

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

18/2/15
CASE NO: A713/09

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
18/02/2015	<i>EM busi</i>
DATE	SIGNATURE

In the matter between:

THABO ANTHONY NTHOLENG

APPELLANT

and

THE STATE

RESPONDENT

J U D G M E N T

HEARD ON: 13 FEBRUARY 2015

JUDGMENT ON: 18 FEBRUARY 2015

KUBUSHI, J

[1] The appellant was, together with Oupa Mokhachane convicted on a charge of attempted murder. The appellant was accused 2 in the trial and Oupa Mokhachane was accused 1. I shall for convenience, in this judgment, refer to Oupa Mokhachane as accused 1. Both the appellant and accused 1 were sentenced to 15 years imprisonment. The appellant is with leave of the trial court appealing both the conviction and sentence.

[2] The common cause facts in this appeal is that the complainant, Mr George Letsweyu, gave two people (unknown to him) a lift and he was shot at the time these two people alighted from his motor vehicle. The bullet grazed his forehead and he was seriously injured and had to undergo two operations to his forehead.

[3] The complainant did not identify his assailants. The incident happened at night and at a place where it was dark. The only evidence that linked his assailants, namely, the appellant and accused 1 to the offence was the presence of the finger prints lifted by the police on the body of the complainant's motor vehicle and the testimony of accused 1. The appellant's finger print was lifted on the left front passenger door of the complainant's motor vehicle. The trial court convicted the appellant and accused 1 on the strength of this evidence.

AD CONVICTION

[4] The appellant is appealing the conviction and contends that even if this court can find the evidence of the finger print to be in order, the presence of such finger print does not prove the guilt of the appellant beyond reasonable doubt.

[5] I do not understand the appellant to be contending that the finger print in question does not belong to him, what he places in issue is that the evidence of the finger print does not prove the state's case beyond reasonable doubt. This is so, according to the appellant, because the age of the finger print was not placed on record and the finger print was found outside the motor vehicle as such the appellant may have unintentionally touched the motor vehicle.

[6] The trial court is correct to have concluded that the finger print found on the left front passenger door of the complainant's motor vehicle is that of the appellant. Although, the appellant denied that it was his finger print, he was, however, not able to call any credible evidence to discredit the evidence of the state in that regard. It is my view that the only inference that can be drawn is that the appellant's finger print landed on the complainant's motor vehicle at the time of the incident. The evidence shows that the appellant was not known to the complainant before the incident and there is as such no way that he could have come into contact with the motor vehicle except at the time of the incident. The submission by the appellant's counsel that he could have touched it in parking lots in the vicinity where both the appellant and the complainant stay, is far-fetched and is mere speculation as it does not form part of the evidence tendered in court. Moreover, according to the complainant's evidence, on the day in question he personally washed the car at around 17h00 and from there parked it in the garage. He later left in it to go to town and that is when he encountered the appellant and accused 1. The finger print therefore places the appellant on the scene of crime at the time of the commission of that crime.

[7] The appellant's counsel when arguing before us, correctly so, abandoned the appellant's contention that the age of the print was not placed on record and that the print was lifted after 12 hours . The evidence in respect of this issue is clear from the record. Captain Adriaan Harold, the finger print expert, conceded under cross-examination that he lifted the finger print the following morning after the day of the incident, that is, on 15 November 2004 at approximately 9h20. This was of course, longer than twelve hours after the incident had occurred. The fact that the finger print was lifted after 12 hours does not take the argument any further.

[8] Another contention by the appellant is that the trial court erred in accepting the evidence of accused 1 which implicated the appellant in the commission of the offence and resulted in the trial court concluding that the complainant was shot by the appellant. According to the appellant's counsel, the trial court should not have relied on this evidence because accused 1 had a motive to implicate the appellant. I am in agreement with the appellant in this regard.

[9] Accused 1 was an accomplice to the commission of the offence and his evidence ought to have been approached with caution by the trial court. There is no indication in the trial court's judgment that it approached accused 1's evidence with the necessary caution required in law. I am also prepared to accept the appellant's contention that accused 1 had a motive to implicate the appellant. On those basis, in my opinion, the trial court should not have accepted this evidence and in doing so it erred.

[10] Be as it may, this however, does not exculpate the appellant from the commission of the offence.

[11] In terms of the doctrine of common purpose, an accused may be found guilty of the offence he or she is charged with if the following requirements have been complied with:

- (a) He must be present at the scene where the offence was being committed;
- (b) He must have been aware of the commission of the offence;
- (c) He must have intended to make common cause with those committing the offence;
- (d) He must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others;
- (e) He must have intended to commit the offence or to contribute to the commission of the offence.¹

[12] It is common cause that the complainant was shot on the day in question. Either the appellant or accused 1 shot the complainant. My view is that based on the doctrine of common purpose it is irrelevant who of the two shot the complainant. Both of them were at the scene of the crime at the time the complainant was shot. The evidence show that the appellant is the one who stopped the complainant and asked for a lift under false pretence that he had difficulty with his leg or feet (he appeared to be limping) and that his friend, accused 1, had blisters on his feet. The appellant ran away

¹ See S v Mgedezi 1989 (1) 7051 706C

together with accused 1 after the complainant was shot. On that basis the argument that the complainant might have been shot by accused 1 cannot be sustained. If it is accused 1 who shot the complainant, it is my view that, the appellant associated himself with the commission of that offence and is therefore guilty.

[13] The appeal on conviction must therefore fail.

AD SENTENCE

[14] The offence for which the appellant has been convicted, falls under the provisions of Part IV of Schedule 2 of s 51 (2) (c) of the Criminal Law Amendment Act. In terms of this section a person who is a first offender in the circumstances where a firearm was used to inflict serious bodily harm, shall be sentenced to imprisonment for a period of not less than 5 years.

[15] The appellant's assertion in respect of the appeal on sentence is that, in sentencing the appellant to an effective term of 15 years imprisonment, the trial court erred in over-emphasising the seriousness of the offence and the interest of the society over the personal circumstances of the appellant and resulted in imposing a sentence which is shockingly harsh and induces a sense of shock.

[16] It is trite that a court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at simply because it prefers it. To do so would be to usurp the sentencing

discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, the appellate court is of course entitled to consider the question of sentence afresh.²

[17] It is my view that although the offence with which the appellant has been convicted is serious enough to be met with a term of imprisonment, the term imposed in the circumstances of this case is not proportionate to the offence committed. In that sense the sentence is shockingly harsh and induces a sense of shock and this court is thus entitled to interfere.

[18] The appellant suggests that a term of eight years imprisonment would be just and appropriate in the circumstances of this case. The respondent's counsel is also of the view that an effective period of not more than eight years should have been imposed in this matter. My view therefore is that the sentence imposed by the trial court should in the interest of justice be reduced to eight years imprisonment.

[19] In the premises I would propose the following order:

1. The conviction is confirmed.
2. The appeal on sentence succeeds.

² S v Malgas 2001 (1) SACR 469 (SCA) at 478 par 12 d – g and S v Blank 1995 (1) SACR 62 (A) at 86i

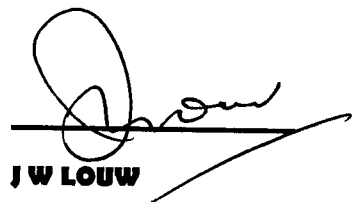
3. The sentence imposed by the trial court is set aside and substituted by the following sentence:

"Accused 2 is sentenced to eight (8) years imprisonment."



E. M. KUBUSHI
JUDGE OF THE HIGH COURT

I concur and it is so ordered



J W LOUW
JUDGE OF THE HIGH COURT,

Appearances:

On behalf of the appellant:

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