5] Although there are conflicting versions of what transpired during the initial encounter between the boys and the accused, the fact that they met is common cause. The point of departure is whether they were robbed of their possessions as deposed to by them or voluntarily handed over the goods as a form of security as alleged by accused no. 2. As adumbrated hereinbefore, I can place no reliance whatsoever on the

testimony of either accused. The entire body of their evidence falls to be rejected as false. I accept that accused no. 2 robbed *Mbanda* of his cellphone and R20, 00 whilst accused no. 1 was sound asleep in the passenger seat.

[6] *Tola's* discovery of the wallet in accused no. 1's right rear pocket yielded, on closer inspection, a driver's licence and a number of bank cards bearing the surname *Ovrenovits*. It is not in dispute that the wallet and its contents belonged to the deceased. *Tolom's* further enquiry via official channels vis-à-vis the particulars displayed on the vehicle's licence disc established that the golf had been "hijacked" in Swartkops the previous evening. What transpired at the scene therefore is of no real consequence. The end result saw the two accused being incarcerated at the Swartkops police station.

[7] At approximately 18:30 that evening the two accused were booked out of the Swartkops police station by Sargent *Makaleni* and Constable *Tsitsi* of the Motherwell police station and transported to their offices and returned later the evening. It is not in issue that on the morning of 19 December 2014, accused no. 2 made a statement to Detective Lieutenant Colonel P J *Smidt* at the Motherwell police station. The admissibility of the statement was challenged on the basis that it had not been made fairly and voluntarily and without undue influence. I ordered that a trial within a trial be held to determine the issue and, after the adduction of evidence thereanent, ruled the statement admissible as evidence against accused no. 2.

[8] In determining the issue whether the state discharged the onus of establishing that accused no. 2 made the statement freely and voluntarily, in his sound and sober sense and without having been unduly influenced thereto, I must at the outset record that upon a conspectus of the testimony adduced, accused no. 2's testimony is contrived and clearly false. It is unnecessary to traverse the evidence adduced on behalf of the state. Each of the witnesses were clearly truthful and honest and I unreservedly accept that accused no. 2 made the statement freely and voluntarily and without having been unduly influenced thereto. The accused's contrary assertions were shown to be demonstrably false.

[9] Accused no. 2's evidence that he was at his house and fetched on the morning of the 17th by accused no. 1 is in direct conflict with contents of his statement. His evidence that part of the content of the statement emanated from Warrant Officer *Berg* (*Berg*) and the remainder, a product of his own fertile imagination, is clearly false regard being had to the narrative contained therein. The specificity and detailed description of the events which unfolded represents a firsthand account of the events which unfolded on that fateful night. The statement moreover finds corroboration in the evidence of *van der Mescht*, *Kitching* and Warrant Officer *Hannigan*. On the Morning of 17 December 2014, the latter retrieved a fired cartridge case in the river in close proximity to where the deceased's body had been discovered. It is not in dispute and in fact formally admitted, that the cartridge case had been fired from the Glock firearm which Constable *Tolom* found on accused no. 2. His denial that it was found on his person is patently false.

[10] The movement of accused no. 2 and his cohorts on the riverbank immediately prior to the shooting and thereafter moreover finds corroboration in the evidence of both *van der Mescht* and *Kicthing* and provides the death knell for accused no. 2's version that he was not the author of the statement.

[11] Accused no. 1's evidence that he was not at the scene of the murder and that the wallet had not been found on his person is clearly false. He was a pathetic witness and his testimony falls to be rejected in its entirety. The presence of both the wallet and the vehicle on him and in his immediate vicinity respectively called for an explanation. The version tendered was clearly false and the inference is inescapable that he was at the scene when the deceased was killed and robbed of his possessions. An objective appraisal of the evidence establishes the falsity of accused no. 1's testimony that he spent the night at home and was fetched therefrom by accused no. 2 the following morning. The policemen who arrested him were in no doubt that he reeked of alcohol. The boys both confirmed that he was asleep in the passenger seat of the vehicle. A search of the vehicle moreover revealed empty beer bottles. Accused no. 1's belated attempt under cross-examination to allege that he moved from the driver's seat to the passenger seat to smoke dagga is clearly contrived. Holistically viewed, his alibi is a complete and utter fabrication. The accused's continued association the following day with the deceased's possessions in tow establishes beyond any doubt that they shared a common purpose. In such circumstances it matters not which of the two accused fired the fatal shot – their common design render both liable for the death of the deceased.

[12] Ms *Coertzen* however submitted that the evidence adduced was wholly insufficient to found a conviction on counts 4 and 5. The argument is no doubt premised upon the acceptance of the state's evidence that accused no. 2 fired a shot at the initiation school and was found in possession of the firearm. The question whether an inference may legitimately be drawn that there was a joint intention to possess the firearm must perforce commence with an analysis of the facts.

[13] From his observation point across the river, *van der Mescht* observed three (3) persons who had congregated prior to the arrival of the golf. According to *Kitching* the vehicle left the scene and returned approximately two (2) minutes later. He noticed the same group of persons and two (2) minutes later a shot rang out. The three (3) persons moved towards the parked golf and stood there for about four (4) minutes before the vehicle drove off without the lights being switched on. After the shot rang out, *van der Mescht* had observed a person walking away from the jetty, meeting up with the two (2) others and walking towards the golf. As adumbrated hereinbefore, accused no. 1 was, on the probabilities, one of the three (3) persons. On the totality of the evidence I am satisfied that the inference that the accused had the intention to possess the firearm is entirely permissible.

[14] I am therefore satisfied that the state discharged the onus resting upon it. In the result accused no. 1 is convicted as charged on counts 1, 2, 4 and 5. Accused no. 2 is convicted as charged on counts 1, 2, 3, 4 and 5.

D. CHETTY

JUDGE OF THE HIGH COURT