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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE HIGHCOURT, KIMBERLEY

CASE NO: K/S 47/07

HEARD: 12/03/2012

DELIVERED: 25/05/2012

In the matter between:

HOSEA SHIMANYANA BOWALE

APPELLANT

and

THE STATE

RESPONDENT

CORAM: WILLIAMS J, PHATSHOANE J *et* HUGHES-MADONDO AJ

JUDGMENT

HUGHES-MADONDO AJ

1] The appellant Mr Hosea ShimanyanaBowale, was charged as follows:

Count 1 - Robbery with aggravating circumstances;

Count 2 - Attempted Murder;

Count 3- Kidnapping;

Count 4 and 5 - Illegal possession of firearms and ammunition (respectively).

On 28 November 2007 he was convicted in the Upington Circuit Court on all counts and was sentenced to terms of imprisonment of fifteen years on count 1, seven years on count 2, five years on count 3 and four years each on counts 4 and 5. The sentences in count 3, 4 and 5 are to run concurrently with the sentence in count 1, appellant would serve effectively a term of 22 years imprisonment. He applied for leave to appeal against his convictions and sentences. Leave to appeal was granted by, Olivier J of this Court, in respect of the attempted murder conviction(count 2)but leave was refused in respect of the other counts.

2] On 19 October 1997 the complainant, Johan George Abrahams Stadler accompanied by Ivan Strauss, were on their way to Stadler's home in Koms, Northern Cape Province. They were returning from Keimoes. Plus minus 800 meters away from his home they encountered two unknown men who indicated that Stadler (the driver) should stop, which he did. The men said

that they were looking for water as the radiator of their vehicle had overheated. The one closest to him grabbed him by the chest through the open window of hisbakkie. He managed to grab his assailant's hands and held them tightly. He asked what they wanted of him but before they couldrespondone of theassailants managed to pull the keys from the ignition.

3] Mr Strauss had been seated at the back of the bakkiebutwasbrought to the driver's side of the vehicle by the other assailant who then hit Stadler with a pistol on the left side of his head. The complainant sustained an open wound to the head.Stadler and Strauss were huddled in the front of the single-cab bakkie together with the two assailants, one of whom was driving. This bakkiebelonged to a friend of his, Mr Olivier. They drove for a short while and came across another two men who joined them. The victimswere ordered out of the bakkie in afield. Stadler was made to sit against a tree, the assailants tied his hands behind his back with his tie, gagged him with a piece of cloth torn from his pair of trouser, took a chain and tied him against the tree.He was then left in the care of one of the assailants who was armed with a knife. The threeothers took Strauss and proceededwith the bakkiein the direction of Stadler's home.

4] After a while they returned and Stadler was untiedfrom the

tree. He was placed in the bakkie and they drove along with him and parked about 200 metres away on a farm road. They were in possession of his bakkie which they must have taken from his home. He was taken to his bakkie where he noticed his safe at the back which was stolen from his home. They demanded that he open the safe. He told them that he had forgotten the code. They nevertheless offloaded the safe and ordered that he open it, which he failed to do. As a result he was hit again on the right side of his head with the firearm. This resulted in yet another open wound. In addition he was stabbed by one of the assailants three times, twice on the back of his right shoulder. These were not severe wounds as the jacket that he wore acted as a buffer. He was also stabbed once on his left buttock. Stadler conceded that these wounds were not life threatening. He was again instructed to open the safe but failed. One of the robbers shot him through the foot.

5] As regards the shooting in his foot the complainant proffered the following explanation:

"STADLER: Nee die een wat- dis 'n ander een wat my geskiet het, ek weet ook nie, ek kan nie mooi gesien het nie want dis donker, ek weet glad nie wie het my geskiet. Maar dit was- dit was nie 'n baie groot pistol nie want hy het nie so 'n vreeslike groot gat deur my voet gemaak nie. ...Hy het my nou

dwarsdeur die voetgeskiet.

MNR OLIVIER [prosecutor]: Wat gebeur toe nou verder nadat hulle vir u deur die voetgeskiet het?

STADLER: Toe het daai- een het vir my gesê hy sal my kop afsny en hy sal my doodskiet. Toe sê ek vir hulle maar dan moet hulle maar doodskiet of kop afsny en maak wat hulle wil, maar ek kan nie daardie ding oopmaak nie. Nou ja toe het hulle my daardie bakkie wat hulle van my gevat het,..., toe het hulle my met 'n nylon tou wat in die bakkie was, het hulle my voor aan die stuurwiel van daardie bakkievasgemaak en toe het hulle die bakkie, die kluis op daardie bakkiegelaai wat die kappie op was, en toe het hulle vertrek. ...en toe het ek gesukkel en toe het ek lateraan my touelosgekry wat om my handewas. Nou ja toe het ek die bakkie, sy sleutels was toe in die bakkie gewees nog, toe het ek die bakkiegevat en toe het ek gery tot in Keimoes. ...na ons Pastoor toe ...hom toe nou gesê wat gebeur het. ...en toe is ons daarvan af na die Polisiestasie toe en daar verklarings afgelê en daarvan af is ek na die hospital toe waar hulle my opgeneem heten die wondetoegewerk het.... Keismoes se hospital...”

6] The appellant who was legally represented, pleaded not guilty and stated that he was not in Koms or near Koms or in the Northern Cape on the day in question, that he was in fact in

Warmbaths, Limpopo. However one of his accomplices, who had already been convicted and sentenced in a separate trial, Hermanus Malgas, placed the appellant on the scene of the crime as a participant who was armed with a firearm on the day in question. Evidence by Captain Du Plessis of the SAPS, a fingerprint expert, confirmed that the appellant had been at Stadler's home as his fingerprint was lifted from a safe in Stadler's home. The trial court therefore correctly concluded that the appellant was part and parcel of the group that committed the offences and that they acted with a common purpose.

7] In the appellant's appeal papers in respect of the conviction on count 2, attempted murder, he states that he was convicted without the state adducing any evidence from the doctor who treated the complainant to determine the severity of the injuries and to infer the intent. Incidentally, Olivier J granted the appellant leave to appeal in respect of this specific count only, his reasons are set out as follows:

"[18] I am, however, concerned about the conviction on count 2, that of attempted murder. No medical evidence was presented. It appears that blunt force (two blows with a fire arm) to the side of the complainant's head necessitated stitches. The complainant was also stabbed, twice on the back

of his shoulder and once on his buttock. According to him his clothes prevented the stab-wound on his back from penetrating very deeply.

[19] Furthermore the complainant was shot in the foot. The evidence appears to be that the shot was aimed at complainant's foot.

[20] In my view there is a reasonable possibility that a Court of appeal may find that these actions [that is the injuries inflicted on Stadler] constituted an assault with intend to cause grievous bodily harm, but not attempted murder."

8] The trial court in dealing with this count went on as followings:

"(I)t is argued by the state that the injuries that Stadler suffered were not that serious, they were slight injuries. Stadler himself testified that because he had a jacket on, probably that's why the knife could not penetrate him that much. I do not believe that it's the injuries only that [have] to be taken into consideration." The trial court then goes on to make mention of the fact that the appellant and his accomplices were armed two firearms and knives. The injuries so sustained are described and the court concludes: *"I am satisfied that the assault on Mr Stadler was actually directed in killing him. Further that they even [though] he was injured, they tied him to a car, to the steering wheel of the car, they didn't even leave him to maybe*

go and look for help. They wanted him to stay there, then if he bleeds, he bleeds to death. And I am satisfied that really, the assault was intended to kill Mr Stadler."

9] It is trite that a person can be found guilty of attempting to commit a crime if he or she had the intention to commit that particular crime. **SEE S v Du PLESSIS 1981 (3) SA 382 (A) at 400D** where the Court stated that "*... to constitute an attempt, there must at the very least have been a formulated intention on the part of the accused to commit the offence.*"

10] In my view to support a conviction for attempted murder in this matter, there needs to be an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death. **SEE R v HUEBSCH 1953 (2) SA 561 (A) at 567H.**

11] Thus the question to be addressed would be whether the appellant together with his accomplices in these circumstances had the intention to kill the complainant. Adv J Rosenberg, for the state, argued that yes indeed their actions were such that the injuries inflicted upon Stadler, and I may add their location on the body, as well as the fact that they left him tied to the steering wheel of the bakkie, could only be construed as an

intento leave him for dead. I disagree with this proposition.

12]On examination as to when exactly the injuries were inflicted, it is noted that the initial blow with the firearm to Stadler's head was struck whilst he was still in thebakkie having just tried to ward off an attack by one of the assailants who had removed the keys fromthevehicle. This was done in an effort to subdue him. The second blow to his head was inflicted when he was unable,or maybe unwilling, to open the safe. At that stage he was also stabbedthree times and shot in his foot. Of significance is the fact that thereafter he was threatened by one of the assailants who said he "*sal my kop afsny and hy sal my doodskiet.*" After this threat though there were no further assaults. They tied him to the steering wheel with the keys to the vehicle still in the ignition. The vehicle was parked 200 metres away on a farm road.

13]From the aforesaid scenario I do not get the sense that the appellant and his accomplices'quest was to kill Stadler. The assault was clearly inflicted to punish him as he had failed to accede to his assailants' demands to open the safe. Why then would they threaten to kill him after the assault and instead of following through with their threat tie him to thesteering wheel

of his vehicle with the keys in the ignition.

14]In the face of the evidence before us I cannot agree with Mr Rosenberg's submission that the injuries were inflicted with an intention to result in Stadler's death. No evidence, medical or otherwise, was placed before the trial court from which it could be inferred that the injuries were severe and life threatening. The state in argument also seemed to suggest that the injuries suffered by Stadler were not serious. Stadler's own testimony of the wounds was to the effect that they could have been worse, had he not had a jacket on. In addition after he freed himself he drove to the pastor; went to make statements at the SAPS; then drove himself to Keiskamma hospital where he was eventually attended to. Clearly this conduct cannot be construed as that of a person who had sustained life threatening injuries.

15]The conclusion that I come to in these circumstances is that there was a lack of the requisite intention to commit the crime of attempted murder. This is so even though the assault on Stadler was unlawful and done with the clear intent to harm his body and impair its integrity in a grievous manner.

16]To summarise I make the following observations; if the robbers wanted Mr Stadler dead the following may have happened:

16.1 The shooter would have shot him in his upper body and nothis foot;

16.2 The opportunity was there to inflict on him penetrating and life threatening injuries with the knife but fortunately only superficial injuries were inflicted;

16.3 The criminals could have taken him deeper into the field and tied him up in such a way that he could not free himself and leave him to die. Instead they left him where he could be found, if he could not free himself, with a means of transport readily available.

17]The benefit of the doubt must accrue to the appellant. On the evidence,the state has only proven that the complainant was assaulted with the intent to do grievous bodily harm.

18]Having come to the conclusion that the appellant should have been convicted on count 2 of assault with the intent to do grievous bodily harm, we are entitled to interfere with the sentence imposed. The appellant's accomplice referred to herein above was sentenced to four years imprisonment for the exact

same conviction. We are of the opinion that four years imprisonment for count 2, assault with intent to do grievous bodily harm, would be appropriate in the circumstances because their degree of participation was the same and they acted with a common purpose. Their personal circumstances are also more or less the same.

In the circumstances the following order is made:

1. The appeal against the conviction and sentence in respect of count 2 (attempted murder) is upheld.

2. The conviction and sentence in respect of count 2 (attempted murder) are set aside and replaced with the following:

“The accused is convicted of assault with intent to do grievous bodily harm and sentenced to four (4) years imprisonment.”

3. In terms of section 282 of the Criminal Procedure Act, 51 of 1977, this sentence is antedated to 28 November 2007.

W HUGHES-MADONDO
ACTING JUDGE

NORTHERN CAPE HIGH COURT

(i) costs of such procee

(ii)

I concur

WILLIAMS
JUDGE

NORTHERN CAPE HIGH COURT

I concur

PHATSHOANE
JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the Appellant: **Adv PJ CLOETE (LEGAL AID BOARD)**

On behalf of the State: **Adv J ROSENBERG (DPP)**