
FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 159/2011

In the review between:

THE STATE

and

BANNY JANUARY AND 3 OTHERS

CORAM: VAN DER MERWE, J *et* LEKALE, AJ

JUDGMENT: LEKALE, AJ

DELIVERED ON: 23 JUNE 2011

[1] On the 4th March 2011 the 4 accused persons were each sentenced to 30 months imprisonment on three counts of assault with intent to cause grievous bodily harm and 6 months imprisonment each on a charge of theft by the magistrate court at Botshabelo. The sentences in respect of accused number 2 were, however, wholly and conditionally suspended for 3 years mainly because he was a minor.

[2] The matter, eventually, served before Van der Merwe J on automatic review and he directed the following query to the trial

magistrate:

- “1. Is dit bo redelike twyfel bewys dat beskuldigdes 2, 3, en 4 skuldig is aan diefstal (aanklag 4)?**
- 2. Verskaf asseblief redes vir die vonnisse.”**

[3] The learned magistrate has since obliged and the court is indebted to her for, *inter alia*, the following detailed response with regard to convictions:

“...Dit is duidelik uit die getuienis dat die beskuldigdes hulle daardie aand vereenselwig het met die optrede van hulle medebeskuldigdes, wat die optrede ook al was. ‘n Persoon kan op grond van gemeenskaplike opset ook aan diefstal skuldig bevind word en die skuldigbevinding van beskuldigdes 2, 3 en 4 op die diefstalaanklag, het dus op hierdie basis geskied ...”

[4] In respect of the sentences the trial magistrate responds as follows, among others:

“Weer eens, as die beskuldigdes van openbare geweld aangekla sou gewees het, was hulle optrede van ernstige omvang genoeg om, na my mening, ‘n vonnis van drie jaar

gevangenisstraf te regverdig selfs met inagneming van al die ander faktore, waaronder hulle persoonlike omstandighede. Die aanklagte soos wel gestel, regverdig nie noodwendig 'n mindere vonnis nie. Ek het die kumulatiewe uitwerking van die vonnisse in ag geneem en daarom aanklag een tot drie saamgeneem vir vonnisdoeleindes. ...”

- [5] It is correct, as pointed out by the learned trial magistrate, that several accused persons may, in an appropriate case, be convicted on the basis of the doctrine of common purpose where, in the absence of an agreement to commit the offence in question, they are shown, beyond reasonable doubt, to have shared a common purpose aimed at the furtherance of a crime with the actual perpetrator or perpetrators. (See **S v MGEDEZI AND OTHERS** 1989 (1) SA 687 (A).

- [6] In the present matter the recorded direct evidence only implicates accused number 1 on the theft charge. There is no direct evidence to show that the other three accused persons agreed with accused number 1 to steal cigarettes and money from the tavern. Their culpability on this charge, therefore, depends on the presence of the following pre-conditions among

others:

- 6.1 they knew or were aware of the theft;
- 6.2 they intended to make common cause with accused no. 1 in the commission of theft;
- 6.3 they manifested common purpose with accused no. 1 by some or other association with his conduct;
- 6.4 they had the necessary *mens rea* with regard to theft.

(See **S v MGEDEZI AND OTHERS** *supra*).__

[7] There was nothing, in our view, before the trial court suggesting that the three other accused were aware that accused number 1 intended to and, in fact, did steal from the tavern and that they actually associated themselves with his conduct in that regard.

[8] In our judgment the guilt of accused numbers 2, 3 and 4 on the theft charge has, with respect, not been established beyond a reasonable doubt. It is reasonably possible that they were oblivious of the activities of accused number 1 relating to theft and that he was engaged in a frolic of his own when he committed that crime.

- [9] A perusal of the record further reveals that the only evidence tendered in support of charge number 3 emanated from the complainant on that charge. Her evidence, however, could not, in our view, sustain the allegation that the accused threw stones at her insofar as she testified that:

“Toe ek nou buite gaan kyk daarso ek het gesien dat nou hulle is besig om met die bottels te gooi.”

(See page 50, lines 12 – 14 of the record.)

“Where you fired(?) or thrown with any objects during the incident? ... Nee.”

(See page 52, lines 5 and 6 of the record.)

- [10] We are, thus, not satisfied that the accused are guilty on charge number 3.

- [11] It is patent, in our judgment, from her response that the trial magistrate imposed the sentences on the footing that the accused should, in fact, have been charged with and are actually guilty of public violence which, in her view, warrants a

heavier sentence. As the magistrate correctly acknowledges in her response, that was not the charge preferred against the accused and the same is, further, not a competent verdict in terms of section 266 of the Criminal Procedure Act, no. 51 of 1977 as amended (“the CPA”).

[12] The sentences are, in our opinion, not appropriate in the circumstances of the present matter regard being had to the accused’s respective personal circumstances, among others.

[13] When all is said and done we are not satisfied that the proceedings before the trial magistrate were in accordance with justice.

ORDER:

[14] In the result, the judgment of the trial court on the convictions and the sentences is set aside and replaced with the following:

- “1. The four accused are found guilty on charges 1 and 2 and not guilty on charge number 3;**
- 2. Accused number 1 is further found guilty on charge number 4 while the other accused are found not guilty on that charge;**

3. Accused numbers 1, 3 and 4 are sentenced to 12 months imprisonment on charges 1 and 2 taken together and a further 6 months imprisonment suspended for 3 years on condition that they are not found guilty of assault with intent to do grievous bodily harm committed during the period of suspension;
4. Accused number 2 is sentenced to 12 months imprisonment on charges 1 and 2 which sentence is wholly suspended for 3 years on condition that he is not found guilty of assault with intent to cause grievous bodily harm committed during the period of suspension;
5. Accused number 1 is further sentenced to 3 months imprisonment on charge number 4.”

[15] The above sentences are antedated to run with effect from the 4th March 2011.

L. J. LEKALE, AJ

I concur.

C. H. G. VAN DER MERWE, J