

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)

In the matter between:

Case No: CC 34/2014

THE STATE

And

SANDILE KENNETH NOMBAMBA

TOBELA BAILEY

MONDE JACK

Accused

Coram: **Chetty J**

Heard: **10- 13 May 2016; 16 – 18 May 2016**

Delivered: **19 May 2016**

JUDGMENT

Chetty J:

[1] For reasons which will become evident as this judgment unfolds, it is apposite to commence with a prologue. The original indictment enumerated four persons as

the accused – one *Xhanti Msizi (Msizi)* (accused no. 1), *Sandile Kenneth Nombamba* (accused no. 2), *Tobela Bailey* (accused no. 3) and *Monde Jack* (accused no. 4). The trial was due to commence on 3 May 2016. On the morning of the hearing I was appraised that *Msizi* had entered into an agreement as envisaged in terms of S105A of the ***Criminal Procedure Act***¹ (the Act) and, an order for separation of his trial from that of his co-accused would accordingly be sought before Eksteen J. The remaining accused, now enumerated as per the heading of this judgment, entered pleas to the now amended indictment which formulated the multiple charges as follows:

“Count 1: THEFT OF MOTOR VEHICLE

IN THAT, between 17-18 June 2013, and at [... P. S.], Walmer Township, Walmer, in the district of PORT ELIZABETH, the said accused, the one, the other or all of them acting in concert and in the execution of a common purpose, did unlawfully and intentionally steal an Isuzu KB bakkie with registration number [B....]C, with a value of approximately R18,000-00, the property of **Thandisizwe Goodman Johannes**, and/or in the lawful possession of **Thandisizwe Goodman Johannes**.

Count 2: MURDER

IN THAT, upon or about 18 June 2013, and at Cele Street, Govan Mbeki, in the district of PORT ELIZABETH, the said

¹ Act No. 51 of 1977

accused the one, the other or all of them acting in concert and in the execution of a common purpose, did unlawfully and intentionally kill **Mzwandile Eric Mbudu**, an adult male, by shooting him with a firearm.

COUNT 3: ROBBERY (read with section 1(1)(b) of Act 51 of 1977)

IN THAT, upon or about 18 June 2013, and at Cele Street, Govan Mbeki, in the district of PORT ELIZABETH, the said accused the one, the other or all of them acting in concert and in the execution of a common purpose, did unlawfully assault **Mzwandile Eric Mbudu**, and by intentionally using force and violence to induce submission by **Mzwandile Eric Mbudu**, did take and steal from his immediate presence certain property to wit a Toyota Corolla motor vehicle, with registration number [F....], with a value of approximately R45,000-00, his property or in his lawful possession, and did rob him of the same.

COUNT 4: ROBBERY (read with section 1(1)(b) of Act 51 of 1977)

IN THAT, upon or about 18 June 2013, and at Triangle Service Station, 177 Walmer Boulevard, Walmer, in the district of PORT ELIZABETH, the said accused the one, the other or all of them acting in concert and in the execution of

a common purpose, did unlawfully threaten **Farai Nyahunzi** and/or **Thembekile Patrick Toni** with a firearm and knives, and by intentionally using force and violence to induce submission by **Farai Nyahunzi** and/or **Thembekile Patrick Toni**, did take and steal from their immediate presence certain property to wit

- A Blackberry Torch 9800 cellular phone;
- Nokia C201 cellular phone;
- Cash of approximately R1,500-00;
- Merchandise including biltong, cigarettes and chips, with a value of approximately R10,500-00, their property or in their lawful possession, and did rob them of the same.

COUNT 5: ROBBERY (read with section 1(1)(b) of Act 51 of 1977)

IN THAT, upon or about 18 June 2013, and at Shell Garage (Airport Motors), 147 Heugh Road, Walmer, in the district of PORT ELIZABETH, the said accused the one, the other or all of them acting in concert and in the execution of a common purpose, did unlawfully threaten **Buyiswa Jela** and/or **Zethembe Mapasa** with a firearm and knives, and by intentionally using force and violence to induce submission by **Buyiswa Jela** and/or **Zethembe Mapasa**, did take and steal from their immediate presence certain property to wit

- Cash of approximately R1,000-00;

- Merchandise including pies, chocolates and sweets;
 - MNT cellular phone with IMEI number 868352002187520;
 - E250 Samsung cellular phone;
 - Wallet containing R3,00-00 in cash,
- With a value of approximately R6,000-00, their property or in their lawful possession and did rob them of the same.

COUNT 6: UNLAWFUL POSSESSION OF A FIREARM

(in contravention of Section 3 read with sections 1, 103, 117, 120(1)(a), and section 121 and also read with schedule 4 of the Firearms Act, Act 60 of 2000, and further read with section 250 of the Criminal Procedure Act, Act 51 of 1977)

IN THAT, during the period 17-20 June 2013, and in the district of PORT ELIZABETH, the said accused did unlawfully have in their possession a semi-automatic firearm, to wit a 9mm Parabellum Star firearm with no. 1391221, without holding a licence, permit or authorization issued in terms of Act 60 of 2000 to possess the said firearm.

COUNT 7: UNLAWFUL POSSESSION OF AMMUNITION

(in contravention of Section 3 read with sections 1, 103, 117, 120(1)(a), and section 121 and also read with schedule 4 of the Firearms Act, Act 60 of 2000, and

further read with section 250 of the Criminal Procedure Act, Act 51 of 1977)

IN THAT, during the period 17-20 June 2013, and in the district of PORT ELIZABETH, the said accused did unlawfully have in their possession ammunition, to with a 9mm calibre rounds, without holding a licence in respect of an arm capable of discharging the said ammunition; a permit to possess the said ammunition; a dealer's, manufacturer's or gunsmith's licence; an import, export, in-transit or transporter's permit; or without being otherwise authorized to do so."

The indictment furthermore alerted the accused to the mandatory minimum sentences which were applicable *vis-à-vis* counts 2, 3, 4, 5 and 6.

[2] Accused no. 1 pleaded guilty to counts 1, 4 and 5 and not guilty to the remaining counts. In his written plea explanation tendered pursuant to the provisions of sections 112(2), and 115 of the Act, he admitted his presence at the various locales disclosed in the indictment and proffered an account of his involvement albeit under the coercive influence of *Msizi*.

[3] Accused no. 2 pleaded guilty on count 1, not guilty on counts 2, 3, 6 and 7 and guilty to theft on counts 4 and 5. In his written plea explanation, he adverted to his accidental presence at the various scenes which unfolded that evening – he being an unwitting observer.

[4] Accused no. 3 pleaded guilty to counts 1, 4 and 5 and not guilty to the remaining counts. In his written plea explanation tendered pursuant to the provisions of section 112(2), he admitted complicity in the aforementioned offences. Apropos the remaining counts, he availed himself of his right to silence.

[5] Given the ostensible defence of duress which underpins accused no. 1 and, to a lesser extent accused no. 2's participation in the multiple offences, it is apposite to introduce *Msizi* into the narrative at this juncture. He is a self-confessed murderer and without any doubt a reproachful individual. Such castigation should however not *per se* warrant the rejection of his testimony. It was suggested during cross-examination and in argument before me that given the agreement concluded between himself and the state he has a motive to falsely implicate the accused. The suggestions made and the implications concerning his honesty are without foundation. In his testimony before me he readily admitted his leading role. Furthermore, his implication of the accused on the various counts is not of recent vintage and a product of the plea agreement.

[6] Under cross-examination by Mr *Crompton*, *Msizi's* veracity and a fortiori, his credibility and reliability was sought to be impugned by recourse to a confession which he deposed to before magistrate *Johan Herselman* on 26 June 2013. The statement, notwithstanding *Msizi's* reservations concerning certain of its content, mirrors, not only the factual exposition expounded upon in the plea agreement but his *viva voce* evidence.

[7] *Msizi's* implication of accused no's 1 and 2 during the robbery of the Toyota Corolla (Count 1) is detailed in the confession. It moreover finds corroboration in the testimony of Ms *Sheila Sikiti (Ms Sikiti)* whom, it is common cause was seated in the Corolla on the accused's arrival on the scene. She described how she and the deceased were set upon by four persons whose faces were covered with only their eyes being visible. She recounted her removal from the vehicle by a person she described as "***the tall one***". That tittle of evidence finds corroboration in the testimony of both *Msizi* and accused no. 1. Accused no. 2's initial version was that he had throughout that episode positioned himself at the Isuzu bakkie. In response to a question by me he stated that he had begun the process of running away when he saw his cohorts in the Corolla and that this propelled him to join them. Accused no. 2's penchant to tailor his evidence is self-evident and his disregard for the truth legion. I reject his testimony that he was a passive bystander nonchalantly waiting at the bakkie while the robbery took place. The evidence conclusively establishes that he was the person who manhandled Ms *Sikiti* out of the Corolla and held onto her whilst the deceased was forcibly removed therefrom.

[8] Accused no. 1's version was shown to be a complete and utter fabrication. He was a thoroughly disreputable witness and his evidence is clearly contrived. A cursory examination of the photos on exhibit "U" establishes his criminal propensity. The video footage on exhibits 1 and 2 demonstrate quite unequivocally that the front occupants of the Corolla acted spontaneously and with ardent resolve. Mr *Thembekile Patrick Toni*, the petrol attendant at the Triangle Service Station described how the two persons who entered the shop after the gun wielding person were armed with knives and approached him. The agreed upon written notes to the

aforesaid video footage, (exhibit “P”), which, it is common cause, depict three people entering the shop, corroborates *Toni*’s evidence. Accused no. 1 admits in his plea explanation that when he entered the shop he was carrying a knife. He furthermore admits that at the second garage he held the petrol attendant at knifepoint. These actions demonstrate unequivocally that accused no. 1 was an integral part of the group’s robbery escapades.

[9] The question which thus falls for decision is whether the accused are, by operation of the common purpose doctrine, guilty of the murder of the deceased. Mr *Mnyani* was constrained to concede that the evidence is woefully inadequate to sustain a conviction against accused no.’s 2 and 3. He submitted however that accused no. 1 falls into a completely different category and guilty beyond a reasonable doubt. To test the validity of the submission, *Mgedezi*² beckons. Botha JA state the legal position thus: -

“In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* [1988 \(1\) SA 868 \(A\)](#), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea* ; so, in respect of the killing of the deceased, he must have intended them

² *S v Mgedezi and Others* 1989 (1) SA 687(A).

to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SALJ 38 at 39.) In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt.”

[10] The correct approach to considering the requirement of active association was articulated in Thebus³ as follows: -

“ . . . the duty of every trial court, when applying the doctrine of common purpose, is to exercise the utmost circumspection in evaluating the evidence against each accused person. A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.”

³ S v Thebus and Another 2003 (2) SACR 319 (CC)

[11] As adumbrated hereinbefore, accused no. 1's evidence falls to be rejected in its entirety. *Msizi's* evidence that accused no. 1 was the first person to alight from the Isuzu and proceed to the Corolla is admitted by him. The question whether accused no. 1 himself took the firearm from the vehicle or it was handed to him by *Msizi* is of no real moment. The fact of the matter is that whilst *Msizi* proceeded to turn and park the Isuzu, accused no. 1 returned to the Corolla armed therewith. His version, that the purpose was purely to break the window, is pure drivel. Their common objective, from the outset, was to secure possession of the vehicle. To that end the occupants, *Ms Sikiti* and the deceased were forcibly ejected from the vehicle.

[12] Although *Ms Sikiti* stated that she heard a bang of a firearm against the driver's side window, the weight of the evidence clearly establishes that the two (2) shots which she heard were only fired once she and the deceased had been removed from the vehicle. It is furthermore abundantly clear from *Ms Sikiti's* testimony that after she had been removed from the vehicle by accused no. 2, that she saw the person whom she described as the one holding the firearm removing and dragging the deceased from the vehicle. On the probabilities, that person was accused no. 1. *Msizi's* evidence was that the ejected cartridge struck him on the hand whereupon he took possession of the firearm from accused no. 1 and shot the deceased.

[13] Although there are undoubtedly imperfections in the testimony of *Ms Sikiti*, the probabilities favour the sequence of events as described by her. It moreover finds corroboration in *Msizi's* testimony and the inference can properly be made that in

firing at the deceased, accused no. 1 intended to kill him. It is merely fortuitous that he missed his intended target. His active association with *Msizi*, who fired the fatal shot, is thus clearly established. Accused no. 1's guilt on the murder charge has therefore been proven beyond any doubt.

[14] The robberies at the Triangle and Airport service stations present little difficulty. On *Msizi's* evidence, three of them entered the Triangle service station. His concession, under cross-examination by Mr *Crompton* that accused no. 2 could possibly have been sitting in the car does not inure to accused no. 2's benefit. The fact of the matter is that three of them entered the service station shop when it was robbed. The probabilities are that it was he who entered with accused no. 1 and *Msizi*, and participated in the robbery. His denial of any involvement in the robbery at the Airport Motors service station is also clearly contrived. His futile attempt to explain the anomaly concerning the presence of the cashier demonstrated, quite unequivocally, that he was in the service station shop during the robbery.

[16] Accused no. 3 pleaded guilty to counts 1, 4 and 5. Counsel for the state fairly conceded that on the remaining counts he was entitled to his acquittal.

[17] As regards counts 6 and 7, Mr *Mnyani* once more fairly conceded that only accused no.'s 2 and 3 were entitled to an acquittal thereanent. He however submitted that the evidence adduced established the guilt of accused no. 1 beyond any reasonable doubt. Mr *Skepe* however submitted that *Msizi's* evidence that he

regarded the firearm as his property negated any suggestion that accused no. 1 possessed the firearm and ammunition. It is not in issue, and was in fact admitted by accused no. 1, that he was in possession of the firearm when he went to the Corolla. His purpose, as I have found, was to control the weapon to appropriate the Corolla. The inference can thus properly be made that *ex facie* his conduct, he had the necessary *animus* thereby rendering him guilty on both counts 6 and 7.

[18] In the circumstances:

Accused No. 1 is found guilty on each of counts 1 – 7.

Accused no. 2 is found guilty on counts 1, 3, 4 and 5 and not guilty on the remaining counts.

Accused no. 3 is found guilty on counts 1, 4 and 5 and not guilty on the other counts.

D CHETTY

JUDGE OF THE HIGH COURT

Obo the State: *Adv M. Mnyani*
National Director of Public Prosecutions, Port Elizabeth

Obo Accused No. 1: *Adv N. E. Skepe*
Instructed by Legal Aid, Port Elizabeth

Obo Accused No. 2: *Adv R.D. Crompton*
Instructed by Legal Aid, Port Elizabeth

Obo Accused No. 3: *Mr P.J. Schoonraad*
Instructed by Legal Aid, Port Elizabeth