

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

Appeal No.: A40/2005

In the appeal between:

SAMUEL TLADI

Appellant

and

THE STATE

Respondent

CORAM:

VAN DER MERWE, J *et* MATSEPE, AJ

JUDGMENT:

MATSEPE, AJ

HEARD ON:

7 NOVEMBER 2005

DELIVERED ON:

10 NOVEMBER 2005

The accused, Samuel Tladi, was arraigned before the regional court in the district, Sasolburg on three charges, namely:

1. A charge of robbery in that he and two others robbed one Jacob Rampitsana on the 2nd of April 1999 at Zamdela, Sasolburg;
2. Attempted robbery with aggravating circumstances in that on

the 3rd of April 1999 at Sasolburg he unlawfully and intentional attempted to rob one Molopi John Motsoeneng;

3. Unlawful possession of a firearm in that he was found in possession of a 7,65mm pistol in contravention of the provisions of Act 75 of 1969.

His co-accused, Jacob Natala Makume, died before the trial had commenced.

The appellant was acquitted on charges 1 and 3. This is an appeal against his conviction and sentence as far as the second count is concerned.

It is common cause that on the date in question the appellant was in the company of the deceased, Makume and another when he, Makume and the other person approached the complainant, Motsoeneng, from behind and whilst the other person was holding the complainant, he Makume took out a firearm and pointed it in the direction of the complainant whilst simultaneously searching the complainant. Nothing was found on him and he was subsequently left to go. The appellant, Makume and the other person left together to a shebeen.

The question that has to be answered is whether on the evidence

as a whole, the state has proved beyond a reasonable doubt that the appellant so associated himself with the actions of Makume and the other person so as to make him culpable on the basis that he is an accomplice.

As far as the law is concerned regarding an accomplice the following may be noted:

1. A crime should have been committed by another person.

In this case it is common cause that the crime of attempted robbery was committed by Makume and the other person.
2. There must be an act on the part of the accomplice which assists the perpetrator to commit the crime. Such assistance can take various forms such as giving advice, encouraging or providing assistance. This assistance may be of a negligible nature but what is required is that it must be proven that there was adequate assistance. Counsel for the appellant correctly points out that a person who is present when a crime is committed and watches cannot be said to be assisting in the commission of such crime. In this regards see **STATE v QUINTA & ANOTHER** 1974 (1)

SA 544 (TPD) which is authority for the view that such person may only be culpable if there was a duty to intervene and he/she failed to do so. In this regard see **STATE v PENDEKE** 1967 (3) SA 200 (RA) as well as **STATE v CLAASEN** 1979 (4) SA 460 (T). In the latter case the appellant had permitted another person to drive his vehicle without a licence whilst he was a passenger in the vehicle. His appeal against the conviction in the magistrate's court was dismissed.

3. The accomplice must have the intention to assist the perpetrator. In **REX v MASUKA AND OTHERS** 1965 (2) SASR 40, Young, J AT 42 G – H held that:

i°i°. if there was not physical contribution to the death of the deceased there must, at least, be a psychological contribution in the sense of incitement or encouragement.”

See also **STATE v WILLIAMS EN ‘N ANDER** 1980 (1) SA 63 (A) at 63 F - G. Joubert, JA stated as follows:

„Deurdat ‘n medepligtige hom bewustelik vereenselwig met die pleging van die misdaad of bewustelik hulp verleen om die pleging van die misdaad te bevorder, het hy die bedoeling om die dader of mededaders te help om die misdaad te pleeg.”

His culpable act consists in the giving of assistance or encouraging the commission of the crime.

It is my intention to evaluate and analyse the evidence of the actions of the appellant regard being had to the principles set out in the authorities mentioned above. In order to do so the actions of the appellant before, during and after the attempted robbery would have to be looked at. The evidence of the complainant regarding the actual participation of the appellant is that the appellant was standing directly behind him during the robbery and that he, the appellant, pressed against his back with his chest. This is vehemently denied by the appellant who states that he was standing a few metres away and watched the incident from that distance. It is significant to note that when the appellant is asked

by his attorney as to what happened after the complainant was grabbed from behind he says:

“Then I stopped them. I reprimand, let this man alone. What are you doing?”

And on page 126, line 23 of the record, when asked whether he went closer to the complainant he states:

“I went nearer to them, and then I talked to them to stop what they are doing.”

On page 128, line number 18, when asked what happened when they remained at the tavern after the incident and the statement is put to him:

“But you were no longer in each company.” He answers: “Yes”.

It is important to note that he states that he was no longer in the company of the two would be robbers at the shebeen giving the impression that they had now parted ways. The complainant confirms that at some stage during the robbery when the person with the firearm was threatening to shoot Motsoeneng, he the

appellant said that he must leave Motsoeneng and not shoot him. In this regard see page 130, line 19. The question however that comes to mind is that if he did not associate himself with the actions of Makume and the other person why accompany them to the shebeen? He states repeatedly that he was threatened and was afraid that he would be shot. He repeats this when the court asks questions of clarity and on page 135, line 11 and 18 he states that he was forced “gedwing om saam te loop” and “as jy nie saamloop nie gaan ons jou skiet”. He states that in the shebeen he was sitting very far from them and in this regard on page 136, line 8 the following may be noted from the questions by the court:

“So, jy was glad nie, jy wou so ver as moontlik van hulle af weggebly het. Is dit korrek? ----- Ja.”

He went to the taxi-rank early in the morning after he moved away from them from the shebeen but when he got to the taxi they were already there. After several questions from the court to clarify how come he is found together with them at the taxi-rank, in the taxi, sitting at the backseat which he initially denied, he concedes on

page 138, line 5 that he was sitting with them:

“Ja, ek het saam met hulle daar gesit.”

It is significant that shortly thereafter he stated that this was because as he puts it:

“...die stoele moet volgemaak van agter af. Ek het geen keuse gehad nie.”

The question that needs to be answered is whether his behaviour according to him both at the shebeen and in the taxi are consistent with that of a person who, as he claims, want to disassociate himself from the persons who committed the crime and indeed who feels threatened. One would have expected him to want to get away from them as much as possible if he was indeed threatened as he states.

It is necessary in this case to determine whether the magistrate properly evaluated and appreciated the significance of the onus which rested upon the state and in this regard reference is made to the matter of **S v V** 2000 (1) SACR 453 at 455 A-C where the

court sets out the principle that needs to be applied as follows:

“It is trite that there is no obligation upon an accused person, where the State bears the *onus*, ‘to convince the court’. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable. A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the probabilities of the case to determine whether the accused’s version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this Court and other courts the test is whether there is a reasonable possibility that the accused’s evidence may be true.”

In considering the facts in this case the question whether one subjectively believes the appellant’s version or not should not be the test. What needs to be done is to determine whether as indicated in the **S v V** *supra* matter, there is a reasonable possibility that the accused’s evidence *may* be true.

The appellant was certainly not honest with the court regarding his

activities and association with the other two accomplices as to what transpired at the shebeen after the attempted robbery incident as well as when they got to the taxi-rank. His evidence in this regard is fraught with improbabilities and can safely be rejected as false. It is therefore found that the court *a quo* correctly rejected the evidence of the appellant.

However the question that needs to be asked is whether on the evidence of the state it can be found that the state has proved the guilt of the appellant beyond a reasonable doubt. In this regard the following may be noted:

1. The complainant repeatedly said that although the appellant was at his back, the appellant did nothing. He also said that although the appellant could have searched his back pocket, he did not do so. His further evidence must be seen in this light.
2. The complainant did at one stage say that the appellant pressed his chest against the back of the complainant. He did not say that that was done in order to subdue the complainant. On the contrary, according to the complainant he was rendered motionless by the actions of the other two people. The

complainant also said at one stage that when he retreated he bumped into the person at his back. It is a quite reasonable possibility that the complainant was referring to the same incident when he said that he was pressed from the back.

3. The complainant, when asked in cross-examination whether he can dispute the fact that the appellant did not take part in the robbery, responds as follows:

“That I cannot say”

See page 64, line 20 of the record.

4. When it is further put to him that he cannot say that the appellant took part in the robbery, he responds by saying:

“I, there is nothing that I can say”

See in this regard page 64 (26) and 65 (4) of the record.

The circumstances mentioned above create doubt as to whether it can be found that the state proved beyond reasonable doubt, participation by the appellant in the crime.

The appeal against conviction consequently succeeds.

The conviction and sentence are set aside.

MATSEPE, AJ

I concur.

C.H.G. VAN DER MERWE, J

For the appellant:

Adv. R. van Wyk
Instructed by:
Claude Reid Inc.
BLOEMFONTEIN

For the respondent:

Adv. L. Faber
Instructed by:
The Director of
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