REPUBLIC OF SOUTH AFRICA

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

APPEAL CASE NO. 154/2013

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

25/9/2018
DATE

SIGNATURE

In the matter between:

MUBEKA, SAMUEL Appellant

and

THE STATE Respondent

JUDGMENT

Van Vuuren AJ (Fisher J concurring):

Background

[1] This matter arises from what was initially planned to be a staged robbery of cash to replenish an ATM at a supermarket in Bredell, Kempton Park. An employee of FG Security Services ("Fidelity") had planned the staged robbery with some erstwhile colleagues, but reconsidered his position and informed a superior at Fidelity of the planned robbery who contacted the South African Police Service ("SAPS"). Various SAPS members organised themselves during a prior briefing and strategically positioned themselves in anticipation of the planned robbery.

[2] When the cash-in-transit vehicle arrived at the supermarket and the Fidelity personnel moved the cash to the ATM, the four assailants who arrived in a VW Jetta motor vehicle set out to execute their planned crime.

[3] Members of the SAPS announced their presence which was followed by various rounds being fired. This led to one of the assailants suffering fatal gunshot wounds at the hands of a member of the SAPS.

The charges and the trial

[4] The three surviving assailants stood trial in the Regional Court in Kempton Park on the following counts:

[4.1] Count 1: Attempted robbery with aggravating circumstances which related to the attempted robbery of money in Bredell, Kempton Park;

[4.2] Count 2: Robbery with aggravated circumstances which related to the taking a cellular phone and a firearm from Mr Latie Motanya, a Fidelity employee;

[4.3] Count 3: Murder which related to the death of Mr Peter Maseko alleged to have been one of the assailants;

[4.4] Count 4: Attempted murder of Constable Louis de Bruyn;

[4.5] Count 5: Attempted murder of Mr Deal Robert Haswell;

[4.6] Count 6: Attempted murder of Mr Petrus Lafras Daniël Truter;

[4.7] Count 7: Unlawful possession of firearms;

[4.8] Count 8: Unlawful possession of ammunition; and

[4.9] Count 9: Theft of a VW Jetta motor vehicle in Mokopane.

[5] The appellant was accused 3 before the Court *a quo*. He was legally represented during the trial and pleaded not guilty in respect of all counts. The appellant with accused 1 and 2 sought, and were granted, a discharge under section 174 of the Criminal Procedure Act[1] in respect of count 7.

[6] The appellant closed his case without giving evidence or calling any witnesses as he was entitled to do. So did accused 1 and 2.

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[1] Criminal Procedure Act 51 of 1977

The sentence *a quo*

[7] The learned Regional Magistrate *a quo* sentenced the appellant on 9 September 2010 in comparable terms to the sentences of the 1st and 2nd accused. The appellant's sentence was as follows in respect of each of the counts:

[7.1] Count 1: 10 years imprisonment;

[7.2] Count 2: 15 years imprisonment;

[7.3] Count 3: Life imprisonment;

[7.4] Counts 4, 5 and 6: These were taken together for purposes of sentencing - 10 years imprisonment;

[7.5] Count 8: 5 years imprisonment; and

[7.6] [Count 9: 8 years imprisonment.

[8] Although the appellant did not testify, the court *a quo* was presented with various mitigating and factual circumstances in relation to the appellant for purposes of sentence.

[9] He was 38 years of age at the time of sentencing (34 years of age at the time of the robbery). He is married and his wife is employed and earned approximately R4 000 per month at the time. The accused was self-employed as a fitter of tiles and ceilings, from which he earned approximately R6 000 per month. They lived in Mamelodi in their own home. The accused and his

wife have three children, a boy aged 17 in grade 11, a girl aged 5 in grade R, and a 1-year old girl who was not attending pre-school at the time.

[10] The accused was supporting his aged mother and his nephew aged 7.

[11] He was previously found guilty of possession of an unlicensed firearm on 26 March 2002, which the court *a quo* was told was pursuant a plea of guilty.

Leave to appeal

[12] On 4 December 2012 an application for leave to appeal against the judgment *a quo* was brought. At the time of that application, leave to appeal had previously been sought by accused 1 and 2 and, leave having been granted, their appeals were heard before the Honourable Justices Coppin and Moshidi JJ. In granting leave to appeal the learned Regional Magistrate considered the judgment in that appeal. The court *a quo* granted leave on these counts on the basis that this Court could reasonably reach similar conclusions on sentencing as was reached by the Court of appeal in the cases of the 1st and 2nd accused.

[13] A distinguishing feature between the appeals brought by the 1st and 2nd accused and the appellant related to the finding on count 9 of theft of the motor vehicle. The learned Regional Magistrate granted the appellant leave to appeal the conviction on count 9 on the basis that this Court might come to a different conclusion. It was argued at the application for leave to appeal that the two week period was too long a period between theft and appellants possession thereof for a presumption of theft to arise. As such, so the learned Regional Magistrate explained, the vehicle stolen from Mr Gerrit Pretorius

may not have been stolen by the appellant – and accordingly that reasonable doubt may exist as to whether it was indeed the appellant who stole the vehicle from Mr Pretorius in Mokopane on 18 or 19 July 2007.

Particular facts relevant in considering the appeal

[14] The robbery and its aftermath occurred on the morning of 3 August 2007 at around 09h00 at the supermarket in Bredell described above. This, as stated, occurred whilst members of Fidelity were about to replenish an ATM of ABSA Bank on the premises. One of the assailants had taken a handgun from Mr Lucky Mothale, a member of Fidelity's personnel, and forced him to lie face down at gunpoint. Firearms were also pointed at the other Fidelity employees.

[15] During these events a shooting ensued which resulted in the fatal wounding by a police officer of the deceased referenced in count 3. Others, including the 1st and 2nd accused sustained gunshot wounds at the scene. It was subsequently found, according to a ballistics report admitted into evidence, that all 35 spent cartridges found at the scene were fired by the SAPS.

[16] Ultimately the SAPS overpowered, subdued and arrested between 10 and 15 suspects. Some suspects were released and the 3 accused were charged.

[17] The 3rd accused was held to have been the driver of the VW Jetta motor vehicle used in the robbery. The court *a quo*, in my view, correctly dealt with the evidence of Constable De Bruyn who mistakenly identified the driver of the Jetta as accused 1. The 3rd accused was, however, properly identified as the driver of the Jetta by Constable Haswell. This was also confirmed by

Constable Olympia Keswa. Constable Keswa saw the appellant driving the Jetta motor vehicle earlier that morning at the Bredell Supermarket and again during the robbery.

Contentions on behalf of the appellant in respect of the convictions

[18] Before us counsel for the appellant confirmed the appropriateness of the court *a quo's* convictions on counts 1, 3, 4, 5 and 6 but contended that the convictions on counts 2, 8 and 9 ought to be set aside on appeal. I deal with these counts in turn:

Count 2

[19] Mr Hodes SC argued that the learned Regional Magistrate erred in convicting the appellant on count 2. He correctly contended firstly that the evidence did not indicate that the cellular telephone, to which this count related in part, was ever taken, and secondly, that the taking of the firearm by a fellow assailant was in order to facilitate the robbery of the money. I agree with the submission that the conviction on count 2 amounted to an improper splitting of charges.[2] As such, the conviction and sentence in respect of count 2 ought to be set aside.

Count 3

[20] Mr Hodes SC for the appellant agreed that the convictions on counts 3, 4, 5 and 6 were legally correct, even though the police had shot the deceased. I agree with his reasoning. The conduct of the police in preventing the robbery

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2 S v Toubie 2004 (1) SACR 530 (WLD) 545G – 547I

was lawful whilst the conduct of the assailants which was causally linked to the death of the deceased was not.

[21] On behalf of the appellant it was submitted that the sentence imposed upon the appellant, for an effective term of imprisonment for life, was inappropriate. In contending that a 20 year imprisonment sentence was more appropriate, Mr Hodes argued that in the context of the assailants' common purpose, parity of sentences imposed upon all three accused would be just.

[22] It is of course correct that the particular mitigating and aggravating circumstances that relate to each accused ought to be considered in addition to a factor such as their common purpose.

[23] The appellant did not testify in mitigation of his sentence, but counsel representing him in the court *a quo* placed his personal circumstances before the court which were not disputed by the prosecutor and consequently duly accepted by the court *a quo*.[3]

[24] In respect of count 3, the learned Magistrate imposed the minimum prescribed sentence. In my view, having regard to the particular circumstances and mitigating factors, which include the appellant's personal circumstances, the intent in the form of *dolus eventualis,* the fact that the deceased entered into the common pursuit, and having considered the judgment on appeal in respect of the 1st and 2nd accused,[4] it is my view that the Regional Court ought to have come to the conclusion that the sentence of life imprisonment

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3 *S v Caleni* 1990 (1) SACR 178 (C) 181E-G

4 See Reginald Tlhoaela and Lucky Makunyane v The State GSJ case no. A29/12 – a judgment of Justices Coppin and Moshidi JJ delivered on 31 May 2012.

for the death of one of the appellant's accomplices was not proportionate and that the imposition of a lesser sentence in respect of that crime was justified. There was no evidence that the appellant fired any shots in this failed robbery.

[25] In argument before us the State motivated for a sentence of 20 years imprisonment, as did counsel on behalf of the appellant.

[26] I am of the view that a disturbing disparity in sentences exists in circumstances where the participation of the three assailants was more or less equal and that an appropriate sentence on count 3 is 20 years' imprisonment.[5] Where the principle of common purpose applies with comparable personal circumstances, a parity of sentences imposed upon all three accused would be just.

Count 8

[27] In the 1st and 2nd accused's appeal, the court held that the charge for possession of ammunition only related to Mr Makunyane, the 1st accused. That court duly set aside the conviction of the 2nd accused, and by parity of reasoning, so should the conviction on count 8 be set aside in respect of the appellant. Ms Britz for the State agreed that the court *a quo* ought to have acquitted the appellant on count 8.

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5 *S v Giannoulis* 1975 (4) SA 867 (A) 873F-G and 874B-E
S v Marx 1989 (1) SA 222 (A) at 225B – 226E

Count 9 – Theft of the VW Jetta motor vehicle

[28] The Volkswagen Jetta motor vehicle found in possession of the appellant at the time of the robbery was allaged to be a stolen vehicle. A certain Mr Pretorius had reported the theft of his vehicle to the SAPS in Mokopane.

[29] Mr Pretorius identified the vehicle depicted in the photograph shown to him in the trial as similar to his stolen VW Jetta. The registration plates of the vehicle used in the robbery were, however, different. The plates could have been changed, but this aspect was not adequately addressed.

[30] In cross-examination Mr Pretorius testified that he has not seen the vehicle since it was stolen. He accepted that he could neither identify the engine number nor the registration number of the vehicle used in the robbery.

[31] To my mind there is merit in the argument that there was insufficient evidence before the court *a quo* in relation to whether the vehicle was that stolen from Mr Pretorius .

Recent possession

[32] Even on the premise that the vehicle was that stolen from Mr Pretorius, the doctrine of recent possession should be considered in the context of the present factual matrix.

[33] In this regard, the accused operated as a gang with a common purpose to commit the robbery and period of more than two weeks passed between the theft of the vehicle and the robbery.

[34] The following was stated by the Honourable Mr Justice Mathopo JA, who wrote for the Court in *S v Mothwa*:[6]

> "*There is no rule about what length of time qualifies as recent. It depends on the circumstances generally and, more particularly, on the nature of the property stolen. If the property stolen is common place the time might be very short as it is always easy to trade it. It can thus change hands easily and much more quickly. Property such as money and motor vehicles are easily circulated.*"

[35] The learned Judge of Appeal continued:[7]

> "*[8] The doctrine of recent possession permits the court to make the inference that the possessor of the property had knowledge that the property was obtained in the commission of an offence and in certain instances was also a party to the initial offence. The court must be satisfied that (a) the accused was found in possession of the property; and (b) the item was recently stolen. When considering whether to draw such an inference, the court must have regard to factors such as the length of time that passed between the possession and the actual offence, the rareness of the property, and the readiness with which the property can or is likely to pass to another person.*"
>
> ...
>
> [10] *Courts have repeatedly emphasised that the doctrine of recent possession must not be used to undermine the onus of proof which always remains with the State. It is not for the accused to rebut an inference of guilt by providing an explanation. All that the law requires is that, having been found in possession of property that has been recently stolen, he gives the court a reasonable explanation for such possession.*

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6 *S v Mothwa* 2016 (2) SACR 489 (SCA) at [9]
S v Madonsela 2012 (2) SACR 456 (GSJ) at [6]
Zwane and Another v The State (426/13) [2013] ZASCA 165 (27 November 2013) at [11]

7 *Mothwa* at [10]

[36] Having particular regard to the Supreme Court of Appeal's recognition that both money and motor vehicles are easily circulated and the present circumstances where the vehicle was found in the appellant's possession during a robbery in a different province more than two weeks later, too much uncertainty remained to have convicted the appellant of theft of Mr Pretorius's vehicle in Mokopane on 18 or 19 July 2007 by mere application of the doctrine.

[37] The conviction on count 9 ought accordingly be set aside based on reasonable doubt arising from: the 'identification' of the motor vehicle depicted in the photograph by Mr Pretorius as his vehicle; the difference in registration numbers which were not adequately explained; and the lapse of time of some 17 days during which the vehicle may have changed hands between the date of theft of Mr Pretorius's motor vehicle and the date of the robbery (assuming for purposes of the latter that it was indeed Mr Pretorius's vehicle that was found in possession of the appellant).

Sentences to run concurrently

[38] The offences committed by the appellant all form part of the same events committed by the assailants on 3 August 2007 and consequently, in order to address their cumulative effect, it would be proper to order that the sentences in respect of counts 1, 4, 5 and 6 run concurrently with the sentence imposed upon the appellant in respect of count 3. As such an effective sentence of 20 years imprisonment is appropriate in the circumstances of this case.

The order

In the premises I make the following order:

1. The appellant's appeal against his conviction and sentence in respect of counts 2, 8 and 9 is upheld.

2. The convictions and sentences in respect of counts 2, 8, and 9 are set aside.

3. The appellant's appeal against his conviction in respect of counts 1,3,4,5, and 6 is dismissed.

4. The appellant's appeal against the sentence imposed in respect of count 3 is upheld. The sentence of life imprisonment in respect of count 3 is set aside and is substituted with a sentence of 20 years imprisonment.

5. The appellant's appeal against the sentences imposed in respect of counts 1,4,5 and 6 is dismissed.

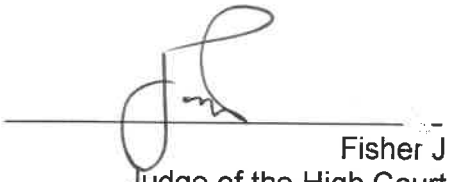
6. The sentences imposed in respect of counts 1, 4, 5 and 6 are to run concurrently with the sentence imposed in respect of count 3 (20 years imprisonment).

7. The appellant is sentenced to an effective 20 years imprisonment and the sentences are antedated to 9 september 2010.

8. The appellant's unfitness to possess a firearm is confirmed.

E Van Vuuren AJ
Acting Judge of the High Court
Gauteng Division, Johannesburg

I agree,



Fisher J
Judge of the High Court
Gauteng Division, Johannesburg

APPEARANCES

Counsel for the appellant	:	Adv L M Hodes SC
Instructed by	:	E T Paile Inc Attorneys
Counsel for the respondent:		Adv C Britz
Date of hearing	:	13 September 2018
Date of judgment	:	25 September 2018