

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)APPEAL NO: AA 05/2023
COURT A QUO: CC76/2018

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO THE JUDGES: YES / NO
(3) REVISED.

Signature

Date

2024/09/19

In the matter between:

SEHLABE LOUIS NTHATENG

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MONENE AJ

INTRODUCTION

[1] Criticizing the philosophical outlook of a fellow thought leader in Italian Marxist theory, Antonio Gramsci in an article titled "Sterile and Negative Criticism" sourced from *L'Unita* of 30 September 1925 accused Amadeo Bordiga of oscillating between thesis and antithesis.

[2] The difficulties attendant to what others have termed approbating and reprobating at the same time or at least akin thereto have often seized our courts in situations where opposing litigants' versions are mutually destructive or where there are internal contradictions in a party's version, the approach to resolution of which is now established law as gleaned from such authorities as *Stellenbosch Farmers Winery Group Ltd and Another v Martell et Cie and Others* 2003(1) SA 11(SCA) at 14J-15E and *National Employers General Insurance Co Ltd v Jagers* 1984(4) SA 437(E) at 440E. But nowhere has it been, at least as per this court's improvable research, that a court of appeal had to decide a situation where, like in *casu*, it is not versions of litigants but findings of a court which are materially irreconcilable.

[3] The judgement of this division per Mudau J, which serves before this Full Court of appeal following leave being successfully petitioned to the Supreme Court of Appeal,

found there to be no proof that the appellant was ever in either physical or constructive possession of firearms but still found a way to convict him of two counts of murder and three counts of attempted murder which offences were ostensibly committed through the utilization of the same firearms the appellant never possessed. If the rationale of the court a quo's judgement be not approbation and reprobation at the same time or being so, it still is acceptable at law and undeserving anti-Bordiga like Gramsci criticism, then the appeal must fail because the appellant shall have been correctly convicted. If not, then the conviction of the appellants shouts out to be set aside. But what shall it be?

BRIEF BACKGROUND AND EVIDENCE LED IN THE COURT A QUO

The charges and brief chronology

[4] The appellant was together with two other persons charged with Robbery with aggravating circumstances, conspiracy to commit murder, three counts of attempted murder, two counts of murder, two counts of unlawful possession of firearms and one count of unlawful possession of ammunition.

[5] Following the testimony of three police officers for the state, the appellant and other accused, the appellant was convicted on the conspiracy to commit robbery charge, the two counts of murder and the three counts of attempted murder. He was acquitted

on the robbery count, the two unlawful possession of firearms charges and the unlawful possession of ammunition charge. The convictions then saw the appellant on 6 August 2020 sentenced to an effective term of 25 years imprisonment it being so that the sentence of 15 years for the conspiracy charge, 5 years for the attempted murder charges and 25 years for each of the murder charges were ordered to run concurrently.

[6] Leave to appeal having been denied by the court a quo, albeit per Makgoba JP who had heard the leave to appeal ostensibly in the absence of Mudau J, the appellant was on 31 May 2023 granted leave to appeal to this Full Court against both conviction and sentence.

The evidence led

[7] In sum the evidence led by the state was as follows:

7.1 The police received information that there was a group of about five people travelling in a Ford Ranger Motor vehicle intending to rob a cash delivery van when it arrived at Boxer Store in Mokopane.

7.2 Sergeants Mphotle Marokane, Masilo Phaladi Makola and Motshoane Bopape were among the police officers who upon identifying the said Ford Ranger parked in the Mokopane town.

7.3 When the police were apparently noticed by the occupants the Ford Ranger sped off resulting in the police giving chase.

7.4 Subsequent to the chase around town there ensued a shoot-out between the police and some of the occupants of the Ford Ranger Motor Vehicle.

7.5 In the aftermath of the shootout two of the occupants of the motor vehicle lay dead. These are the "victims" in the two murder charges for which the appellant and his co-accused were convicted.

7.6 Sergeant Marokane could not see whether the appellant was ever in possession of a firearm or not.

7.7 In facie curiae Sergeant Makola testified that the appellant was in possession of a firearm but failed to explain why such a crucial part of his evidence was not mentioned in his written affidavit.

7.8 Warrant Officer Kutumi Kgare testified that the appellant was amongst those on whom gunpowder residue tests returned a negative result.

7.9 For his part the appellant gave a version that he did not know all the other four occupants of the motor vehicle as he had hitched a lift in the motor vehicle. He testified that upon successfully hitching a lift at an Engen Petrol Station in the Mokopane town on his way back to Gauteng after visiting his girlfriend overnight, he was informed by the driver of the motor vehicle, to wit, the first accused that the car was first going into the neighboring township of Mahwelereng to drop off some of the passengers. It was while they were supposed to still go via the township that the shoot-out had occurred to his

shock and amazement. He had during the shootout gotten out of the motor vehicle laid himself on the ground and been arrested.

7.10 The appellant's hitchhiker version was corroborated by his two co-accused who both testified that he was completely unknown to them as he had moments before the chase and altercation with the police been picked up while hitchhiking.

[8] From the full conspectus of the evidence led before the court *a quo* it further becomes clear that the robbery charge on which the appellant was acquitted related to an earlier event in January 2017 where the Ford Ranger motor vehicle in casu was ostensibly robbed off its owners or lawful possessors at gunpoint. The conspiracy to commit robbery charge related to the alleged plan to rob a cash in transit vehicle on 1st April 2017. The attempted murder charges related to the gunshots aimed at the three police officers who were involved in the shootout with some of the occupants of the motor vehicle while the Firearms Control Act related offences flew from the firearms recovered by the police at the shootout scene.

THE GROUNDS OF APPEAL

[9] The notice of appeal is no model of how to articulate grounds of appeal at all. It is so generalized, unsubstantiated, threadbare and meagre as to what is to be faulted in the judgement of the court *a quo* that absolutely nothing helpful can be gained from

it. It is to the heads of argument of the appellant and oral submissions eloquently made before us by Mr Legodi on behalf of the appellant that reliance was made to enumerate the grounds of appeal as being the following:

- 9.1 There was no evidence led to lead the trial court to a conclusion that the appellant was part of a conspiracy to commit robbery of the cash in transit at Boxer Mokopane.
- 9.2 The fact of the intelligence information on the intended robbery being hearsay was most unhelpful to the cause that the trial court has not committed a misdirection in convicting the appellant of conspiracy to commit the said robbery.
- 9.3 Having found that the appellant was never in possession of the firearms nor the ammunition, it was not available for the trial court to in the same vein convict the appellant of having utilized the same firearms in commission of the attempted murder and murder charges.
- 9.4 The trial court misapplied the common purpose doctrine in this matter.
- 9.5. The trial court misdirected itself in admitting the confession of the third accused against the appellant, who was accused number two in that trial.
- 9.6 Generally, the court has misdirected itself in finding, on the facts before it, that the respondent had discharged its onus of proof of the commission of the offence beyond reasonable doubt.

[10] Owing to the conclusion reached *infra* as to conviction, it becomes unnecessary, in my view, to go into the grounds of appeal against sentence. Suffice to at least remark that if the guilt of the appellant was proven the sentence would not, in this court's view, have been sharp enough for the offences allegedly committed *in casu*.

THE TEST, THE APPLICABLE LAW AND ANALYSIS

[11] Section 322 of the Criminal Procedure Act provides, *inter alia*, as follows regarding appeals of the type this court is seized with:

"322(1) In the case of an appeal against conviction or of any question of law

reserved, the court of appeal may-

(a) Allow the appeal if it thinks that the judgement of the trial court should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a failure of justice; ...

[12] The question is thus whether on any of the grounds listed above the court *a quo* misdirected itself resulting in failure of justice.

[13] In making its finding on the presence of conspiracy to commit robbery the trial court correctly identified, with reference to such relevant authority as ***S v Cooper and Others 1976(2) SA 875(T)*** that conspiracy normally involves three stages, to wit, the making of an agreement, implementation and termination and further that once a conspiratorial agreement has been made the offence of conspiracy has been completed.

[14] However, going through the judgement a view that the only basis upon which the trial court concluded that the appellant was part of the conspiracy was his mere presence in the Ford Ranger is inescapable. Nowhere does the trial court go on to prove how any of the three stages of a conspiracy are engaged, at least, regarding the appellant. The reasoning appears to simply that because the trial court rejected his hitchhiker version his mere presence in the motor vehicle proves his being part of a conspiracy. That reasoning does not sit well with this court.

[15] Assuming that there is in casu acceptable evidence to prove that there was a plan by other occupants of the Ford Ranger to commit robbery on the day of the incident which assumption itself is shrouded in a lot of doubt because its basis is purely hearsay from probable police informers, there is simply no evidence that the appellant was part of such a plan.

[16] The information not really evidence that the occupants of the Ford Ranger intended to rob a cash in transit van on the day plays, as hearsay, a decisive role in convicting the appellant of conspiracy to commit robbery. The Supreme Court of Appeal or Appellate Division as it then was known in ***S v Ramavhale 1996(1) SACR 639 (A) at 649 C-D*** cautioned against the admission of hearsay evidence in criminal proceedings where such evidence plays a decisive role in convicting an accused person. Not even subsequent events such as the discovery of assault rifles and large quantities of ammunition as part of what was possessed in the motor vehicle prove conclusively that the plan was to rob a cash in transit van at Boxer store in Mokopane on that day let alone, for purposes of this appeal, that the

appellant was party to that plan. Certainly, mere presence in that motor vehicle, is not in itself, that is, absent any other evidence proof of the appellant's involvement in the "conspiracy".

[17] From all the above considerations, I am persuaded that the conviction of the appellant for the offence of conspiracy to commit robbery is indefensible and must be interfered with.

[18] The trial court found there to be no evidence to sustain the charges of unlawful possession of firearms and ammunition against the appellant. It still however found the appellant guilty of attempted murder as regards shooting at the police ostensibly with a firearm or firearms.

[19] It is these contradictory findings which are lamented supra as oscillating between thesis and anti-thesis for it is incongruent how one who is found not to have been in possession of a firearm could in the same vein be found to have used that firearm to commit an offence. Not even the common purpose doctrine allegedly relied upon by the trial court can assist anyone in breathing harmony to these two mutually destructive findings by the trial court because whether the accused persons acted in concert or not cannot explain how the appellant would have used a firearm while being in neither physical nor constructive possession thereof.

[20] For the above reason alone the conviction of the appellant for the three attempted murder charges is, in my view, a wrong decision susceptible to interference with on appeal.

[21] Regarding the murder convictions and all the other offences for which the appellant was convicted a key thread appears to be the trial court's application of the common purpose doctrine deductible from, inter alia, the following quotes from the judgement:

21.1 *"It is improbable that, accused 2 and for that matter, accused 1 and 3, would have been taken along by the two deceased if they were not party to a commission of a particular crime. I indicated earlier the suspects had the means to carry out the planned robbery, and in addition a bag to carry the cash with, which hardly had any contents. At the scene of the shootout, all of them as indicated above, jumped from a moving vehicle, which can only point to guilt..."*

21.2 *"In addition, when the police were shot at by means of a rifle from the Ford Ranger by one of the conspirators, it was in furtherance of the purported agreement and the fact that some of the conspirators jumped out of the Ford Ranger whilst armed to confront the police, of which the accused was aware and did not disassociate themselves therefrom...In this instance, all these factors taken cumulatively regarding this matter, I hold that, on the cardinal*

rules of logic that are referred to in Blom above, the state has shown beyond reasonable doubt that there was a concluded agreement between them, an actual concurrence of minds inferable from their conduct."

[22] It may be appropriate to once more refer verbatim to the now trite principles attendant to the common purpose doctrine as stated by Botha JA in ***S v Mgedezi and Others 1989(1) SA 687(A) at 705 I-706 B("Mgedezi")*** which were stated as follows:

"In the absence of proof of a prior agreement, accused no 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in S v Sefatsa and Others 1988(1) SA 868(A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing his sharing of a common purpose with the perpetrators of the assault by himself performing an act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea in respect of the killing of the deceased, he must have intended them to be killed or foreseen the possibility of being killed...In order to secure a conviction against accused on all the counts on which he was charged, the state had to

prove all of these prerequisites beyond reasonable doubt. It failed so to prove a single one of them. It follows that the appeal of accused No 6 must succeed in respect of all 5 counts."

[23] From the trial court's reasoning it appears that it read prior consent inclusive of the appellant from his mere presence in the Ford Ranger. That was incorrect because prior consent needed to be proven and not merely inferred as the law used to be in **S v Sefatsa and Others 1988(1) SA 868(A)** prior to **Mgedezi**.

[24] Furthermore the trial court appears to have interpreted the appellant's getting out of the motor vehicle during the shootout as an act of association with the offences for which he was convicted, particularly the attempted murder and murder charges. That is incredulous regard being had to the fact that the Ford Ranger was facing heavy gunfire from the police and somehow the court's reasoning suggests that it was available to the appellant to either stay put in the motor vehicle or perhaps run towards the firing police.

[25] With the state witnesses having contradicted each other sharply on whether the appellant was in physical possession of a firearm or not and the court having found that the appellant was not proven to have possessed a firearm, it is self-evident that the evidence does not prove any act of active association with the shootout with police as regards the appellant. That said, apart from mere presence at the scene of the

shootout and awareness thereof, the other three **Mgedezi** prerequisites of the employ of the common purpose doctrine have not been proven against the appellant. It follows thus that the common purpose doctrine, as it relates to the appellant, was misapplied by the trial court.

[26] In its judgement the trial court stated, inter alia, the following:

26.1 *"Regarding Exhibit J1, the confession made by accused number 3, he(the appellant) could not explain why reference was made to him and the role he allegedly played."*

26.2 *"The criminal enterprise that was the subject of conspiracy contemplated the commission of the offence of robbery because of accused 3's statement and the information received by the police."*

[27] It is trite that a confession of an accused person is not admissible against co-accused. Nothing further than merely referencing section 219 of the Criminal Procedure Act 51 of 1977 as amended is needed on this score. It unequivocally states as follows:

"No confession made by any person shall be admissible as evidence against another person."

[28] The above quotes from the trial court's reasoning clearly shows that that court admitted the confession of the third accused against the appellant who was the second accused. That was a grave misdirection which also militates for this court of appeal to intervene.

CONCLUSION

[29] It is so that in criminal proceedings the state remains with the duty to prove the guilt of an accused person beyond reasonable doubt and further true that while an accused has no duty to prove his innocence he may at times, on a preponderance of probabilities, just posit a reasonably possibly true version to escape criminal liability. His version may even appear untrue but its weaknesses, no matter how manifest, do not lighten the state's burden to prove an accused person's guilt beyond reasonable doubt whatsoever.

[30] If the burden of proof in criminal proceedings was on a balance of probabilities then the improbabilities highlighted by the state against the appellant's hitchhiker version in their cross-examination of the appellant such as the curiosity of occupying a front passenger seat when hitching a lift in a motor vehicle already occupied by other passengers and the unlikelihood of not seeing assault rifles in a motor vehicle would have helped in convicting the appellant. But the burden of proof is not on a balance of probabilities. Probabilities in a criminal trial only help to bolster an already

available case against an accused person premised on evidence other than the probabilities. They cannot on their own, given the standard of proof being beyond reasonable doubt, sustain a conviction.

[31] It may well be that the evidence led before the trial court as summarized above raises a suspicion against the appellant and maybe a strong suspicion. It may also be that as a trier of fact I may have a strong belief or intuition that the appellant was not an innocent hitchhiker on the fateful day. But what anyone, including a court, believes, suspects or intuitively "knows" is immaterial in the determination of guilt or innocence in the criminal court. What matters and needs following is the evidence. Indeed, based on evidence at a trier of facts' disposal, the old criminal law mantra of it being better or preferable to acquit a "guilty" person than convicting an "innocent" person continues to hold true and enforceable.

[32] Regard being had to all the foregoing I am persuaded that the trial court's decisions on the questions of fact and law identified supra were decisions which were wrong and led to a failure of justice as per section 322 of the Criminal Procedure Act 51 of 1977 such that the appeal must be allowed.

ORDER

[33] In the result, the following order is made:

33.1 The appellant's appeal against conviction on all counts for which the appellant was convicted succeeds.

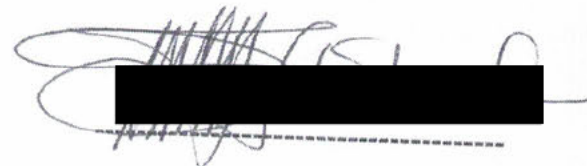
33.1 The court a quo's guilty verdicts as regards the appellant are replaced with the following order:

"The appellant is found not guilty in respect of counts 2, 3, 4, 5, 6 and 7. He is accordingly discharged."




MALOSE S MONENE

ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE




T C TSHIDADA
JUDGE OF THE HIGH COURT
LIMPOPO DIVISION, POLOKWANE



MOGALE-MAKINTA
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION, POLOKWANE

APPEARANCES

Heard on

: 31 May 2024

Judgment delivered on

: 19 September 2024

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