

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO: CA302/2014

IN THE MATTER BETWEEN:-

CLAYTON FRANCIS : APPELLANT

AND

THE STATE : RESPONDENT

JUDGMENT

MASETI A. J

[1] The appellant was arraigned in the Eastern Cape Local Division, Port Elizabeth together with accused No. 1 on the following charges which emanate from two separate incidents:

- Count 1 : Murder
- Count 2 : Attempted murder
- Count 3 : Murder

- Count 4 : Attempted murder
- Count 5 : Unlawful possession of a firearm in contravention of the provisions of Section 3 of the Firearms Control Act of 2000

- Count 6 : Unlawful possession of Ammunition in contravention of the provisions of Section 90 of the Firearms Control Act 6 of 2000

[2] The Appellant was accused No. 2 and he pleaded not guilty to all the charges but was convicted on counts 1,3,4,5 and 6 and was then sentenced to serve an effective sentence of (20) twenty years imprisonment as his sentences were ordered to run concurrently. (See page 410 of the court record).

[3] Leave to appeal was granted to appeal to the Full Court of this division against conviction only.

[4] The first incident occurred on 2 January 2010 at Oliphant Street, Helenvale, Port Elizabeth and the second incident occurred near the corners of Baatjies Street and Kobus Road on 23 January 2010.

[5] I find it necessary to set out a synopsis of what happened on 2 January 2010 and 23 January 2010. Mr Hensley Smith testified that on 2 January 2010 at Oliphant Street, whilst conversing with the deceased, Patrick Cornelius, and other men who were consuming alcohol, observed three unknown men walking up Oliphant Street. When he saw these men coming he warned the deceased to get up because there were men that were coming.

The deceased then got up but told Smith that he does not worry about those men who were coming. The deceased then walked away after which a gunshot was fired which came from the direction where the three men were coming. When the deceased attempted to go into the yard he was shot in his back. Smith jumped over the wall and ran into the next yard. The deceased was shot by accused No. 1 who was in company of the appellant and the other man named Dala.

Two further shots were fired but Smith could no longer say who fired these shots because he was already in the yard. After the shooting the deceased was seen lying on the ground and was ultimately taken to Livingstone Hospital where he was certified dead.

There were electric lights and spray lights in the area where the deceased was shot and therefore visibility was good. Smith knew the appellant prior to the date of the incident as he was a friend to appellant's brother, Berto. Smith identified the appellant at a formal identification parade.

[6] Hensley Smith's evidence also covered the events of 23 January 2010 that at about 20H00 he was standing at the back of the bus shelters at the corner of Kobus and Baatjies Streets in Helenvale with two women namely Rene and Candice as well as another young man. As he was conversing with Rene he observed that Rene was no longer concentrating on their conversation as if something was distracting her. He looked around and saw two men coming. It transpired that they painted their faces with calamine. They came from the direction of Pienaar Street. He had also observed young children in the vicinity of the bus shelters. He had intentions of informing the children to leave the area as he could see there was going to be trouble.

When he started to walk away a gunshot went off. He made attempts to run away across Kobus Street. He then saw one of the children emerging from behind the grille. Immediately thereafter the boy was struck off with a bullet who was later identified as Hubert Mejane, a 12 year old child. The shot was fired by one of the two men who were seen coming and he could not identify who it was. One of the shots hit Mr Smith in the middle of his right leg above the knee. The boy who was struck by a bullet fell down and was later certified dead. There were electric lights as well as spray lights in the area and therefore visibility was good. He identified the two men as accused No. 1 and the appellant but could not say who of the two fired a shot at him.

[7] The second witness who testified is Candice Melanie Nel in relation to the incident of 23 January 2010 at the corner of Baatjies Street and Kobus Road. She was one of the ladies who were conversing at the bus shelter with Rene and Griebena at about 20H00 when Hensley Smith joined them. When Hensley Smith was walking away she and others saw two men who appeared to be following Hensley Smith. When Smith saw them he turned away.

At that stage the appellant handed over a gun to accused No. 1. She was about 20 metres away from accused No. 1 and the appellant. She was able to identify them by the aid of electric lights including spray lights. At the identification parade the witness identified the appellant as having handed over the firearm to accused No. 1 on the date in issue. The witness and appellant attended the same primary school although they were not in the same class. According to the witness after appellant handed over the gun to accused No. 1, the latter fired shots directed at Hensley Smith. It is at that stage that she went to hide behind the bus

shelter. The identification parade evidence was not disputed and was handed in by consent.

[8] The appellant failed to give evidence under oath. His defence in respect of counts 3 and 4 is that of an alibi and in respect of counts 1 and 2 he denied knowledge of the commission of the offence.

Count 1 involves murder of Patrick Cornelius. He was acquitted of attempted murder of Hensley Smith in respect of count 2.

Count 3 involves the murder of Hubert Mejane, a 12 year old boy and count 4 the attempted murder of Hensley Smith.

[9] The issues involving the doctrine of common purpose and identification are applicable in respect of counts 1,3 and 4. Alibi defence is pleaded only in respect of counts 3 and 4. Counsel for the appellant at paragraph 1 of his Heads of Argument conceded that the conviction of the appellant in respects of counts 5 and 6 should be confirmed.

[10] In argument before us it was acknowledged by appellant's Counsel that the appellant never disassociated himself with accused No. 1's actions and that the alibi defence should be ignored.

Appellant further failed to take the Court into his confidence by failing to testify under oath despite being implicated in both incidents.

[11] In respect of counts 1, 3 and 4 the trial Court accepted the evidence led by the prosecution on the basis that the appellant was clearly and positively identified by the witness, Hensley Smith, as one of the people who fired shots at the deceased, Mr Cornelius, in respect of count 1.

All the people who were in company of accused No. 1 including the appellant had intended to kill the deceased. They reconciled themselves with the actions of accused No. 1 who fired shots at the deceased. The appellant was present from the corner of the street and came towards the group of men who were with the deceased until the shots were fired. The appellant was present at the scene during the killing of the deceased. He was aware of the shooting of the deceased. Clearly he must have intended to make a common cause with committing the murder; that he must have manifested his sharing of a common purpose by performing some act of association with the conduct of the others and this was accompanied by his intent to kill the deceased and referred to **S V MGEDESI 1989 (1) SA 687 (A)**.

[12] In respect counts 3 and 4 the trial Court had no doubt that accused No. 1 and appellant had intentions to attempt to kill Hensley Smith on 23 January 2010. The shot that was fired hit the complainant and he sustained injuries on his leg. The common purpose has been established here in that the appellant gave a gun to accused No. 1 who fired the shots at Mr Smith.

The findings by the ballistic expert that the empty cartridges found at the scene at Oliphant Street and those found at Baatjies and Kobus Road were fired from the same firearm, proved clearly that the appellant and accused No. 1 were together on both occasions and were positively identified.

It is also clear from the evidence that when firearm was used the accused No. 1 and the appellant were acting in the execution of the common purpose.

[13] The acceptance of the State's evidence clearly shows that the appellant's defences cannot be true.

[14] I am of the view that the trial judge has not misdirected himself both on facts and in law. His conclusion is correct.

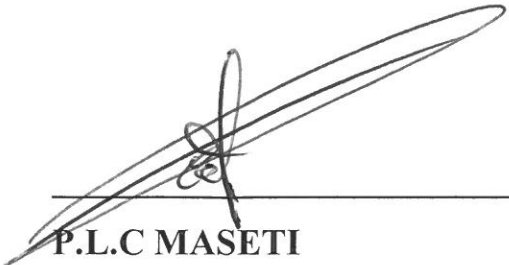
[15] The identification evidence viewed in the context of all the evidence was sufficiently trustworthy and reliable.

[16] The state relied on the doctrine of common purpose. For this doctrine to suffice an act of association with the actions of the group should be proved against the appellant in order to find common purpose. The requirements to hold a person criminally liable on the basis of the common purpose approach followed by Botha **J.A in S V SAFATSA 1988 (1) SA 868 (A)** were set out in **S V MGEDEZI 1989 (1) SA 687 (A) at 705-706**. In his judgment the trial judge has referred to Mgedezi's case and thoroughly covered the common purpose doctrine.

[17] In the circumstances, therefore, I am not persuaded that there is any basis to interfere with the trial Court's findings in respect of the conviction.

[18] I therefore make the following order.

The appeal is dismissed.



P.L.C MASETI

ACTING JUDGE OF THE HIGH COURT

SANDI J

I agree

B.SANDI

JUDGE OF THE HIGH COURT

GOOSEN J

I agree

J. GOOSEN

JUDGE OF THE HIGH COURT

DATE OF HEARING: 9 MARCH 2015

DATE OF JUDGMENT: 14 APRIL 2015

APPEARANCES:

**FOR THE APPELLANT: ADV. CROMPTON
JUSTICE CENTRE
GRAHAMSTOWN**

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