

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No: CA&R17/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

and

TSHEPO JEFFREY NKEANE

ACCUSED 1

ANDILE MESHACK MERAHE

ACCUSED 2

VELO LOLATA

ACCUSED 3

Heard on: In chambers

Made available on: 01/08/2024

Summary: This is a special review in terms of s 304(4) of the Criminal Procedure Act, 51 of 1977 (CPA). The trial Court stopped proceedings and the accused were committed for sentence by a regional court in terms of s 116(1)(a) of the CPA. The regional magistrate had doubts with the conviction of accused 3 on count 1 and accused 1 on count 2.

ORDER

(a)The conviction of accused 3 on count 1, of robbery with aggravating circumstances, is overturned.

(b)The conviction of accused 1 on count 2, of assault with intent to do grievous bodily harm on S[...] O[...], is confirmed.

(c)The matter is referred to the regional court to sentence the accused as follows: accused 1 and 2 on all three counts and accused 3 on counts 2 and 3.

Coram: Mamosebo J et Lever J

JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J

[1] The three accused appeared before the district magistrate Makume in Jan Kempdorp on three counts: robbery with aggravating circumstances, and two counts of assault with intent to do grievous bodily harm. The trial court, having found that they acted in the execution of a common purpose, convicted all three accused as charged on 20 September 2023.

[2] The trial court stopped the proceedings and the accused were committed for sentence by a regional court in terms of s 116(1)(a) of the CPA which stipulates:

‘Committal of accused for sentence by regional court after trial in magistrate's court

(1) If a magistrate's court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

(a) that the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of a magistrate's court.'

[3] Having queried the trial court in respect of the conviction of accused 3 and dissatisfied with the status of the conviction, the regional magistrate referred the matter on special review on 14 March 2024 in terms of s 304(4) of the CPA for a further directive. The trial court explained that reference was made to accused 3 as Shusha when his correct name or nickname is Makaveli or Vele or Velelo. The reference was meant for accused 3 and the court alluded to an honest and innocent mistake for having confused the two names.

[4] The regional magistrate was supposed to record the reasons for his or her opinion when transmitting the record to the registrar as contemplated in s 116(3)(a) of the CPA but did not so. The regional magistrate has doubt in the conviction of accused 3 in count 1 of robbery with aggravating circumstances and of accused 2 in the assault of S[...] O[...] with intent to do grievous bodily harm. We enjoined the regional magistrate do so. We further sought an opinion from the office of the Director: Public Prosecutions, Northern Cape. We are grateful for the insightful opinion by Adv JJ Cloete.

[5] The trial court relied on the doctrine of common purpose as stated hereinbefore. Buys J, concurred in by Kriek JP and Van der Walt J in *S v Nooroodien en Andere* 1998 (2) SACR 510 (NC) at 517f-g (headnote 513d-f, the requirements for active participation are the following:

(a) the participant must have been present at the scene where the violence was committed;

(b) he must have been aware of the assault upon the victim;

- (c) he must have intended to make common cause with those who were actually perpetrating the assault;
- (d) he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others; and
- (e) he must have had the necessary *mens rea* in respect of the offence.

See also *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I – 706B

- [6] To address the concerns by the regional magistrate, I will briefly refer to the relevant of the evidence by the State. First, I deal with the conviction of accused 3 on robbery with aggravating circumstances. The complainant in this count is Mr Piet Jasson. His testimony was that he and his friends were approached by a group of people at night. Of this group, 3 persons approached him, separating him from his friends. Accused 3 was not part of these three. Those who remained in the larger group were armed with pangas but Jasson did not observe if accused 3 was also armed. Jasson could only identify accused 3 by his eyes because he was wearing a mask. After he was robbed of his cellphone the larger group followed the group of three. When cross-examined, Jasson testified that accused 3 was not carrying a panga. He also said that when he was robbed Fresh, Ngonyoko, Susha, Fanie, Vele were there but accused 3 stood aloft. Whereas Clifford Mogakwe was called to corroborate the evidence of Jasson, he could not take the State's case any further in implicating accused 3.
- [7] The concern by the regional magistrate in accepting the non-involvement of accused 3 cannot be faulted. The State has not succeeded in proving his guilt on robbery with aggravating circumstances beyond reasonable doubt. His liability cannot be found by his mere presence at the scene. Reverting to the doctrine of common purpose he has not satisfied the requirements as enunciated in *Nooroodien en Andere* and *Mgedezi*. There is no evidence implicating accused 3 in the commission of the robbery.

[8] Secondly, I look at the conviction of accused 1 on count 2 of assault on S[...] O[...] with intent to cause him grievous bodily harm. His testimony is simply this. He was at his home when someone knocked on his door. It was accused 1 accompanied by accused 2 and 3. Accused 1 enquired from him the whereabouts of his daughter. All the three accused were armed with knives. The accused conversed in a language that he did not understand. After this conversation, accused 3 stabbed him. When O[...] attempted to flee accused 1 stabbed him on the head. O[...]’s girlfriend tried to intervene but was stabbed by accused 1. After the stabbing O[...] and his girlfriend were chased by the group including accused 1 but they managed to flee to the police station. Later that same day, after they had reported the incidents and received medical treatment, O[...] was further threatened by accused 1.

[9] There can be no doubt that the actions of accused 1, in concert with accused 2 and 3, satisfies the requirements of common purpose in the assault of O[...] as acts of association, assessed against this background:

(a) he was armed with a knife;

(b) the search for his daughter led him to play a leading role in confronting O[...];

(c) he stabbed O[...];

(d) he stabbed O[...]’s girlfriend when she tried to intervene; and

(e) he chased and threatened O[...] after the assault.

[10] To summarise: The State has not made out a case against accused 3 in respect of count 1 (robbery with aggravating circumstances) and his conviction stands to be overturned. Accused 1 and 2 should be sentenced on all three counts. In as far as accused 3 is concerned, he should be

sentenced on counts 2 and 3, that is, on both counts of assault with intent to do grievous bodily harm.

[11] On a conspectus of all the evidence, the submissions of the trial court, regional magistrate and the opinion of the Director Public Prosecutions and all the authorities considered the following order is made:

- (a) The conviction of accused 3 in count 1, of robbery with aggravating circumstances, is overturned.
- (b) The conviction of accused 1 on count 2, of assault with intent to do grievous bodily harm on S[...] O[...], is confirmed.
- (c) The matter is referred to the regional court to sentence the accused as follows: accused 1 and 2 on all three counts and accused 3 on counts 2 and 3.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I concur

L LEVER
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY