

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NUMBER: AR13/2024

In the matter between

NHLANHLA HENDRY TSHABALALA

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

P C BEZUIDENHOUT J:

[1] Appellant was convicted in the Regional Court, Newcastle on 3 counts of attempted murder which were taken together for purposes of sentence and sentenced to 10 (ten) years imprisonment. He now appeals against the convictions and sentence with leave of the court *a quo*. There was firstly an application for condonation of the late filing of Appellants heads of argument which was not opposed and condonation was granted.

[2] The complainant in count 1 was Mr. Zondi, in count 2 Ms Myeni and in count 3 Mr. Buthelezi.

[3] The J88 in respect of Hercules Bonginkosi Zondi in respect of count 1 was admitted as exhibit "A". The J88 of Dumisani Buthelezi in respect of count 3 was

admitted as exhibit "B". A photograph album was admitted as exhibit "C" and a ballistic report by warrant officer Thula Mcane was admitted as exhibit "D". Appellant at the commencement of the hearing elected not to disclose any defence.

[4] Mr. Zondi testified that on the day in question he was in his vehicle together with his wife, Ms. Myeni, and Mr. Buthelezi. It was in the afternoon at about 18h30 and was getting dark. He was the driver of the vehicle. While travelling to Arbor Park in Newcastle, he came across a Golf motor vehicle that was stationery of which the front doors were open. He stopped and saw Appellant standing talking to a female on the right hand side. As his vehicles window was not functional he opened his door to speak as he could not drive past and asked to pass. Appellant told him that he must drive into his motor vehicle so that he can pass. There was then a discussion between him and Appellant and another man came and assisted them in driving past this vehicle.

[5] He then continued driving for some distance. As he was driving he saw lights of a motor vehicle approaching from behind which was speeding and when it came close he recognised it as the vehicle which they had passed which had been stationery. When this vehicle came parallel to his vehicle he heard the sound of a firearm being discharged and this vehicle was at that stage not travelling at high speed. After the shots were fired the Golf motor vehicle drove on and stopped ahead of them. He and Mr Buthelezi were injured. They then decided to turn around and return in the other direction. When they arrived at his home they took another vehicle and both he and Mr. Buthelezi were taken to hospital as they had each sustained a gunshot wound to their left legs. Ms Myeni was not injured.

[6] He was shocked and scared at the time when the shots were fired and could not say who was firing the shots. After he was treated at the hospital he proceeded to the police station to open a case. He pointed out certain places to the police and photographs were taken. The bullet holes on his vehicle are visible in the photographs.

[7] Some days later he was informed by his wife that there were people outside the house. They then entered and he called various people to come there so that they could hear what was being said. He also phoned Dumisani Buthelezi to come and hear. Amongst those people he recognised the one who was present on the day and had told them to drive around the vehicle. He identified himself as Bongani Khumalo. He also phoned warrant officer Meyer from the South African Police Services to attend. Bongani stated that he came to apologise on behalf of Appellant. He stated that it was his brother Appellant who fired the shots while he was seated in the passenger seat.

[8] Ms Myeza also came to his home and indicated that Appellant was her boyfriend and apologised that they were shot.

[9] Ms Myeni confirmed that she was in the vehicle with Mr. Zondi and Mr. Buthelezi when they came across a stationery vehicle and that an altercation developed about the car parked in the road, and that they later passed this vehicle. She confirmed that a motor vehicle with lights on bright came from behind at high speed but slowed down when it was behind them and then drove parallel to their vehicle. Bullets were then fired and she stated that they came from the direction of this other vehicle. The left front window of this other vehicle was open. She estimated 4 or 5 gunshots were fired. The vehicle stopped ahead of them and they then turned around and proceeded back home. Her husband and Mr. Buthelezi were then taken to the hospital. She was not injured. She confirmed that the lady Mthane Myeza also referred to as Zanele Skhakhane, who was with Appellant on the day, came to their home to apologise.

[10] Mr. Dumisani Buthelezi confirmed that he was in the vehicle at the time in question and he was seated behind the driver. He confirmed the incident of the Golf motor vehicle that was parked with its front doors open and that they thereafter passed this vehicle after another person intervened and continued driving. They were driving slowly as it was a dirt road. Whilst still driving he heard a noise and then felt that he had been shot. At this stage the Golf was driving past them. They then returned to the home of Mr. Zondi and thereafter he and Mr. Zondi proceeded to different hospitals for

assistance. Some time later Mr. Zondi phoned him to come to his home where one Bongani and others were. Bongani stated that he came to apologise. He testified that this Golf was driving fast then applied brakes when next to their vehicle and then sped off.

[11] One Zanele Sikhakhane testified that she is also known as Mathane Myeza and that she was the lady who was talking to Appellant at the time that the vehicle was parked with its front doors open. She stated that an argument broke out between Appellant and Mr. Zondi and that Appellant's brother apologised and allowed the vehicle to pass. She after about 20 minutes departed and went home.

[12] One Cornelius Johannes Daniel Meyer, a warrant officer in the South African Police Services, testified he was present when the brother of Appellant came to the home of Mr. Zondi to apologise for what had transpired and that he had made notes in his pocket book. For reasons which will become clear later I will not deal with his evidence in this regard any further.

[13] From the J88's it is apparent that Mr. Zondi sustained an injury to his left knee and Mr. Buthelezi to the left lower leg. From the photographs it is also apparent that bullet holes are visible on the right hand side of Mr. Zondi's vehicle.

[14] Appellant testified and confirmed that he had parked next to the road and the other vehicle passed his vehicle. The driver of the other vehicle then said to him why do you youngsters park your vehicles in a manner that you have parked your vehicle. He then later drove off and while driving with the intention of passing the vehicle of Mr. Zondi he heard a shot being fired. He then got frightened. The shot was coming from the white Avanza. He accelerated and saw that Bongani was looking for something underneath his seat. Just before he could pass the white Avanza he heard another shot that came from his motor vehicle and that it was Bongani who fired those shots. He asked him why he was firing and he said that it was warning shots. He stated that it was about 4 or 5 shots that were fired by Bongani.

[15] He drove off, went to Blaauwbosch to drop off Bongani and then continued with his journey to Balfour where he stayed. It was only later when he received a phone call from his girlfriend that he heard that two people had been injured. He did not have his firearm with him on the day as he left it in his safe. He was contacted by a detective Meyer at a later stage. He was then informed that a case of attempted murder had been opened against him. He was unaware of the meeting which Bongani had with the complainants. He denied that he drove slower and parallel to Mr. Zondi's vehicle. When he approached from behind the driver's door of this vehicle was slightly open. He was driving slowly and increased speed when he heard the gunshot coming from the Toyota. He was close to the Toyota at that stage. He was able to see the door of the driver being slightly open but was not parallel to the Toyota.

[16] Bongani said that he would go and look for the people and apologise to them. However after he dropped Bongani off he drove to Balfour as they had agreed that since it is late he will go to Balfour. He stated that he did not go and report the incident as Bongani was supposed to go and do so because he was the one who had fired the shots. He told Bongani to report the matter to the police. There was no damage to his vehicle. That was the case for the defence

[17] The learned magistrate in his judgment summarised the evidence that was presented. He found that the state witnesses were credible and that there was not much that was in dispute. He found that the evidence indicated that not one of the complainants saw who fired the shots but however it became apparent from the evidence that the vehicle of Appellant had slowed down when the shots were fired and was next to the complainants' vehicle when these shots were fired. Also that it was common cause that there had been an earlier confrontation between the parties and that a number of shots were fired. Appellant continued on to Balfour where he stayed and did not go and report the matter to the police. He only heard of the injuries to the people when he was phoned by the police.

[18] The learned magistrate found that the version of Appellant was improbable and that the evidence that the first complainant drove with his door slightly open was to accommodate the evidence that his window was broken and to try and justify how shots could have been fired from the said vehicle. Bongani fired warning shots but despite the fact that they were shot at Appellant did not go and report this matter to the police or open a case of attempted murder. He told Bongani to go and open a case which he stated was because Bongani fired the shots. Further the evidence that the victim of the shooting going to apologise to his assailants was highly improbable.

[19] He found that there was no direct evidence as to who the person was who fired the shots. He found that the evidence of Bongani that went to the home and made an apology on behalf of his brother as well as that of warrant officer Meyer was inadmissible hearsay evidence. As I set out earlier it is therefore not necessary to deal with the evidence as the learned magistrate was correct in this regard and this was also not challenged. The question which had to be answered was whether it was Bongani or Appellant who fired the shots from their vehicle. If it was Bongani then Appellant knew that the shots were going to be fired and that is why he came next to the vehicle of the complainants and also why he slowed down. The learned magistrate referred to the decisions of *Safatsa and Others* 1988 (1) SA 868 A and *S v Mgedezi* 1981 (1) SA 687 A and *Criminal Law* by Snyman at page 250 and found Appellant knew that the shots were going to be fired at the vehicle of the complainants and that he provided the opportunity to do so. He must therefore have foreseen the possibility that a person could die from such actions.

[20] During the application for leave to appeal the learned magistrate held that an important aspect in the matter was whether it can be inferred and accepted from the conduct of appellant that he was an accomplice in the commission of the offence. He stated that it was for that reason with regard to conviction that he will grant him leave to appeal. He held that he could not find that another court would come to a different conclusion on the credibility of the witnesses.

[21] It is common cause that there was an altercation between the Mr. Zondi and Appellant when they approached Appellant's vehicle where it was parked with open doors. Thereafter it is also common cause that Appellant drove past the complainant's vehicle and that shots were fired. Ms Myeni and Mr. Buthelezi testified that they heard at least 4 or 5 shots. This was confirmed by Appellant who also testified he heard 4 or 5 shots being fired. This also appears from the bullet holes to the vehicles. Nobody could identify who fired the shots but the complainants were adamant that the shots that were fired came from the vehicle of Appellant, which Appellant later admitted by stating that it was Bongani who fired the shots. The bullet holes are all on the right hand side of Mr. Zondi's vehicle. It is therefore not in dispute that the shots were fired from Appellant's vehicle at the vehicle of Mr. Zondi.

[22] Appellant's contention that a shot was fired at them from the complainant's vehicle was correctly rejected by the learned magistrate. There was nothing in the evidence that supports this contention. The question therefore is if it is not possible to identify who exactly fired the shots whether there was a common purpose to act and fire the said shots. Having correctly rejected the version of Appellant it must be considered whether there was a common purpose or whether it was that of an accomplice. It was submitted by Mr. Roets that any inference to be drawn from the evidence must be the only inference that can be drawn in the circumstances. He based the most of his argument on the finding by the learned magistrate that Appellant was complicit and therefore an accomplice. The learned magistrate however also found that the prerequisites of common purpose was probably present.

[23] In *S v Safatsa and Other* 1988 (1) SA 868 (A) at 898 B it was held:

"It is well established that a common purpose need not be derived from an interceded agreement, but can arise on the spur of the moment and can be inferred from the facts surrounding the active association with the furtherance of the common design."

It continued at 899 E:

“Association in a common illegal purpose constitutes the participation of the actus reus. It is not necessary to show that each party did a specific act towards the attainment of the joint object. Association in the common design makes the act of the principal offender the act of all.”

And at 899 F:

“Moreover, it is not necessary to show that there was a causal link between the conduct of each party to the common purpose and the unlawful consequence”

[24] In *S v Mgedezi and Others* 1989 (1) SA 687 AD it was held that there are certain prerequisites that need to be satisfied for common purpose. Firstly he/she must have been present at the scene where the crime was committed, secondly he/she must have been aware of the assault of the victims, thirdly he/she must have intended to make common cause with those who are actually perpetrating the assault, fourthly he/she must have manifested his/her sharing of common purpose with the perpetrators of the assault by himself/herself performing some act or association of the conduct of the others and fifthly the requisite mens reus. He/she must have intended them to be killed or must have foreseen the possibility of their being killed and performed his/her own act of association recklessness as to whether or not death was to ensue.

[25] In the present matter considering the facts of the case it is clear that Appellant was present, he was aware of what was happening because he stated that Bongani was firing the shots. He did not try to stop him or reprimand him. Thirdly he made common cause with Bongani because the evidence was clear that he drove next to the vehicle and slowed down next to the vehicle of the complainants when the shots were fired which indicates that he intended to make common cause with it and also must have then foreseen that those five shots being fired at the vehicle that there was indeed the possibility of someone being killed and therefore he acted recklessly as to the consequences thereof.

[26] The learned magistrate in his judgment stated that the requirements for common purpose would probably be present but because he referred to a quotation from

Snyman held that the requirements for complicity are present as the accused knew the shots were going to be fired at the vehicle and he presented the opportunity to do so. These factors that he has mentioned are all factors which are to be applied in common purpose.

[27] Having considered the evidence of Appellant, especially that after all these shots had been fired, being a traffic officer, he did not report the matter, made no attempt to report the matter but merely went to Balfour is all in my view indicative of the fact that he associated himself fully with the conduct of Bongani if he was the one that fired. It is accordingly immaterial whether it was him or Bongani who fired as their conduct both contributed and accordingly in terms of the doctrine of common purpose he is just as guilty as whoever fired the shots if it was not him. Appellant accordingly had a common purpose with Bongani as it is not necessary to show that each party did a specific act. Appellant is therefore guilty on all three counts.

[28] The appeal against the conviction must accordingly fail.

[29] Appellant was employed as a traffic officer. He was a licenced examiner who also owned taxis, married with four children and was a first offender. The learned magistrate took into account the seriousness of the offence that two of the people were in actual fact struck by the bullets, that there were four to five bullets that were fired and that it was fortunate that nobody was killed. The learned magistrate found that the shooting was unnecessary, that the epidemic of violence was something which cannot be tolerated. He also found that society's legitimate demand that members of the public be entitled to drive on the roads without the risk of being murdered by other erring drivers must be considered. The correctional officer found that he was a suitable candidate for correctional supervision but the learned magistrate found that it was not a suitable sentence in the circumstances and found that imprisonment was necessary. He referred to *S v Eadie* 2002 (3) SA 719 (SCA) and termed it "road rage". He took the 3 counts of attempted murder as one and sentenced Appellant to ten (10) years imprisonment.

[30] It was submitted that the learned magistrate overemphasized the incident at the expense of Appellant's personal circumstances and erred by classing it as "road rage". He also did not set out why he found correctional supervision was not suitable. The learned magistrate had set out the seriousness of the offence and the safety on the roads and thus provided reasons why correctional supervision would not be suitable.

[31] On 5 August 2022 the amendment to Act 105 of 1997 came into effect which amended the Act that attempted murder other than those referred to in Part I but under Part II of Schedule 2 of the Act prescribed a minimum sentence of fifteen (15) years imprisonment. This case was heard on 13 September 2022 and no mention was made of the minimum sentence.

[32] Considering all the facts the learned magistrate in my view did not err in his reasoning nor was there any misdirection by him. The sentence also does not induce a sense of shock. It is unfortunately necessary that it must be brought to mind to citizens of this county that one cannot, merely because of an altercation or a disagreement, especially on the roads, go to the extent of shooting at other people. The roads should be safe for everyone to travel on and it is actually more worrying that Appellant as a traffic official associated himself with such conduct and by losing his temper as well and not reporting the matter to the police. The appeal against sentence must accordingly also fail.

The following order is made:

The appeal against the convictions and sentence is dismissed.

P C BEZUIDENHOUT J.

I agree.

SIBIYA J.

JUDGMENT HANDED DOWN: 20 JUNE 2025

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