

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

CASE NO.: CC31/2022

Heard: 24, 25, 26 & 27 October 2022

Delivered: 28 October 2022

In the matter between:

THE STATE

and

AYANDA RWEQANE

JUDGMENT

MOLONY AJ:

1. The accused in this matter faces six charges emanating from events occurring on 18 August 2021 at C[...] G[...] Farm, that being the home of J[...] J[...] R[...] F[...] (hereafter referred to as the complainant), an 80-year old man.

2. The charges, in summary, are the following:

2.1 One count of attempted murder of the complainant, by shooting at him with a firearm.

2.2 One count of housebreaking with intent to commit robbery with aggravating circumstances, in that the accused broke into and entered the home of the complainant, with the intent to commit robbery with aggravating circumstances. The

aggravating circumstances relate to the use of the abovementioned firearm. A discretionary minimum sentence of 5 years imprisonment is applicable to this charge.

2.3 Attempted robbery with aggravating circumstances, in that the accused assaulted the complainant in an attempt to take by force from his possession items inside the house, those being the property of, or in the lawful possession of, the complainant. Aggravating circumstances were present in that a firearm was wielded during the commission of the attempted robbery.

2.4 Murder, in that the accused acting in furtherance of a common purpose to commit the offences in question, killed L[...] X[...], a 38-year-old male (hereafter referred to as 'the deceased'). A discretionary minimum sentence of life imprisonment is applicable to this charge, as the death of the victim was caused during an attempt to commit the offence of robbery with aggravating circumstances, and was committed by a group of persons acting in the furtherance of a common purpose or conspiracy.

2.5 Unlawful possession of a firearm, in that the accused had in his possession a 9mm Lew/Vektor semi-automatic pistol with the serial number erased, without holding the requisite license, permit or authorization. A discretionary minimum sentence of 15 years imprisonment is applicable to this charge, as the accused was in possession of a semi-automatic firearm.

2.6 Unlawful possession of ammunition, in that the accused had in his possession ammunition (those being 3 x 9 mm parabellum calibre cartridges) without being the holder of the requisite license, permit or authorization for a firearm capable of discharging such ammunition.

3. Whilst the above-mentioned charges only mention common purpose in terms of the charge of murder (which is count 4), the summary of substantial facts states in paragraph 10 thereof that the accused acted in concert throughout, in the furtherance of a common purpose to commit the crimes in question. It is not in dispute that this

adequately served to inform the accused of the nature of the charges against him, and there was accordingly no prejudice emanating from this aspect.¹

4. The accused pleaded not guilty to all the charges. No plea explanation was advanced, however several formal admissions were made in terms of section 220 of the Criminal Procedure Act (see exhibit 'A' in this regard).

5. The contents of the following documents were admitted as correct:

5.1 The post-mortem report in regard to the deceased (exhibit 'B').

5.2 The contents of the photo album and the key thereto (exhibits 'C' and 'D').

5.3 The contents of the comparison report compiled in regard to shoe imprints found at the scene (exhibit 'E').

5.4 The ballistic report (exhibit 'F') confirming, *inter alia*, that the pistol used in the commission of the offences was a semi-automatic firearm.

6. The accused does not dispute that he did not, at the relevant times, have a valid firearm license/permit/authorization to have the pistol or the relevant ammunition in his possession.

7. For record purposes it must be noted that I was informed that, in regard to exhibit 'C', only 104 of the 169 photographs taken were considered relevant and utilized in evidence by the State. In regard to exhibit 'E', it appeared the affidavit portion of the report was commissioned on 16 August 2021. This was clearly an error. Mr Solani (who appeared for the accused) was aware of both of the aforementioned aspects and did not raise any concerns or objections.

¹ See Section 144(3)(a) of the Criminal Procedure Act 51 of 1977 and the commentary thereto in Du Toit *et al: Commentary on the Criminal Procedure Act at R5 68 2022 ch21-22*.

8. The State led the evidence of four witnesses, those being Mr E[...] P[...]; Mr D[...] P[...] (both of whom reside on farms neighbouring C[...] G[...] Farm), Warrant Officer Plaatjies, who is the investigating officer in this matter, and Mr A[...] B[...] (an employee of the complainant).

9. The complainant himself did not testify due to his advanced age, ill health, and the difficulty in transporting him to Makhandia from the Bedford area, particularly given the state of the roads.

10. The accused was the only witness to testify in his defence.

11. The following was common cause:

11.1 At approximately lunch time on Wednesday 18 August 2021, the accused and the deceased, who had travelled together to C[...] G[...] Farm, arrived at the glass paneled veranda door of the complainant's farmhouse. One of them apparently knocked on the door.

11.2 When the complainant approached the door from inside the house, one or more shots were fired at the complainant through the door, utilizing the 9mm pistol referred to in count 5.

11.3 The accused and the deceased both entered the farmhouse.

11.4 The complainant, at some point, managed to obtain his own firearms (apparently from his gun safe in the spare bedroom), and a gun battle ensued, during which time one or both of the perpetrators (that being the accused and the deceased) were trapped in the bathroom of the farmhouse.

11.5 Ultimately the deceased was shot in the head and killed by the complainant. The identity of the deceased and the cause of his death was not in dispute.

11.6 The accused, thereafter, took the pistol, left the farmhouse, and fled the scene, leaving his beanie behind in the bathroom.

11.7 Later the same day, Mr E[...] P[...] and Mr D[...] P[...] , having discovered what had occurred and the police having been alerted, went in a bakkie looking for the perpetrator who had fled the scene.

11.8 At some point on the road to Bedford (it appears not far from the farmhouse) they encountered the accused, and instructed him to climb on the back of the bakkie.

11.9 Both had firearms with them at the time, which would have been visible to someone looking into the bakkie. The intention (as testified by Mr E[...] P[...]) was to return with the accused to the farmhouse, so that the complainant could confirm whether or not the accused was the perpetrator who had fled the scene.

11.10 After turning the bakkie and beginning to accelerate, the accused jumped off the back of the bakkie, and ultimately jumped over a fence and fled. Mr E[...] P[...] and Mr D[...] P[...] both fired what they referred to as warning shots (the accused testified that he thought they were shooting at him), but the accused nonetheless continued to run away. Despite a further search, the accused was not found that day.

11.11 On Friday 20 August 2022, Mr. D[...] P[...] was notified that the accused had been spotted on one of his farms. Mr D[...] P[...] drove to the farm and saw the accused walking in the road. When he was about 200 meters away from the accused, the accused began running away. Mr D[...] P[...] pursued the accused, shouting at him to stop. The accused during his evidence in chief confirmed hearing Mr P[...] shout at him to stop, but during cross-examination disputed hearing this. Mr P[...] thereafter fired several warning shots (the accused's view was that Mr D[...] P[...] was shooting at him at the time). After pursuing the accused across two other properties, and the accused having thrown the pistol into a goat shed along the way, the accused ultimately surrendered, and was arrested thereafter. The pistol was recovered from the goat shed the same day.

12. Warrant Officer Plaatjies, who had been present when the relevant footprints were examined at the scene, confirmed that the import of the report (exhibit 'E') was, *inter alia*, that the footprints of the deceased and the accused had been found going from one window to another along the front of the farmhouse. The accused's footprints had also been found going away from the farmhouse, the pattern of the prints indicating that he had been running.

13. Mr B[...], who has been working on the complainant's farm for 5 years, testified that on Monday 16 August 2021, he had seen the deceased and another man sitting together on the public road which runs through the complainant's farm.

14. He knew the deceased because the deceased had a girlfriend from another farm in the area.

15. On 16 August 2021, at about noon, the deceased and the other man were about 100 meters from the farmhouse. Mr B[...] was travelling with the complainant in the complainant's vehicle. The complainant asked Mr B[...] to find out what they wanted there.

16. Mr B[...] did so. Both the deceased and the man with him were eating apples, and Mr B[...] was informed that they were eating breakfast. When they were finished they would leave.

17. He had seen the face of the man (whom he did not know) who was with the deceased. He identified him in court as the accused.

18. Mr B[...] described both the deceased and the man he was with as having hair that looked like dreadlocks. It must be noted that Mr E[...] P[...] also described the accused (when he was stopped by Mr E[...] P[...] and Mr D[...] P[...] on 18 August 2021) as having long dreadlocks.

19. Mr B[...] observed that both men were wearing beanies.

20. On Wednesday 18 August 2021, Mr B[...] saw both the deceased and the accused again, at approximately 08h00, walking past the complainant's farmhouse. Mr B[...] was outside the shed next to the farmhouse at the time. The accused and deceased appeared to be wearing the same clothes they had been wearing on Monday 16 August 2021, and looked at him as they passed.

21. He then saw them again, just before 1 pm, this time walking in the opposite direction past the farmhouse. He did not speak to either the deceased or the accused that day.

22. Mr B[...] then locked up the dog (which he was required to do) and went to lunch at about 13h00.

23. He lives in a house beyond the shed. He did not hear any shots being fired or any noise from the direction of the complainant's farmhouse during lunch. He was informed of what had occurred when he returned from lunch.

24. He was shown the body of the deceased in the farmhouse by the complainant.

25. The accused's version of events is the following:

25.1 He resides in M[...] in Port Elizabeth.

25.2 On Monday 16 August 2021, he met the deceased for the first time, whilst he was visiting someone who lives in the same street as him (the accused).

25.3 He heard the deceased discussing employment with someone else. Apparently the deceased was saying that he must return to the place where he used to work, and ask for employment. The accused asked to accompany the deceased as he too was looking for employment.

25.4 The deceased did not disclose where they would go, how far they would need to travel, who his previous employer was, or what specific type of work they might be

doing. All that the accused was aware of was that they would be looking for work on a farm.

25.5 Despite this the deceased paid for himself and the deceased to hitchhike to Bedford on Tuesday 17 August 2021. The accused took a purse with him, containing a wallet and a phone. This was the bag into which he later placed the pistol after fleeing the scene on 18 August 2021.

25.6 Aside from that, he had no luggage. Once he found work on a farm, he would travel back to Port Elizabeth, notify his family, pack his belongings and return to the relevant farm.

25.7 The accused and the deceased spent the night at the deceased's parental home in Bedford.

25.8 Based on the aforementioned sequence of events, the accused denied under cross-examination that either he, or the deceased, could have been on the complainant's farm on Monday 16 August 2021. It must be noted that it was not put, on the accused's behalf, to Mr B[...] during cross-examination that the deceased had not been at the farm on 16 August 2021.

25.9 The next day they made their way to the complainant's farm. The accused apparently did not enquire as to whose farm they were going to, or whether any work was available there which he (the accused) would be able to do.

25.10 They arrived at the complainant's farm between 12h00 and 13h00. Once there he saw the deceased talking to Mr B[...]. The accused at this point still did not know if they were going to ask for employment at this farm, and had not asked the deceased whose farmhouse this was. Despite it having been put on his behalf to Mr E[...] P[...] that the deceased used to be employed by the complainant, the accused testified that the deceased did not volunteer any information about whether or not he (the deceased) had previously been employed on this farm.

25.11 The deceased and Mr B[...] conversed briefly in Afrikaans. In his evidence in chief the accused testified that he could understand their conversation, and said that the deceased had been asking Mr B[...] if the complainant was in the house. This was also put to Mr B[...] when he was cross examined. Under cross-examination the accused was adamant that he had no idea what was being discussed between the deceased and Mr B[...].

25.12 Mr B[...] had then placed the dog in its kennel, and left for lunch.

25.13 The deceased went to the verandah door and knocked. The accused was behind him. The complainant appeared from inside. Upon seeing the complainant, the deceased took out a firearm (which he had apparently, the accused surmised, been carrying in the front of his lumbar jacket). The deceased tried to open the door, but it would not open.

25.14 The deceased then fired a shot at the door through the glass panes. The door did not open and the deceased kicked it. He then told the accused to go through one of the gaps created in the door. The accused, under cross- examination, was clearly uncertain as to which gap in the door he had been forced to climb through, and changed his mind more than once about which gap was the gap in question. In contrast, it was put on his behalf to Mr E[...] P[...], during cross-examination, that the deceased had opened the door after firing a shot through the glass of the door, at the complainant. The section 220 admissions state that the deceased shot at the complainant through a glass pane of the verandah door, and then kicked the door open.

25.15 When asked why he complied by entering the house, the accused initially testified that the deceased had been in possession of a firearm, and the accused was shocked and afraid. Later, under cross-examination, the version developed to include that the firearm had been pointed at him. He also said that it had come across his mind that the deceased wanted him to go in first because maybe the deceased wanted the farmer to shoot him (the accused) but the farmer ended up shooting the deceased. The accused later tried to distance himself from this comment, but did concede during cross-examination that he thought the farmer could have posed a threat in his house.

25.16 Once inside the house, the deceased directed the accused, and made the accused walk in front of him until they reached the bathroom. Apparently then the gun battle began, with the complainant shooting at them from the entrance to the living room. The accused's version vacillated between him and the deceased having been in the process of turning in to the bathroom when the first shot was fired, to him being the only one in the bathroom, with the deceased being in the passage, when the first shot was fired. The version again appeared to evolve during cross-examination in accordance with where bullet cartridges and bullet holes appeared in the house, (as set out in exhibit 'C').

25.17 The accused, upon the deceased being shot, pulled the deceased into the bathroom, ostensibly in order to gain access to the pistol. He wanted the pistol in order to be able to fight back and shoot at the farmer. He did not know how to use a firearm, but in re-examination stated that he had seen the deceased operate the firearm in his presence, which apparently caused him to have the confidence to operate the firearm.

25.18 He took the pistol and left the house, running in the opposite direction to the side of the house where he saw the complainant when he looked outside. Under cross-examination, when referred to the admitted contents of exhibit 'E', and the import thereof, he changed the direction in which he had been running when he left the house. Later he said that after speaking to Mr B[...], he and the deceased had walked past the windows to get to the verandah door.

25.19 He said he had been wearing a hat that day, but did not know if he left it there (at the farmhouse) or if he lost it. This is despite the fact that in the formal admissions in terms of section 220 the accused confirmed having left his 'beanie hat' behind in the bathroom of the complainant's house.

25.20 The accused apparently later jumped off the bakkie, having climbed on at the behest of Mr E[...] P[...], as he had heard Mr E[...] P[...] and Mr D[...] P[...] stating that they were going to shoot him. This did not accord with what was put on his behalf to those witnesses under cross-examination, which was that he had heard them saying

that someone had been shot and died, which had made the accused think that he would be shot. When the accused ran away from the bakkie, he was shot at by the two farmers.

25.21 The accused left the main road to Bedford, apparently being concerned that he may encounter more farmers who would want to shoot him. He kept the pistol because if the police arrested him he wanted to be able to give them the pistol. He intended to return to Bedford and inform the deceased's family of what had occurred, and would then wait for them to contact the police. He did not ask the employees he encountered on one of Mr D[...] P[...] 's farms on Friday 20 August 2021 to call the police because they told him he must leave as Mr P[...] did not want visitors there.

25.22 He ran from Mr D[...] P[...] on Friday 20 August 2021 because he thought he was also going to shoot him. He threw the pistol into the goat shed because he did not want to appear threatening when he eventually surrendered, which he did after Mr D[...] P[...] had pursued him for between 45 minutes and an hour. He surrendered because he was tired.

25.23 He did not know that it was an offence to possess a firearm without a license, and had not been aware as to whether or not the pistol had ammunition in it when he took it.

26. It is trite that in criminal matters the State bears the onus to prove its case beyond a reasonable doubt. If the accused's version is reasonably possibly true, he is entitled to his acquittal.

27. As stated in the oft-cited matter of *S v Van der Meyden* 1999 (1) SACR 447 (W) at pages 80 to 81:

'The onus of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent (see, for example, R v Difford 1937 AD 370 at 373 and 383). These are not separate and independent tests, but the expression of the same test when viewed from opposite

perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other.

In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.²

28. The state witnesses all testified in a forthright manner and without any apparent guile. There is no obvious reason to doubt the truth of their evidence.

29. I was invited by Mr Solani to speculate on the fact that Mr B[...] had not appeared on the original witness list, yet was a crucial witness, and appeared to be called as an afterthought. The suggestion, although not specifically stated, was that an adverse inference may be drawn.

30. In my view the aforementioned does not warrant any such inference. There was no objection to Mr B[...] being called, and the State undertook to provide a statement from Mr B[...] to the defence before he testified.

31. The accused himself was a poor witness. There were several contradictions in his evidence, as well as between his evidence and the version put on his behalf, which have already been canvassed. His description of how he met the deceased and came to be at the complainant's farm, and in particular his lack of knowledge about any of the details surrounding his intended trip to find employment, render his version inherently improbable.

32. His version in this regard is furthermore incompatible with the evidence which is common cause.

² See further *S v Chabalala* 2003(1) SACR 134 (SCA) at paragraph 15.

33. In particular, he was unable to provide a cogent explanation in relation to where his and the deceased's footprints had been found outside the house, and furthermore quite clearly tailored his version when improbabilities between his version and what was contained in annexure 'C' were pointed out to him.

34. He also, between 18 and 20 August 2021, avoided every possible opportunity to proclaim his innocence and offer his surrender, and instead, after leaving the farmhouse, behaved in a manner far more akin to one who was evading detection than one who feared for his life from the local farmers.

35. In my view the version of the accused, to the extent that it does not accord with the probabilities, falls to be rejected as false, and not reasonably possibly true.

36. The evidence of the State, which was in my view reliable, demonstrates that the accused and the deceased (having agreed on a prior date to commit the offences in question) spent two days prior to the incident observing activities on the farm. The deceased had knowledge of the area, having lived there previously.

37. They arrived on 18 August 2021 just before Mr B[...] was due to lock up the only dog on the property, and leave the premises to go on lunch, thus leaving the elderly complainant alone on the premises to face the accused and the deceased.

38. Either the deceased or the accused shot at the complainant through the verandah door, and broke into the house, where after a gun battle ensued. Unfortunately for the accused and deceased, their plans went severely awry, as the complainant (despite his age) launched a formidable attack of his own in order to defend himself and his property.

39. The accused admitted that he was aware of the potential that the complainant may harm them once they were inside his home.

40. The conduct of the deceased and the accused demonstrates a common purpose to commit the relevant offences from the outset, with the aid of a firearm.

Whilst nothing was taken from the complainant's home, given the circumstances and probabilities, in my view the only reasonable inference which can be drawn in regard to their reasons for observing the complainant's home over two days, as well as the timing and manner of their approach, is that they intended to break into the complainant's home and rob the complainant.

41. The fact that one of them shot at the complainant through his own verandah door, demonstrates a clear intention to kill the complainant. It is not necessary to determine whether this was by prior agreement or not, as the accused actively associated himself with what occurred from the outset.

42. In regard to count 4, the accused has been charged with the murder of his co-perpetrator. There is precedent in this regard, and I can do no better than refer to the matter of *S v Nkosi* 2016 (1) SACR 301 (SCA), which involved an armed robbery of business premises, in the course of which one of the perpetrators was killed by the owner of the premises. The issue of the liability of a co-perpetrator was dealt with. The court, having considered various case authorities on the issue, and recognizing that such an enquiry was fact-specific, stated the following at para 13:

'[13] In conclusion and to summarise: on the facts of this case the appellant was well aware that the fact of him and his fellow robbers being armed with loaded firearms may result in a shoot-out or, as it was referred to in Bergstedt and in Dube, that they may encounter 'dangerous resistance'. He reasonably foresaw subjectively that, in the course of encountering such 'dangerous resistance', the firearms may be used with possible fatal consequences. He was thus correctly convicted of murder and the appeal must fail.'

43. I also bear in mind the following caution from the *Nkosi* matter, found in paragraph 7 in which it is stated that:

'[7] I am mindful of the fact that intent is a subjective state of mind and that 'the several thought processes attributed to an accused must be established beyond any reasonable doubt, having due regard to the particular circumstances of the case' (per Olivier JA in S v Lungile and Another 1999 (2) SACR 597 (SCA) ([1999] ZASCA 96)

para 16). Equally important is to be cognisant that 'the question whether an accused in fact foresaw a particular consequence of his acts can only be answered by way of deductive reasoning. . . . (b)ecause such reasoning can be misleading, one must be cautious'.

44. I am satisfied that, on the facts of this matter, the accused subjectively foresaw that in the course of an armed attack upon the complainant, dangerous resistance may result, and continued nonetheless. The intention involved would be that of *dolus eventualis*.³

45. In regard to counts 5 and 6, the accused's claim of not knowing that it was unlawful to possess a firearm for which he did not have a license (which would in turn affect the possession of ammunition for such firearm), does not ring true, and is clearly not a bona fide belief.

46. The accused took the firearm with him when he left the complainant's property, hid it from the sight of both Mr E[...] P[...] and Mr D[...] P[...] , and attempted to rid himself of it prior to surrendering. The serial number on the firearm had been erased. The accused made off with the firearm, after the deceased had been shot and killed, knowing that it had been used in the commission of serious offences.

47. In the matter of *S v Tilayi* 2021 (2) SACR 350 (ECM), the issue of joint possession of firearms and ammunition was addressed at paragraphs 43 and 44, with the following being stated:

'[43] On the facts of the present matter, I am of the view that the inescapable inference that must be drawn from the evidence as a whole is that the group and the individual participants in the common purpose had the necessary intention (animus) and control required for a conviction on the basis of joint possession as postulated in Nkosi. The group agreed to acquire firearms that were to be used in the execution of the primary offence of robbery, the elements of which offence required the theft of the money by

³ See further *S v Tilayi* 2021 (2) SACR 350 (ECM) at paragraphs 18 to 33.

means of an act of force. The firearms were necessary instruments in the execution of the robbery in the manner it was planned.

[44] Conceptually the question must be asked whether joint possession and the requirements formulated in Nkosi must at all find application in the context of an application of the principles underlying the common- purpose doctrine. In the context of the present matter the right question to ask may accordingly be whether the possession of the firearms and the ammunition by one member of the group is a criminal act (actus reus) that falls within the scope of the group's common design, and must as a result be imputed to all the other members of the group. The doctrine, after all, rests upon the legal fiction that by association one member of the group is held liable for the criminal act (actus reus) of another. Liability for the act of another arises by operation of law and is not based on the individual acts of the participants in the criminal design.'

48. I cannot conclude from the available evidence whether it was the deceased, the accused, or indeed both, who wielded the firearm in question on the relevant day, however it is not, in my view, necessary to do so, as the use of the firearm also clearly formed part of the common design between the accused and the deceased to commit the offences in question, and both the accused and the deceased actively participated in the implementation of the common design.

49. The possession of the firearm and ammunition can accordingly be imputed to both the accused (and indeed the deceased).

50. Given all of the above, I am satisfied that the State had proved its case beyond a reasonable doubt, and the accused is accordingly found guilty as charged.

N MOLONY

JUDGE OF THE HIGH COURT (ACTING)

For the State : Mr Coetzee

For the Defence : Mr Solani