

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL, PIETERMARITZBURG

CASE No : AR 139/11

In the appeal of:

CELUMUSA KHEHLA NENE

Appellant

and

THE STATE

Respondent

JUDGMENT

VAN ZÿL, J.:

1. The appellant appeals, with leave of the trial court (Murugasen, J.) against his convictions only. These comprise malicious injury to property on counts 3, 5 and 7, theft in respect of counts 4 and 8 and attempted theft in respect of count 6. In addition the appellant was convicted of attempted murder in respect of counts 9, 11 and 14. He was sentenced to imprisonment for ten(10) years on each of the counts of malicious injury to property, twelve(12) years on each of the attempted murder counts, five(5) on each of the theft counts and to three(3) years on the attempted theft count. However, it was directed that the sentences imposed upon all these counts run concurrently

with each other, so that the effective term of imprisonment to be served is one of twelve(12) years.

2. These convictions at issue in this appeal all arise out of a series of events which took place during the night of 15 July 2008, when three(3) automatic teller machines (ATM's), all situated at Webber's Centre, Hammarsdale and respectively operated by Standard Bank, Nedbank and ABSA, were attacked and damaged with explosives by an armed gang. The security guards on duty at the centre were held up at gunpoint and monies were taken from two of the ATM's, a shoot-out with members of the South African Police services followed, but the culprits nevertheless managed to make good their escape and no immediate arrests were made.
3. These events at the Webber's Centre, briefly summarised above, were not disputed at the trial of the appellant, who was the sole accused before the trial court. At the trial the appellant entered pleas of not guilty to all the charges and by way of his plea explanation (exhibit "A") merely elaborated thereon by denying that he had committed any of the charged offences and stating that he was "... *never part of the alleged group that committed these offences.*".
4. The real issue before the trial court was whether the respondent (the State) had established, beyond a reasonable doubt, the participation of the appellant in these events as a member of the gang involved.

That also, broadly speaking, is the essential issue before us on appeal to the full court.

5. It is apparent from the appeal record that the convictions of the appellant resulted primarily from a written statement, attributed to him and alleged to have been made by him to a Captain N. B. Eva on 15 August 2008, the day of his arrest and detention. The admissibility of this statement was contested by the defence during the trial and became the subject of a so-called trial within a trial, at the conclusion of which the statement was ruled admissible.
6. In the present appeal the appellant seeks to overturn this ruling and to exclude this statement from the evidential material. If successful, then the remaining body of evidence, whilst establishing the commission of the various offences, would not establish the involvement of the appellant as a participant therein.
7. It therefore becomes necessary at the outset to consider whether the statement was properly received and admitted in evidence and if so, then whether the evidence as at the end of the trial duly established the guilt of the appellant beyond a reasonable doubt in respect of those charges upon which he was convicted.
8. At the trial within a trial the State presented the evidence of four witnesses, the first of which was Inspector (now Warrant Officer) E. A.

Nel, the investigating officer and at the time attached to the Organised Crime Unit at Cato Manor in Durban. According to him he was at his office when he unexpectedly received information to the effect that two suspects relevant to the ATM bombings were to be found at E155, a house in E Section of the KwaMashu Township, North of Durban, but would not likely remain there for long.

9. As a result he hastily assembled a team and departed some time after twelve noon for KwaMashu in search of the suspects, one Maseven and one Musa Nene, the latter being the appellant in the present appeal. The team included, Nel apart, according to his recollection also Capt Eva, an Inspector Mostert and some other members whose identities he could not recall, travelling in different vehicles in convoy.
10. Upon approaching the premises at E155 in KwaMashu the witness recounted how he observed two black males standing on the road in front of the premises. Upon their arrival the members of the team alighted with guns drawn and whilst the once person fell down, apparently in an act of surrender, the other turned and fled into the premises of E155 and disappeared behind the building.
11. According to Nel he approached the prone male and established that he was indeed Musa Nene, one of the suspects sought, whilst the fleeing male was the other suspect, called Maseven. The latter was unsuccessfully pursued by other members of the team, whilst Nel

remained with the prone suspect. According to Nel the latter, who became the accused in the trial and is now the appellant, was informed of the nature of the investigation and of the charges, warned of his constitutional rights and then made what was termed a report to Nel, after which he was formally arrested and put into the police vehicle used by Nel. The medium of communication between Nel and the appellant at that stage was English and Nel maintained that the appellant duly understood him.

12. When it became apparent that the fleeing suspect, referred to as Maseven, had made good his escape, members of the team searched the premises at E155, but nothing was found. According to Nel it was then decided to drive around in the area in the hope of spotting the missing suspect, but this search was both uneventful and unproductive. At some stage further information was received, as a result of which, according to Nel, the team drove to Umlazi in search of firearms, but with equally inconclusive results. Thereafter the convoy returned to their base at Cato Manor. During all this time the appellant remained throughout in the company of Nel in his vehicle whilst Capt Eva was in another vehicle forming part of the convoy of police vehicles.

13. Upon their arrival at the Cato Manor offices, Nel claimed that he found two complainants involved in an unrelated investigation waiting for him. As a result and because he needed to attend to them, he

asked Capt Eva to assist and to take, what is known as a warning statement from the appellant. The suggestion in the evidence is that the taking of such a warning statement is part of the immediate post arrest routine and Nel claimed that, had he believed at the time that the appellant was likely to make a statement in the nature of a confession, then he would not have asked Capt Eva, a member of the same unit as Nel, to take the statement. According to him he would instead have arranged for another officer (presumably one uninvolved with the investigation and from another unit), or a Magistrate, to take the statement.

14. He conceded that the original statement which the appellant made to him in KwaMashu was of a potentially incriminating nature. He contended, however, that the reasons for the arrest and detention of the appellant was due to the nature of the original information received, which implicated the appellant and that the potentially incriminating statement made to him merely strengthened the original information.

15. Nel claimed that he handed custody of the appellant over to Capt Eva in their (shared) office. Thereafter Capt Eva took the appellant to an adjoining office, whilst Nel remained behind and busied himself with the two complainants relevant to the other investigation. He denied that he was present when Capt Eva took the statement from the appellant, or that he was in any way involved in the taking of the

statement.

16. He confirmed, upon enquiry, that from the time of the arrest and detention of the appellant and until the latter was handed over to Capt Eva for the taking of the intended warning statement, the appellant was not in any manner injured, assaulted or threatened, nor were any promises made to him.

17. The evidence of Captain N. B. Eva, the second witness called by the State in the trial within a trial, broadly confirmed but from a different perspective the evidence of Nel, but in addition also dealt with the taking of the disputed statement from the appellant. Eva confirmed that upon their arrival back at the Cato Manor he, Nel and the appellant entered their office, which is a shared office used by several member of their unit, to find some people waiting to see Nel in connection with an unrelated matter. As a result Nel asked the witness, as a favour, to attend to the taking of a warning statement from the appellant and the witness agreed to do so. According to Eva he thereupon printed down a blank copy of the standard warning statement form on his computer, arranged for Warrant Officer (then Inspector) T. E. Mdlalose of the same unit to assist by rendering services as an interpreter and requested the appellant to accompany them to an adjoining office, thereby leaving Nel to attend to the individuals who had called to see him.

18. Once they were in the adjoining office the witness said that he closed the interleading door and the interview commenced at approximately 4pm with only himself, Mdlalose and the appellant present in the room. According to him he introduced himself and Mdlalose to the appellant at the outset, but the appellant informed him that he, the appellant, was fluent in English. According to the witness he nevertheless elected to use the interpretation services of Warrant Officer Mdlalose for purposes of conducting the interview and then proceeded to inform the appellant of his constitutional rights. In the process he read the contents of the form to the appellant, each portion so read was interpreted, the response of the appellant was then interpreted and recorded on the form in manuscript writing. Where appropriate the appellant affixed his thumbprint and his signature.

19. The witness was adamant that the statement was freely and voluntarily obtained from the appellant, who was uninjured, in his sound and sober senses and not influenced to make the statement. In particular he was questioned on the invitation to the appellant, as contained in paragraph 4 of the statement (exhibit J.1), to make an election whether to remain silent, remain silent pending a consultation with a legal practitioner, making a statement there and then, or to answer or respond to questions to be posed to him during the course of the interview. This was by reason of the fact that none of the four possible responses so listed had been marked by the witness to indicate the election allegedly made by the appellant at the time.

20. In response the witness referred to the manuscript statement which he attributed to the appellant and recorded from the top of page 4 of exhibit J.1. He said that he merely recorded the response of the appellant, which commenced with the words "*I want to tell you about this case. I know about a lot of bombings*" and considered the appellant's election to be self evident in context.

21. Because of the apparently self incriminatory nature of the statement which the appellant was about to make, the witness said that he then interposed and recorded as part of the statement a further warning to the appellant, namely "*Before you continue, let me warn you that I am a Commissioned Officer this means that I have the same powers as a Magistrate when it comes to statement taking. In other words what you say to me will be written down and used in court against you. Do you understand?*" To this the appellant according to him replied "Yes." The statement then purports to record the witness asking the appellant "What do you want to do?", to which the appellant replied "I will tell you everything". Thereafter the witness, according to his evidence, proceeded to record the statement as made by the appellant.

22. According to the witness he did not know in advance that the appellant was likely to make a self incriminatory statement and had not himself spoken to the appellant after the latter's arrest because they travelled in different vehicles. The interview concluded at 6.05

pm and the witness then handed custody of the appellant back to Nel, together with the completed statement which he had recorded.

23. Thereafter the State called Warrant Officer T. E. Mdlalose to the stand. He confirmed that he assisted with the taking of the statement as an interpreter and broadly confirmed the evidence of Capt Eva. At the conclusion of the evidence of this witness the State closed its case in the trial within a trial and the matter was adjourned to the following day for continuation. However, upon the resumption of proceedings the State sought and obtained leave to reopen its case in order to call an additional witness, apparently in order to rebut certain suggestions made by the defence in the course of cross examination.

24. This witness was Cst Ravendran Naidoo, commonly known according to him as “Shane” and who was also attached to the Organised Crime Investigation Unit at Cato Manor. Whilst he was also a member of the task team investigating ATM attacks in various centres, he was not involved in the investigation of the Hammarsdale case in respect of which the appellant was subsequently charged and convicted. As such he claimed not to have attended on 15 July 2008 at the crime scene at Hammarsdale, nor to have been present or involved on 15 August 2008 when the appellant was detained.

25. The witness explained that on the latter date he had not even

attended at the Organised Crime offices at all because he was at the Durban satellite campus of Tshwane University of Technology, situated at Prince Alfred (now Florence Nzama) Street, attending lectures during the hours from 9am to 6pm that day. The matter stood down and he procured copies of the class register for the day, as well as the relevant time table, in support of his claimed attendance at the lectures.

26. That finally concluded the evidence of the State in the trial within a trial, whereafter the defence called the appellant to the stand. According to his evidence he is a taxi operator and during the morning of August 15th he went to the rank at Cato Manor where he has taxi's operating from. There he met one Thulani, who he knew from the rank and who then accompanied the appellant to the latter's home at E155 KwaMashu in connection with a problem involving one of the taxi association's vehicles. Whilst they were inside the residence of the appellant, the appellant received a telephone call from a Metro Police Officer who was parked outside.

27. The appellant then went out and was speaking to this metro police officer when the police raiding party arrived and he was commanded to lie down at gunpoint, which he did. Meanwhile some of the other police officers pursued Thulani. The Metro police officer, to whom the appellant had been speaking, was instructed by one of the police officers to drive off. Upon enquiry the appellant confirmed that

Thulani was also known as Maseven, which was one of the suspects the police sought, according to the evidence of the State witnesses. The appellant related how he was then handcuffed and taken inside his home which was the subject of a search, but he was not told what they were searching for. According to him a white police officer wearing spectacles (and not Warrant Officer Nel) was the one who arrested him and who also informed him that the police were not looking for him but for Maseven. He was asked about guns but professed to have no knowledge of any guns. The policeman wearing spectacles and who claimed that he knew the appellant a Musa, then put him in a police vehicle and they drove off. Thereafter they stopped at a PetroPort where the policeman wearing spectacles transferred to another vehicle and the appellant was left in the company of several policemen, including the investigating officer, Warrant Officer Nel.

28. According to the appellant they did not proceed to Umlazi as the State witnesses had said, but instead went directly to the Cato Manor police offices. There, according to the appellant, he was stripped, made to sit in a steel chair with a blue seat and asked where were the firearms and Maseven. Whilst the investigating officer (Nel) was initially present, he then left. A number of policemen were present, including one called "Mossie". The appellant was assaulted by a large policeman who held a flat piece of tubing over his face, thereby preventing him from breathing. The assault was interrupted by the arrival of the spectacled police official who said that Maseven was in Umlazi. He

was instructed to dress and they then departed, together with many policemen and in a number of vehicles, for Umlazi. There, at an unknown address, he was taken from the vehicle and instructed to point out where the firearms were kept, but he denied any knowledge and they then returned to the Cato Manor offices.

29. However, on the way back to Cato Manor a red vehicle, driven by the witness Cst Shane Naidoo, joined them. Back at Cato Manor the appellant claimed that he was again stripped, made to sit on the same chair, assaulted and asked about firearms and Maseven. In the process he was surrounded, but assaulted by the person who was behind him. He identified the witness Shane Naidoo as the main perpetrator of the assaults upon him, including placing a plastic bag over the head of the appellant, thereby subjecting him to suffocation. However, a fat white police official arrived and instructed Shane to stop the assault, after which the appellant dressed again. Then the police official called Mossie took a blue book from his pocket and told Shane to force the appellant to place his thumbprints "*on that book*", which was done. Thereafter Shane took some white papers, some with writing on and others without, instructed the appellant not to read the papers but to affix his thumbprints thereon and sign where indicated, which he did. He subsequently confirmed that these documents formed part of exhibit J.1, but denied that when he was compelled to sign these papers and affix his thumbprints thereon, the documents had been completed. He denied that he had made any statement to

Warrant Officer Nel at the time of his arrest, or even that Nel was present, or had arrested him. He further denied that Capt Eva had taken any statement from him, or that Warrant Officer Mdlalose had assisted as interpreter and claimed that the first time he saw exhibit J.1 was at the office of his attorney.

30.The trial court analysed the evidence at some length and with considerable care. It concluded there were no material discrepancies or improbabilities apparent from the evidence of Nel, Eva, Mdlalose and Naidoo. I am in respectful agreement with this conclusion. It is of significance in my view that Naidoo, the person to whom the appellant attributed a major role in the assault upon him, was able at short notice to obtain documentation which tended to corroborate his absence from his workplace on the day the appellant claimed to have been assaulted. In addition the appellant's evidence as to when Naidoo is alleged to have assaulted him stood in stark contrast with what defence counsel put to Nel in cross examination. Counsel put to Nel that Naidoo participated in an assault upon the appellant before they departed for Umlazi, whereas the appellant testified that Naidoo drove a red vehicle and joined the cavalcade en route back to Cato Manor from Umlazi.

31.The trial court regarded the evidence of the appellant as contradictory and unpersuasive. He claimed to have suffered injuries in the assaults but produced no objective evidence corroborative of such injuries. On

the other hand, in the light of the fact that the appellant claimed not to have provided any of the contents contained in the disputed statement attributed to him, the contents thereof tend to lend support for his involvement in the dramatic events of the ATM bombing at Hammarsdale. Not only do the contents of the statement reflect detail which it is unlikely the police could have fabricated, but they attribute to the appellant only a relatively minor role, namely that of a driver of one of the vehicles used in the attack. In addition the statement awards him a relatively small share in the spoils (R8 900-00), but complains that “*they* (in context the controlling members of the gang) *said that it was R10 000-00.*”

32. Probably the most glaring improbability emerging from the evidence of the appellant was that he claims at no stage to have been questioned relative to the ATM bombing at Hammarsdale on 15 July 2008, but only about the whereabouts of Maseven and some firearms. Given the fact that the ATM bombing and the events of 15 July 2008 were the focus of the investigation, the version of the appellant appears entirely unpersuasive.

33. A court sitting on appeal has a limited discretion to interfere with the conclusions of a trial court. In *S v Monyane and Others* 2008 (1) SACR 543 (SCA) Ponnann JA at paragraph 15 stated that;

“This court's powers to interfere on appeal with the findings of

fact of a trial court are limited. It has not been suggested that the trial court misdirected itself in any respect. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong (S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f). Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony (S v Francis 1991 (1) SACR 198 (A) at 204e)."

(approved of in S v Kekana [2012] ZASCA 75 (25 May 2012) at para 8]

34. In my view also in the present matter there are no material misdirections and the decision of the trial court to admit the disputed statement cannot be faulted. Implicit in that decision is that the statement was made freely and voluntarily, without any undue influence being brought to bear upon the appellant. In arriving at its decision the trial court was aware of the undesirability of an officer in the position of Capt Eva taking down the statement of the appellant, but it correctly concluded that, in the circumstances, no material irregularity occurred.

35. Once the statement was ruled admissible and Eva and Mdlalose recalled to confirm its contents, the State case concluded and the defence case was closed without recalling the appellant. The trial court was then called upon to consider the body of evidence as a whole, in order to decide whether the State had discharged the burden of proof beyond a reasonable doubt resting upon it, despite the fact that the accused did not again testify. In this regard the trial court

cited *S v Van der Meyden* 1999 (1) SACR 447 (W), a decision subsequently approved of in *S v Van Aswegen* 2001 (2) SACR 97 (SCA), Cameron JA at page 101a - e and in *S v Trainor* 2003 (1) SACR 35 (SCA), by Navsa JA in para 8.

36. Applying the authoritative approach laid down in *S v Mgedezi & Ors* 1989 (1) SA 687 (AD) by Botha JA at page 705 I - 706 C, the trial court concluded that the contents of the statement by the appellant duly established that he had, at all material times, the requisite common purpose with the other perpetrators of the assaults upon the ATM's during the evening of July 15th. The trial court further held, on the authority of *S v Molimi and Ano* 2006 (2) SACR 8 (SCA), that the acts perpetrated that night and in respect of which it held the appellant accountable by virtue of the doctrine of common purpose, all fell within the scope of the common intention. Implicit in this conclusion was that such intention, even if it did not amount to *dolus directus*, then at least established *dolus* in the form of *dolus eventualis* and that such actions by the co-perpetrators of the appellant were reasonably foreseeable in the circumstances.

37. The trial court embarked upon a meticulous analyses of the facts relevant to each of the charges which the appellant faced and concluded that with regard to the offences contemplated by counts 1, 2, 10, 12 and 13 his guilt had not been established. As a result he was discharged on these counts. The trial court adopted a cautious

approach and especially with regard to counts 2, 10, 12 and 13 appears to have considered that these acts, in the circumstances of this case, were so unusual and so far removed from what was foreseeable in the execution of the common purpose, that it could not be imputed to the appellant. (Molimi (*supra*) at pages 20H to 21A).

38. Mr Mdladla, who appeared on behalf of the appellant both at the trial, as well as in the appeal before us, attacked the fact that the trial court had admitted the disputed statement (exh J) into evidence. In this regard counsel submitted that the trial court should not have accepted the evidence of the state witnesses, and especially not that of Naidoo who claimed not to have been present at all. Accordingly, so counsel submitted, the trial court erred in concluding that the appellant made the statement to Capt Eva. By implication it followed that even if it were to be held that such statement was actually made by the appellant, then it should nevertheless not have been admitted because the State had not established that it was freely and voluntarily made. But counsel was constrained to concede that the question ultimately became one of credibility and of the factual findings by the trial court.

39. Counsel also sought to persuade us on appeal that, in any event, the trial court had not paid sufficient attention to the constitutional rights of the appellant. In this regard counsel submitted that the appellant had not been sufficiently appraised of his right to legal representation

before making the statement. Again, so it appears to me, this boils down to an issue of credibility. If it is accepted, as the trial court did, that the appellant in fact made the statement to Capt Eva, whose evidence in this regard was believed, then it follows that the rights to legal representation as contained in the constitutional warning to be found in page 1 of exhibit J.1, as well in paragraphs 3.3 and 3.4 in page 2 thereof, were in fact adequately explained to the appellant before he commenced with the making of the statement, as recorded.

40. Finally counsel sought to persuade us that the contents of the statement, if admitted, did not establish the guilt of the appellant beyond a reasonable doubt. I have already indicated above that in my view the analysis of the evidence as a whole at the conclusion of the trial by the trial court cannot be faulted. A court of appeal does not have an unfettered discretion to interfere with the conclusions of the trial court. It may do so in limited circumstances, *inter alia*, if the court of appeal is persuaded that the decision was clearly wrong. (see: R v Dhlumayo 1948 (2) SA 677 (AD)). In my view this is not such a case.

41. As already indicated, I do not consider that there are any grounds upon which to upset the credibility findings of the trial court, or its conclusions as at the end of the trial. That being so, I do not consider that the entreaties of counsel for the appellant to the contrary can succeed.

42.I would therefore propose the following order:-

“The appeal against the convictions of the appellant by the trial court is dismissed and these convictions, as well as the sentences, as imposed, are confirmed.”

VAN ZÿL, J.

I agree.

JAPPIE, J.

I agree.

SCHAUP, A.J.

APPEARANCES:

For the Appellant	:	Adv Mdladla, Instructed by . Durban Justice Cntr.
For the Respondent	:	Adv A. Walters Instructed by the Director of Public Prosecutions (KZN), Pietermaritzburg.
Judgment reserved	:	1 August 2012
Judgment handed down	:	21 AUGUST 2012