

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No. : A28/2004

In the appeal between:

BOONTJIE SKHOSANA Appellant

and

THE STATE Respondent

CORAM: H.M. MUSI J *et* MOLEMELAAJ

HEARD ON: 13 NOVEMBER 2006

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 23 NOVEMBER 2006

[1] The appellant was charged with one count of robbery with aggravating circumstances (count 1) and two counts of attempted murder on Mr. Jacobus Frederick Pretorius (Pretorius) and Mrs. Anna Pretorius (Mrs. Pretorius) being counts 1 and 3 respectively, in the Regional Court sitting in Bloemfontein. He was, on 4 February 1999, duly found guilty as charged and sentenced to 10 (ten) years imprisonment on the robbery conviction and 8 (eight) years imprisonment on each of the

attempted murder convictions. It was ordered that 3 (three) years of each of the attempted murder sentences should run concurrently with the 10 (ten) years imprisonment on count 1, so that the effective term of imprisonment was 20 (twenty) years. The appellant now appeals against both the convictions and the sentences imposed.

[2] The focus of the appeal in respect of conviction was the issue of identity, but Mr. Skibi, who appeared for the appellant in this Court, also contended that the Court *a quo* erred in convicting the appellant on counts 2 and 3. He suggested that because the complainant in count 2, Pretorius, was not struck by any bullet or injured, attempted murder had not been proved. Regarding count 3, he suggested that the appellant should have been convicted only of assault.

[3] This contention that the attempted murder convictions were not competent is without merit. The evidence is that the attacker whose face was initially covered with a mask and who was subsequently identified as the appellant, not only pointed a fire-arm at Pretorius at close range after the latter's hands had been fastened behind his back, but that he actually pulled the trigger during the course of which cartridges were released. That Pretorius was not shot was due only to the fact that the fire-arm malfunctioned and no bullet was released. This attempt at shooting happened on three occasions but on each occasion the fire-

arm malfunctioned. Two cartridges were subsequently found, one in the TV room where the first attempt to shoot occurred and the second in the office or study where two more attempts were made. The only reasonable inference to be drawn from such conduct is that the attacker intended to kill. That he failed to do so is precisely why the correct verdict is attempted murder and not murder.

[4] As far as the attack on Mrs. Pretorius is concerned, this occurred at the time that the alarm system had been activated, when one would have expected the robbers to flee. Instead they hit the defenceless complainant with the butt of the gun so severely that she sustained *inter alia* a fracture of the skull. That they did not kill her is probably due to the alarm that was raised by the activated alarm system. The inference is inescapable that they wanted to eliminate her in order to stop her from identifying the appellant. The conviction on count 3 is therefore fully justified.

[5] Regarding the issue of identity, the evidence is that when the third attempt at shooting Pretorius failed, the attacker removed the mask from his face in order to see why was the fire-arm not functioning. In doing so, he exposed his face. It is instructive to refer to the relevant passage from the record at page 13:

“..... o ja ek het nou gesê die tweede keer het hy mos nou al toe op my gerig en wat hy toe onmiddellik daarna doen is toe klap hy die skerm voor sy gesig weg om te kyk na die pistool wat gaan hier aan natuurlik.”

And further:

“Toe hy dit doen toe skreeu ek vir my vrou Here, kyk wie is hierso.

Ja? -- Nog voor ek sy naam kon sê toe sê sy, toe sy opkyk toe sê sy Sipho, jou vuilgoed of so iets.”

That was the evidence of Pretorius and it is fully corroborated by his wife, Mrs. Pretorius. The latter further testified that she became agitated when she realised that the attacker was their former employee whom she knew by the name of Sipho, that she spontaneously threw objects lying on the desk at him and then dashed past him and ran to another room where she switched on a panic button and thus activated the alarm system.

[6] This piece of evidence by the complainants was not challenged or contradicted by any other evidence. Their conduct is that of people who were truly taken by surprise to see that it was a person they knew very well who was thus attacking them. It is a natural and logical reaction and has all the hallmarks of truth. It is undisputed that the appellant worked for the complainants for some four years before he left a few months prior to the incident and he himself conceded that they knew

him well as a result.

[7] Regarding sentence, Mr. Skibi conceded that 10 (ten) years imprisonment on robbery with aggravating circumstances and 8 (eight) years on attempted murder were appropriate sentences. He submitted, however, that the cumulative effect of the sentences in the form of the effective term of twenty years imprisonment was shockingly inappropriate and urged us to intervene and substitute an appropriate effective term of imprisonment. He also pointed out that the Court *a quo* had not taken into account that the appellant had spent some two years in custody whilst awaiting trial. Mr. Chalale, for the State, did not have any objection to the effective term of imprisonment being reduced as long as the sentences imposed on each individual count were not interfered with.

[8] Now the Court *a quo* fully motivated its decision on sentence and considered the triad of sentence as well as the purposes of punishment. However, there are two issues that need to be addressed, both of which relate to the issue of the effective term of imprisonment. As counsel for the appellant correctly pointed out, the Court *a quo* did not take into account the two years that the appellant spent in custody prior to sentence. In this regard see **S v VILAKAZI AND OTHERS** [2000 \(1\) SACR 140](#) (W).

[9] The second issue is that the Court *a quo* found that counts 2 and 3 were not committed during the course of the robbery and that they could not be made to run concurrently with the sentence on count 1. I respectfully differ. The first and the second attempts at shooting Pretorius occurred during the course of the robbery and it cannot be said that the robbery was over when the last attempt was made. It could well be that the robbers were not satisfied that all the money had been given to them and would have proceeded to demand more had they not been interrupted by the dashing away of Mrs. Pretorius. Likewise the assault on Mrs. Pretorius was probably meant to stop her from phoning. At any rate, the victims of all these offences were the same complainants and the offences were committed at the same time. At the very least the offences are closely linked to one another to justify making the respective sentences to run concurrently. Compare [**S v MATE** 2000 \(1\) SACR 552](#) (T); [**S v BELELIE** 1997 \(2\) SACR 79](#) (W). Furthermore although the complainants were subjected to the real risk of serious harm, the fact is that Pretorius in particular sustained no injuries. Certainly the sentence on count 2 should have been made to run concurrently with the sentence on count 1. Allowing for the 2 (two) years that the appellant spent in custody whilst awaiting trial, 16 (sixteen) years effective term of imprisonment would, in the circumstances of this case, be appropriate.

[10] In the premises, the following order is made:

(a) The appeal against the convictions and the sentences imposed on each individual count is dismissed;

(b) The order relating to the concurrent running of the sentences and the effective term of imprisonment is set aside and replaced with the following:

- i. The sentence of 8 (eight) years on count 2 is to run concurrently with the 10 (ten) years sentence on count 1.
- ii. 2 (two) years of the 8 (eight) years imposed on count 3 is to run concurrently with the sentence imposed on count 1.
- ii. The effective term of imprisonment is 16 (sixteen) years, which is antedated to 4 February 1999.

H.M. MUSI, J

I concur.

On behalf of appellant: Adv. N.I. Skibi
Instructed by:
Justice Centre
BLOEMFONTEIN

On behalf of respondent: Adv. S. Chalale
Instructed by:
Director Public Relations
BLOEMFONTEIN