



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

Case No: A339/2015

In the matter between:

JABU OBABA

Appellant

versus

THE STATE

The State

Case Summary: Criminal Law – same set of proven facts giving rise to separate conviction of robbery with aggravating circumstances and a conviction of attempted murder – failure by State to establish prerequisites for liability on the basis of common purpose in respect of conviction of attempted murder - conviction on count of attempted murder thus set aside.

JUDGMENT

MEYER, J (KLAAREN, AJ concurring)

[1] Following an incident that occurred at about 8.00 pm on 16 September 2010 at First Avenue, Rosettenville, Johannesburg in which Mr Elphas Gama was robbed of his cell phone, wallet and an amount of R920 and during which incident he was stabbed in the abdomen, the appellant, Mr Jabu Obaba, and his co-accused, Mr Mandla Shabanggu, were each convicted by the Regional Court, Johannesburg of robbery with aggravating circumstances (count 1) and attempted murder (count 2). On 24 January 2013, they were each sentenced to twelve years' imprisonment for robbery, twelve years' imprisonment for attempted murder and the two sentences were ordered to run concurrently. This appeal is against the convictions and sentences.

[2] The two eyewitnesses who testified for the state were Mr Gama and his girlfriend, Ms Zanele Sangweni. After work at about 8.00 pm on 16 September 2010, Mr Gama fetched Ms Sangweni from her home at No [...] Avenue, Rosettenville to go out. While walking, they noticed 'a group of guys' (they were a group of about five people according to Mr Gama and about six to seven according to Ms Sangweni ('the group')) approaching them. Mr Gama testified that Ms Sangweni had recognised one person in the group, who was wearing a white cap, as her friend's friend. Ms Sangweni testified that the person she had recognised was known to her by the nickname 'Spikiri'. (Her friend, Ms Ntsaki Nonyane, was also a witness for the state and Spikiri was the appellant's co-accused in the court *a quo*.) According to Mr Gama, Ms Sangweni pointed Spikiri out to him and she also mentioned that they 'are thugs, they are robbing people.' Because the group was familiar with Zanele, so Mr Gama testified, he had thought that they would not cause them any harm nor would they rob them.

[3] The group, however, surrounded Mr Gama and Ms Sangweni. They blocked their way and prevented them from leaving. Mr Gama testified that he had been told not to move. The person who Ms Sangweni pointed out to him as Spikiri demanded his phone, which he handed over to him. He then demanded his wallet. When Mr Gama responded that he did not have one on him, those at his back grabbed his hands and punched him on his shoulders and head. Spikiri produced 'something like a screwdriver' from under his t-shirt. Ms Sangweni testified that Spikiri had produced a knife from under the front of his trousers. Mr Gama testified that Spikiri then had stabbed him in his abdomen. Mr Gama screamed and told them to let go of him and take whatever they wished. He also heard Ms Sangweni screaming, saying 'why are you doing this' and one of them saying 'are you familiar with us.' Ms Sangweni, according to Mr Gama, then said something, but he could not hear what she was saying. Ms Sangweni also testified that she had tried to intervene and that after Mr Gama had been stabbed she said: 'Spikiri what are you doing, why are you doing this?' Mr Gama testified that one of the persons in the group had said to the others that they must stop assaulting him and one had said to him and to Ms Sangweni to run away. Ms Sangweni then ran back to her home, which was nearby, but he could not run because of the injury to his abdomen. The group then left him. His phone, wallet and an amount of R920 were stolen from him during the ordeal. He was later taken to the Alberton Clinic, where he was operated and hospitalised for four days.

[4] Mr Gama was unable to identify any one of his assailants. But Ms Sangweni identified the appellant's co-accused, Spikiri. She had known him for about a month. He had an affair with her friend, Ms Ntsaki Nonyane, or otherwise known as Sisi. She also pointed the appellant out to the police 'as one of the robbers on that day'. She testified that the appellant had been wearing a black t-shirt. During the course

of the incident the appellant, according to Ms Sangweni, remarked as follows: 'Oh, this is Zanele, I did not see.' Ms Sangweni testified that she knew the appellant by sight. She used to see him 'very often'. He used to walk in the street where she was residing. She caused the appellant to be arrested when she saw him at the tavern where her friend, Ms Nonyane, was employed.

[5] A reading of the record satisfies me that the trial court was correct in its finding that all three state witnesses were honest witnesses and their evidence reliable. I am also satisfied that Ms Sangweni's identification of the appellant was reliable. There was sufficient lighting; Mr Gama and Ms Sangweni stood under a streetlight when the incident took place. Ms Sangweni had an adequate opportunity to observe the appellant. He was standing in front of Mr Gama and Ms Sangweni and was facing them.

[6] When the evidence of the appellant and that of his co-accused is considered separately and individually and weighed up against the evidence of the state witnesses, particularly the evidence of Ms Sangweni who implicated the appellant, I am satisfied that his denial of the evidence against him cannot reasonably possibly be true. It is not a reasonable possibility that Mr Gama and Ms Sangweni could have been mistaken in the observations to which they testified. Nor do I consider it to be a reasonable possibility that Ms Sangweni could be mistaken in her identification of the appellant. The facts proved against the appellant show that he was rightly convicted of robbery with aggravating circumstances. The appellant actively associated himself with the group and he participated in the forming of a circle around Mr Gama and Ms Sangweni, thereby blocking their way and preventing them from escaping and enabling the commission of the theft by violence.

[7] I now turn to his conviction of attempted murder. In *Mahlamuza and another v State* 2015 (2) SACR 385 (SCA) para 10, the Supreme Court of Appeal reaffirmed the decision in *S v Moloto* 1982 (1) SA 844 (A), wherein-

‘ . . . it was held that where attempted murder is committed in connection with a robbery the State is entitled, according to the circumstances, to charge the accused with robbery and with attempted murder and the court is entitled to find him guilty on the two separate offences provided that the robber used excessive violence that exceeded the limits and bounds of robbery (which is violence that puts the life of the victim in danger) and it was proved beyond reasonable doubt that the accused also had the intention to kill and not merely to use force aimed at temporarily incapacitating the victim.’

[8] There was no evidence of any prior agreement, either expressly or by implication, to kill Mr Gama. Ms Sangweni, whose evidence I have found the trial court correctly accepted, testified that the appellant committed no physical act. It was his co-accused, Spikiri, who produced a knife from under his clothes and then stabbed Mr Gama in the abdomen. The act which the appellant was proved to have committed does not give rise to an inference beyond reasonable doubt that he agreed with Spikiri or any other person that Mr Gama was to be killed. The question, therefore, is whether the evidence justifies a finding of common purpose between the appellant and the group to also kill Mr Gama and not merely to use force aimed at temporarily incapacitating him.

[9] In the oft-quoted passage in *S v Mgedezi and others* 1989 (1) SA 687 (A), at 705I-706C, Botha JA said the following:

‘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 Safatsa 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 of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[10] Nothing in the evidence can justify a finding of common purpose between the appellant and the group, particularly Spikiri, who launched the attack on Mr Gama. The state, at the very least, failed to prove beyond reasonable doubt that the appellant had the intention to kill Mr Gama (and not only to use force aimed at temporarily incapacitating him) or that he foresaw the possibility of Mr Gama being killed and that he performed his own act of association with recklessness as to whether death was to ensue. There are no proven facts that give rise to an inference that the appellant was aware that Spikiri was armed with a knife when he together with the other members encircled Mr Gama and before Spikiri had produced the knife from under his clothes and had stabbed Mr Gama. The appellant's conviction of attempted murder and the sentence of twelve years' imprisonment imposed upon him pursuant to such conviction, therefore, must in my view be set aside.

[11] Finally, the matter of sentence. In sentencing the appellant the trial court exercised its discretion judicially and the sentence of twelve years' imprisonment imposed upon him pursuant to his conviction of robbery with aggravating

circumstances does not induce a sense of shock (see *S v De Jager* 1965 (2) SA 616 (A) at 628H-629B). All the relevant factors and circumstances were considered and duly taken into account by the trial court. Interference with the imposed sentence is not warranted.

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

- (a) The appeal by the appellant against his conviction of attempted murder (count 2) is upheld. His conviction and sentence on this count are set aside.
- (b) The appeal by the appellant against his conviction of robbery with aggravating circumstances (count 1) and against the sentence of twelve years' imprisonment imposed upon him pursuant to this conviction is dismissed.

P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	3 November 2016
Date of judgment:	8 December 2016
Appellant's counsel:	LS Nkuna
Instructed by:	Johannesburg Justice Centre
State counsel:	NP Serepo