

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

Appeal case number: A20/2020

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.
DATE: 09 FEBRUARY 2023

In the matter between:

THEMBA MOTAU Appellant

And

THE STATE Respondent

Mabesele J and Mdalana-Mayisela J

JUDGMENT

MABESELE, J:

[1] The appellant appealed against conviction on a charge of attempted murder. The *court a quo* found that the appellant and his co-accused fired shots at the police officers in an attempt to escape arrest. This appeal was heard on 28 November 2022. After both counsel had presented argument which was carefully considered by the court and the court having read the appeal record and applied its mind on the matter, the appeal was upheld and conviction and sentence were set aside. The reasons were to follow later so that the release of the appellant from prison should not be delayed, in case the appellant was still in prison because he was not in court when the appeal was heard and it was not known whether he did manage to raise the funds for payment of bail which was fixed at R10 000.

[2] The reasons are now provided here-below.

2.1 On 1 November 2017 the police officer Magagula and his co-employee, Mofokeng, were patrolling on the road and following information with regard to a suspect named, Bruno, who escaped from the police custody. They were travelling in an official vehicle, driven by Mofokeng. It was around 20:00 and was dusty. According to the information that was given to them, the suspect was driving a Hyundai Getz. While they were driving around Senawana, Magagula noticed a Hyundai that was parked near the shops. Next to it was Terios SUV. As they drove pass these vehicles Magagula saw Bruno inside Terios. He then asked Mofokeng to make a U- turn. As they drove towards these vehicles, the drivers drove off in a high speed. They followed behind and Magagula suddenly heard the gunshots. He, too, fired the three warning shots. Since it was dark, he only saw a spark coming from the Terios and a bullet ricochet off the ground from the direction of the Getz. That incident caused Mofokeng to lose control of the vehicle and hit the rock. They then called for a backup and other police officers joined them in chasing the two vehicles.

[3] Mofokeng confirmed that he was the driver of the police vehicle on the day of the incident. He lost control of the vehicle and hit the stone. He testified that it was dusty that day. When he was asked to explain what made him to lose control of the vehicle he responded as follows: 'It was dusty firstly, secondly it was they were shooting and but mostly importantly the Terios tried to bump us off the road'

[4] The witness testified during cross-examination that shots were fired at their direction but did not explain how did he managed to observe that incident when it was dusty and dark and was driving. He testified further that he only saw sparks coming from the direction of the vehicles that they were chasing but did not see any bullet.

[5] Van der Nest is an employee of the SAPS. He testified that he was on duty on 1 November 2017 when he received a complaint through the radio to assist the police who were chasing the suspects in Senawana. He was in the company of his co-employee, called Kgatla. He was given a description of the vehicle that the police were chasing. The vehicle was described as Hyundai Getz and blue in colour. After he had received the complaint, he and Kgatla drove to Senawane. As they approached Senawana Primary School, he saw the Getz driving around the corner of the school. He stopped the vehicle and found three occupants inside, including the appellant. He then instructed them to alight from the vehicle. They were searched by Kgatla and nothing was found in their possession. He searched the vehicle and found 7.64 Norinco firearm at the back seat, behind the driver seat. The firearm had one magazine and three live rounds. The serial number was [...] . He asked the occupants whether they have licence to possess a firearm and none of them responded. They were then arrested by Kgatla for the possession of unlicensed firearm. The firearm was put in a forensic bag and recorded in the SAP13 at the Moroka police station.

[6] Kgatla confirmed the evidence of Van der Nest that after they had received a complaint, they drove to Senawana to assist their fellow police officers in search for the vehicle whose occupants were firing shots at them. A description of the said vehicle was given to them. Upon arrival at Senawana they spotted the same vehicle and immediately switched on the siren and blue lights for the vehicle to stop. After the vehicle came to a halt, they found three occupants inside, including the appellant. He searched the vehicle and found 7.64 Norinco firearm underneath the driver's seat. The firearm had a magazine and three ammunition. He arrested them for possession of unlicensed firearm.

[7] The appellant testified. He is employed as an administration clerk at the maintenance court, in Johannesburg. He testified that on 4 November 2017 he knocked off from work at around 16:00 and went to a tuckshop at his township to buy food. As he came out of the shop, a Hyundai Getz stopped in front of him. He looked inside to see the driver. The driver, who was known to him as Shimmy, requested him to accompany him to Senawane, Soweto, to pick up the owner of the vehicle. They then drove to Senawana and the owner was picked up. While they were driving along Mabalani Street, a BMW vehicle overtook them and stopped in front of them. Thereafter three police officers alighted from the vehicle. One of them fired a shot and instructed them to alight from the vehicle and lie on the ground. After they had done so, he was picked up from the ground and asked to point out Bruno. He told them that he did not know Bruno. They were then arrested. He testified that he never fired any shots and knew nothing about a firearm that was allegedly found in the Getz.

[8] The onus rests on the state to prove the guilt of the accused beyond reasonable doubt in order to secure conviction.

[9] The evidence of the police officers is that it was dusty and dark on the day of the incident which occurred around 20:00. Magagula and Mofokeng saw a spark coming from the vehicle in which the appellant was a passenger. According to Magagula, the spark was followed by a bullet that ricochet off the ground. He could not explain how far was their vehicle away from the spot where the bullet ricochet off the ground before their vehicle collided with the rock. He could not explain the direction in which the bullet travelled after it had ricochet off the ground, in relation to where their vehicle was travelling. The evidence of Mofokeng was of no assistance in this regard. In fact, Mofokeng did not know exactly what made him lose control of the vehicle. Failure by these police officers to explain these concerns had an adverse impact on the state case. Therefore, it stands to reason that the state has failed to prove a charge of attempted murder against the appellant. Counsel for the state correctly conceded this point. Another difficulty that the state would come across had the charge of attempted murder proved, was to prove who, amongst the occupants of the vehicle that they were chasing, fired a shot, regard being had that

the state did not allege that the appellant and his co-accused were facing a charge of attempted murder in furtherance of a common purpose.

[10] The fact that the appellant and the occupants of Hyundai tested positive for gunshot residue would not advance the state case against the appellant. The reason is that the expert witness who testified on behalf of the state conceded that if shots are fired in a close proximity to a person it is possible that the same gun residue may be deposited on the skin of the person who had not fired the original firearm and that there could be traces of gun residue on that person, and further that if someone fires a gun and touches the next person, that person can also be affected by gun residue. This implies that the state would still have to prove who fired the shots. For these reasons, the appeal against conviction was upheld and the conviction and sentence were set aside.

M.M MABESELE

(Judge of the High Court Gauteng Local Division)

I concur

M.M.P MDALANA-MAYISELA

(Judge of the High Court Gauteng Local Division)

Appearances

On behalf of Appellant:

Adv K.G Gumede

Instructed by:

Makete Attorneys

On behalf of the Respondent:

Adv De Klerk

Instructed by:

Director of Public Prosecutions