



MATLAPENG AJ

[1] On 26 May 2016, after a trial lasting several weeks, the two respondents, Messrs Frank Swarts and Frank Itumeleng who were accused 1 and 2 respectively, were acquitted on all the charges that were preferred against them. The applicant, being the state, represented by the Director of Public Prosecutions, Northern Cape, felt aggrieved by this decision. As a result, it launched the present proceedings. For convenience, the parties will be referred to as in the trial.

[2] The application is premised on the provisions of s319 (1) of the Criminal Procedure Act 51 of 1977 which reads as follows:

“ 319 **Reservation of question of law**

(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division”.

[3] According to the state, following the acquittal of the accused, these three questions arose and should be reserved for consideration by the Supreme Court of Appeal namely:

3.1 *Whether the trial court failed to properly consider and appreciate relevant, evidence or erroneously approached or treated relevant evidence presented by the State against both Respondents.*

3.2 *Whether the trial court correctly appreciated and applied the legal principles relating to circumstantial evidence by not considering these legal principles in consideration to all the relevant evidence presented by the State.*

3.3 *Whether the trial court completely disregarded the established legal principle of liability, particularly the doctrine of common purpose, by not appreciating and applying such principles to the relevant and proven evidence against the First Respondent.*

[4] During the oral submissions, the state rightfully conceded, that the third question does not arise. This was after it was pointed out to the state that as both accused were acquitted, it did not become

necessary for the trial court to decide on whether the two accused acted in common purpose in the commission of the offences or not. The question simply did not arise.

- [5] The question that has to be determined in this matter is whether the trial court failed to apply the applicable legal principles to the proven facts presented to it. Once this is found to be the case, it would constitute a question of law as a result, this court would not have any discretion but would be obliged to reserve it for consideration by the Supreme Court of Appeal in terms of s319 (1) of the Criminal Procedure Act.

- [6] In the matter of **Director of Public Prosecutions, Gauteng Division, Pretoria v Moloi 2017 (2) SACR 177 (SCA)** paragraph 18 the court stated that: *"it is trite that the term question of law relates to the application of a legal principle to an established set of facts and determination whether or not a crime has been committed"*. (my own emphasis).

- [7] This is in line with **Magmoed v Janse Van Rensburg and Others 1993 (1) SA 777 (AD)** where **Corbett CJ** stated the following at page 808A of the report:

“As the quotation from the judgment of Feetham JA indicates, category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of a crime. This is clearly a question of law. But in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are” (my own emphasis).

- [8] In the two passages referred to above, the emphasis is on the words “the proven or established facts”. My understanding of these passages is that when one looks at the proven facts in a particular case and ask whether they constitute the commission of the offence, this exercise would be a question of law. But where one still has to determine whether the evidence led is sufficient proof to constitute a requirement of a particular crime, this would be a question of fact. This, to my mind, takes into account that evidence still has to be evaluated before it can be accepted as a proven fact. If it is evaluated, but the conclusion reached is that it falls short of proving the “ingredient” of a crime, then that would clearly be a factual question.

[9] Shorn of its many words, the submission by the state is to the effect that the trial court failed to consider the evidence presented in its totality to determine whether the essential elements of a crime has been proved. In this regard see **S v Libadzi and Another 2010(2) SACR 233 (SCA)** par 17.

[10] The state buttresses its argument on what it terms the disregard by the trial court of "*Exhibit V*" namely, the pointing out done by accused 1. Had the court taken into account this evidence in conjunction with other pieces of evidence such as, the evidence of the shoe print led by W/O Van Niekerk, the cap that was found on top of the garage as testified to by W/O Fortuin, the identification of the cap as per the evidence of the Thobo siblings, the bullet trajectory as per W/O Gerber and cell phone records as per testimony of Mrs Heyneke, there could have been no other conclusion other than that the state has succeeded in proving the guilt of the accused beyond reasonable doubt.

[11] Both accused submitted that the argument presented by the state bears no merit. Mr Mattee for accused No.2 reiterated what he submitted during the trial namely, that the state has failed to present one iota of evidence to link accused 2 with the commission

of the crime. He further submits that all the evidence presented at the trial was dealt with by the trial court in its judgment. Mrs Victor for accused 1 submitted that the trial court considered all the evidence presented to it in its entirety. The difference may lie in the details, but this does not detract from the fact that all the evidence was considered. The conclusion reached by the legal representatives for the two accused is that in the circumstances of the judgment in question, no legal question arises.

[12] The two accused were charged with the following offences:

Count 1: Unlawful possession of a firearm in contravention of s3(1) read with sections 1, 103, 120(1) and 121 of Act 60 of 2000 and s250(1)(f) of the Criminal Procedure Act.

Count 2: Unlawful possession of ammunition in contravention of s9 read with sections 1, 103, 120(1) and 121 of Act 60 of 2000 and s250 (1)(c) of the Criminal Procedure Act

Count 3: Murder read with the provisions of s51 (1) of Act 105 of 1997.

The allegations were that they used a firearm to unlawfully and intentionally kill the deceased. It was further alleged that they did

not have a licence or permission to possess the firearm or ammunition in question.

[13] During the trial, the state led evidence by the following witnesses: Mrs Kruger, Constable Ntidi, Warrant Officer Schoeman, Sergeant Burger, Warrant Fortuin, Warrant Officer Van Niekerk, Warrant Officer Gerber, Mr Monnakgotla, Ben Thobo, Answer Thobo, Mrs Heyneke, Ms Thompson and Lt/Col Myburgh. All these witnesses were called by the state in its effort to prove the guilt of the accused beyond reasonable doubt.

[14] It is not necessary to repeat the evidence led at the trial except to highlight the following:

14.1 There was no direct evidence linking the accused to the commission of the offences charged.

14.2 The state's case was based on circumstantial evidence and this triggered the rules of logic and inferential reasoning espoused in the matter of **R v Blom 1939 AD 188**.

14.3 Of all the evidence led by the state, the pivotal one in an attempt to connect the two accused to the commission of the

offence was the evidence of Ben Thobo, Answer Thobo, Captain Mabena, W/O Van Niekerk, Mrs Heynecke, W/O Gerber and Lt/Col Myburgh.

[15] The Thobo siblings were called to identify the cap that was found at the scene of the crime as belonging to accused 2. The trial court found that their evidence, in conjunction with that of Captain Mabena was not satisfactory. They could not explain the difference in the colour of the cap that was handed in as evidence to the one depicted in photos 104 and 105. That there was an unexplained difference in the colour of the cap was self-evident. As a result, their evidence regarding the identification of the cap was not accepted. Ben Thobo was also discredited in his testimony relating to the times he would have made calls to his own cell phone which he claims was in the possession of accused 2.

[16] Warrant Officer Van Niekerk could not with certainty state that the shoe print uplifted at the scene of crime belonged to accused 1. This notwithstanding that accused 1 owned shoes with prints similar to the one uplifted and further that he placed himself at the scene of crime as testified by Lt/Col Myburgh.

[17] Warrant Officer Gerber was able to identify the serial number on the firearm and although it was filed off. However, of importance, he failed to connect the fired bullet jacket that was found at the scene of crime with the firearm that was discovered as a result of the pointing out. This to my mind was fatal to the state's case in its attempt to link the firearm and the murder. Crucially, no explanation was forthcoming from the state as to why the link could not be made.

[18] The state forcefully submitted that the trial court failed to properly evaluate "*Exhibit V*" and give it its proper place in the mosaic that the state was attempting to build. What should be kept in mind however, is that: "*Exhibit V*" is not a standalone piece of evidence. Lt/Col Myburgh is the author of "*Exhibit V*". He testified about how he drafted "Exhibit V" and how accused 1 identified certain points to him. The trial court expressed itself on Exhibit V. It came to the conclusion that the testimony contained in Exhibit V through Lt/Col Myburgh did not amount to a confession. It was a merely an admission by accused 1 to being at the scene of the crime. It is silent on what he was doing at the farm. Although the accused admitted to being at the farm, it was still incumbent upon the state to prove the guilt of the accused.

[19] The state further submitted that “Exhibit V” taken in conjunction with other pieces of evidence would have shown that the accused were guilty of the offences charged. However, what the state fails to take into account is that such other evidence especially the evidence of the Thobo siblings and W/O Fortuin in relation to the cap was discredited, and together with the evidence of W/O Van Niekerk in relation to the shoe print was found not to be cogent to constitute proven facts.

[20] In a criminal trial, the state through the testimony of its witnesses, presents facts as building blocks which, at the end of the trial must prove that the accused are guilty of the offence that they are being accused of. The evidence presented at such a trial differs in its strength and importance. When evaluating the evidence presented, it is not necessary for the trier of fact to pronounce on every minutiae of such evidence. In this matter the trial court considered the evidence presented and accepted the evidence of certain witnesses, pointed out the weakness in the testimony of the others, rejected such portion in relation to the testimony, and made a finding as to the credibility and reliability of the testimony presented.

[21] It is axiomatic that all the evidence led at the trial should be accounted for. When evaluating the evidence, it stands free for the trial court to either accept or reject such evidence. When accepting the evidence, it does not necessarily mean that such evidence is of such cogency as to amount to the requisite standard of proof. It may be that such evidence, although accepted, is not of such weight as to amount to proof. By way of example W/O Gerber testified about the trajectory of the bullet and that it was fired from the roof of the garage. According to "Exhibit V", one Mabaso, who was not an accused before court climbed on a tree and a bullet went off. There was nothing in this evidence that entitled the trial court to reject it but even as the evidence stood, it did not connect the accused 1 with the commission of the crime.

[22] It is not only the quantity of the evidence that the trial court looks at. It is also the quality and the cogency of such evidence that is material. It may happen, as is the case of "*Exhibit V*", not to necessarily reject a piece of evidence, but to make a finding that such evidence, in conjunction with other evidential material is not of such probative value as to support a conclusion that an element of an offence is present, which in turn would prove that an accused

is guilty. Furthermore, the evidence led should connect the accused with the commission of an offence. The trial court expressed itself regarding the failure by the state through its ballistic experts to connect the fired bullet jacket with the firearm that was subsequently found.

[23] In the matter of **Director of Public Prosecutions, Gauteng v Pistorius [2016]1 ALL SA 346 (SCA)** the court reminds us what constitutes murder by stating the following at paragraph 25:

“It is necessary to explain certain of the issues that arises for consideration in a murder case. Over the years jurists have developed what has been referred to as the grammar of criminal liability. As already mentioned, murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the State must therefore establish that the perpetrator committed the act that led to the death of the deceased with the necessary intention to kill, known as dolus. Negligence, or culpa, on the part of the perpetrator is insufficient”.

In my mind, this passage means that the state must prove all the elements that constitute the offence of murder. In the present case, the trial court found that the evidence led by the state failed

to prove that the two accused committed any act that led to the killing of the deceased. Put differently, the accepted evidence was not sufficient to prove the *actus reus*.

[24] The law is clear on the issue of joint possession of a firearm by co accused when committing an offence. Even though the finding was that the state has failed to prove that both accused unlawfully possessed the firearm and ammunition in question, it is, for completeness sake necessary to refer to the law as propounded in **S v Zumani 2015 (1) SACR (GJ)** at paragraph 4:

*“The principles applicable to joint ownership have authoritatively been dealt with, laid down and explained in a trilogy of cases: the ratio in **S v Nkosi 1998 (1) SACR 284 (W)** was approved in **S v Mbuli 2003 (1) SACR 97 (SCA) [2002] ZASCA 78** and thereafter explained and summarised by Joffe J, in **S v Motsema 2012 (2) SACR 96 (GSJ)** in para [29], as follows:*

“I therefore conclude that on the basis of S v Nkosi and S v Mbuli the law may now stated as follows:

1. *There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit an armed robbery, joint possession of the weapons used in the robbery is to be inferred.*
2. *Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:*

- (a) *Each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants; and*
- (b) *Each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used but should also be possessed by another participant on his behalf”.*

[25] This is the approach that the trial court adopted. All the evidence led by the state was accounted for and due weight was accorded to it. However, the conclusion to which the trial court arrived, was that the evidence was not sufficient to establish a factual ingredient of the offences charged. This, the trial court did by using inferential reasoning and supported its conclusion by referring to the well-known case of **R vs De Villiers 1944 AD 493**. The evidence could not prove that accused 1 and 2 are the perpetrators of this offence despite accused 1 placing himself at the scene of crime.

[26] For reasons set above, I have come to the conclusion that the state has failed to raise a question of law but has rather raised a factual question.

[27] **Order**

In the circumstances, the application for reservation of a question of law is hereby dismissed.

DI Matlapeng

**D I MATLAPENG
ACTING JUDGE**

Northern Cape High Court, Kimberley

Appearances:

For the Applicant: Instructed by:	<u>Adv J.J.D Rosenberg</u> DPP. Kimberley
For the 1 st Respondent: Instructed by:	<u>Adv S.C Victor</u> Legal Aid SA, Kimberley
For the 2 nd Respondent: Instructed by:	<u>Mr K. Mattee</u> Legal Aid SA, Kimberley