IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS152/2015

DATE: 30-03-2022

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
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[redacted]

In the matter between

STATE

and

BONGANI BENEDICT MOKWENA Accused 1

MASHININI ZWANE Accused 2

STHEPHEN MASHIANE Accused 3

J U D G M E N T

KARAM, AJ: Regarding count 1, whilst the robbery of this complainant was not formally admitted, the complainant testified regarding same as well as the recovery of most of the robbed items very shortly thereafter in the said Ford Ranger vehicle.

The evidence of the State witnesses further reveals

that these perpetrators were traveling in the said vehicle as further confirmed by the finding of the robbed items therein. In the course of argument, it was confirmed by all counsel that the aforesaid was common cause, that the perpetrators were in unlawful possession of firearms (count 2); that MacIntosh was fired at during the car chase by an occupant of the said vehicle as well as by occupants of the vehicle after the collision of this vehicle with the Mercedes vehicle (count 4). Count 5 was preferred only against accused 3 and he has already been discharged thereon.

The critical question for determination is whether it was the accused who perpetrated the robbery, travelled in the Ford Ranger vehicle, and who fired at MacIntosh.

The Court will now proceed to analyse the evidence tendered. MacIntosh was a single witness in respect of counts 1,2,3 and 4.

The Court is alive to the authorities that whilst the Court may convict on the evidence of a single witness, that evidence must be satisfactory in all material respects. The evidence must not only be credible, but must also be reliable.

See *R v Mokoena* 1932 OPD 79, *S v Weber* 1971 (3) SA 754 (A), *S v Sauls and Others* 1981 (3) SA 172 (A), *S v Stevens* 2005 (1) ALL SA 1 (SCA) and *S v Gentle* 2005 (1) SACR 420 (SCA).

Indeed, the Court finds that MacIntosh was an impressive witness. It is clear that he had simply and honestly testified as to what transpired on the day in question. His credibility is demonstrated thereby. He could easily, had he been so inclined, *inter alia* state that he had seen and could identify the other two occupants of the vehicle (including accused 3) exiting the vehicle and fleeing.

He could further have implicated the accused by stating that he saw the person who fired shots at him in the course of the high speed chase. He did not do this. He had an excellent demeanour and nothing material arose from the extensive cross-examination by the defence.

The Court has no hesitation in accepting his evidence. The contradiction the Court perceived in his evidence-in-chief as to whether the shots were fired at him in the course of the high speed chase, by the shooter opening the vehicle door or shooting through the window is irrelevant, regarding being held to the time lapse from when the incident occurred and his testimony in Court.

It is further irrelevant in that the attempted murder charge is not only based on this, but on the further two occasions that he testified that accused 1 and accused 2 fired at him after alighting from the Ranger. The criticisms levelled at his evidence are without merit.

It is trite that the Court must not sit as an arm chair critic. In this volatile, highly charged and life threatening situation, it is unreasonable to expect him to notice everything happening around him including other people or vehicles.

His vigilance and bravery in single handedly confronting the situation and bringing the perpetrators to justice, is to be commended. It defies logic that if there were a group or groups of people in the vicinity, he would target accused 1 and accused 2 for no reason.

The Court has no hesitation in accepting that he did not lose sight of the Ranger vehicle or of accused 1 and accused 2 who alighted from the left-hand side thereof and commenced firing at him.

The only criticisms to be levelled at Simpson's evidence, if these can be classed at criticisms, is his inability to recall many issues, regard being held to the time lapse of almost 7 years between the date of the incident and the date on which he testified, as stated by him.

No criticisms can be levelled at the witness Pather. The Court already alluded to its assessment of Odendaal, Makgato and Mavhundla, in its reasons for the provisional admission of accused 3's statement. This pertains also to Odendaal and Makgato's evidence relating to the arrest of accused 3 and subsequent events.

Accused 1 did not present as a good witness for, *inter alia,* the following reasons: He contradicted himself as to the time he initially allegedly arrived at the relevant intersection. It is significant that he claims to have advised his counsel that he had worked earlier that day, had been dropped off, that it was shortly thereafter that the incident occurred, and that he has informed MacIntosh thereof.

This very material issue would most certainly have been put to MacIntosh if this were the case. The Court knows Mr Mosekwa to be a competent counsel. It is further significant that Mr Mosekwa did not inform the Court that the accused had so informed him and that he, Mr Mosekwa, had omitted to put this to MacIntosh.

It is further apparent that the accused did not inform Mr Mosekwa of same, having regard to what was put to MacIntosh by his counsel, namely that accused 1 will say that he was in a group of people gathered at that intersection looking for piece jobs from people driving past.

It is significant that the accused, not being an unsophisticated or unschooled person, did not inform his counsel of the identity of Mr Salter who had allegedly engaged his services that day, yet the accused acknowledges the importance of this and cannot say why he did not advise his counsel of same.

Whilst there is no obligation to the accused to prove his innocence, Mr Salter could potentially have be called as a defence witness, the accused possibly being able to locate him having allegedly been to his residence to paint on two occasions.

The Court finds it improbable that he would travel from Kempton Park to Sandton and back incurring transport expenses in order to get a piece job. It is further improbable that someone with a matric and diploma would engage in sitting on street corners waiting for piece jobs.

There is no evidence that the alleged job accused 1 undertook that day was prearranged. Piece job seekers usually arrive at or before 07h00 hoping to secure such work, not at around 10h00.

Furthermore, his evidence that he sat around after being dropped off at between 14h00 and 15h00 hoping to be hired again as he leaves to go home at 17h00, is also improbable as it is highly unlikely that a person will be hired for some two hours.

Whilst accused 1 cannot be convicted on accused 3's statement, it is further highly improbable that the reference to accused 1 in accused 3's statement, notwithstanding the different surname, is purely coincidental.

Similarly, accused 2 presented as a poor witness.

Significantly, his version in his testimony of having been taken to RedHill School was never communicated to his attorney and was accordingly not put to MacIntosh. Nor did he alert his attorney to put this to MacIntosh in the course of the cross-examination of MacIntosh by his attorney.

His allegation that there was no time to do so is wholly without merit. On Friday, 5 November 2021, and prior to Mr Mosekwa for accused 1 commencing his cross-examination of MacIntosh, Mr Vorster advised the Court that he had received instructions the previous day to take over the case of accused 2 and would request that the matter be adjourned after cross-examination by accused 1, in order to consult with accused 1.

The matter was duly adjourned after cross-examination by accused 1 and cross-examination of MacIntosh on behalf of accused 2 was held over until Tuesday, 9 November 2021, due to MacIntosh's unavailability on Monday, 8 November 2021.

Accordingly, there was very ample opportunity for Mr Vorster to consult with accused 2. Accused 2 then testified that he did not mention this version to his counsel as he was under financial pressure. He subsequently testified that he did not do so as he was confused.

Furthermore and significantly, he testified that after being shot he lost consciousness and only regained same in hospital. This is the first time the court heard of his alleged unconsciousness. MacIntosh made no reference thereto and this was never put to MacIntosh.

Odendaal said he saw accused 1 and accused 2 after their arrest on the scene and never mentioned one of the arrested suspects being unconscious. Also, what was put to MacIntosh by counsel for accused 2, namely that accused 2 will say that he fell, realised that he had been shot and was then arrested by MacIntosh and attended to by medical personnel, and further that he was tested for gunpowder residue, contradicts accused 2's testimony and flies in the face of him having been unconscious.

There are further unsatisfactory aspects of his evidence, for example why did he not call his friend immediately after allegedly being denied access to the school; his statement that he believes he is unemployed even though he allegedly owns a tavern and a taxi and works at the tavern doing deliveries; his lack of knowledge as to his daughter's grade or the name of her current school.

Incidentally, this Court is extremely familiar with RedHill School and it surrounds. The streets outside the school and all the way to the Wedge Shopping Centre

abound with trees and it has been so for the past 20 years. This is mentioned in reference to his evidence that he had to walk from the school all the way to the intersection to find a tree to stand under, because it was a very hot day.

Again, and whist there is no onus on accused 2 to prove his innocence, it is surprising that his friend who allegedly fetched him around 13h00 and dropped him at the school, was not called as a defence witness. As with accused 1, it is highly improbable that the reference to accused 2 in accused 3's statement, notwithstanding the different forename, is purely coincidental.

Accused 3, similarly, presented as a poor witness. He contradicted what had been put to the state witnesses materially and his version is riddled with improbabilities. The Court will only refer to several such examples.

One of the most material issues that his counsel had relied on in not having his statement, EXHIBIT M1, admitted into evidence, was the accused having allegedly purposefully and on the advice of his erstwhile attorney, written on the statement that same was 'involuntary'.

Throughout his evidence however, no reference was made thereto. His counsel asked him more than once whether he himself had written anything on the statement and his replies were that apart from signing same, he had not.

The Court could sense his counsel's frustration in this regard. It has been put to the State witnesses that the accused had been given blank documents to sign. This is markedly different to the accused's evidence that after Mavhundla had completed writing each page of the statement, same had been given to the accused to sign and the process continued in respect of all the pages of EXHIBIT M1.

This latter version was never put to Mavhundla. The accused stated that one of the main reasons he was tortured was because he had asked Odendaal to speak to a lawyer. This had never been put to Odendaal or Makgato.

He had advised Mavhundla of his alleged involvement in the taxi industry. Significantly, no mention whatsoever was made to Mavhundla of his alleged co-ownership of the car wash business. He explained that he did not do so as it was a temporary business.

This is not a credible or satisfactory explanation, given his later evidence that he was allegedly co-owner in this business from 2012 to April 2015. Surprisingly notwithstanding there being no onus on the accused to do so, the co-owner was not called as a defence witness.

Regarding the gunshots allegedly having been fired by the police at the time of his arrest. It was put by his counsel that it was as a result of the first shot that the

accused proceeded to enter the ceiling and whilst in the process of entering the ceiling, he heard another shot being fired.

This issue is very relevant as it was relied on as the first basis for the accused's fear of the police. The accused, however, testified that he entered the ceiling because he had heard a noise and whilst in the ceiling he heard a shot being fired.

He makes no reference in his evidence-in-chief to a second shot having been fired. In cross-examination and upon being questioned thereon, he refers to the second shot which he said also occurred whilst he was in the ceiling. His unsatisfactory evidence regarding these alleged shots is on record, including his contradictory evidence in relation to what was put to the State witnesses.

Again, and whilst there is no onus on him, it is surprising that his mother or partner was not called as a witness regarding same and the alleged hole in the ceiling, in light of the State witnesses' denial that any shots whatsoever were fired.

In his evidence-in-chief he stated that at Alexandra and when asked to point out the room where Steve resides, the police officer who had handcuffed him, removed his firearm, pointed it at the accused and stated that if he is lying, they, that is the police, would shoot him.

This evidence is material as it is a direct threat to the accused. This was never put to any of the State witnesses. What was put to Odendaal was that prior to Odendaal kicking open the door, he took out his firearm and cocked it.

In cross-examination of Makgato, Makgato stated that he had also taken out his firearm at this stage. However, this alleged threat to the accused was never part of the accused's version.

The Court finds that the accused's version of the police having taken him to an address in Alexandra to point out Steve's room, not only highly improbable, but nonsensical.

If the police knew that one of the perpetrators was called Steve and knew his address, why would they require the accused to point out his room? They could simply have themselves gone there and searched the eight dwellings long before the arrest of this accused.

It is clear that the only reason they went there was as a result of the address having been furnished by this accused and he having directed them thereto.

It is improbable that he was scared when he was with Mavhundla, given his evidence that Mavhundla was respectful and good towards the accused; that he gave no statement whatsoever to Mavhundla, yet spent so much time with him; and that he was allegedly tortured by Odendaal

and Makgato and agreed as a result thereof to cooperate with them yet gave no statement to Mavhundla.

On the accused's own version, Odendaal did not discuss any case with Mavhundla or give the accused any story or version to narrate to Mavhundla. Indeed, had this statement been a fabrication or an attempt by the police to falsely implicate him, or as a result of duress, the police would surely have ensured that the residence of the complainant on count 1 be included in the pointing out by this accused.

It is common cause that this was not the case. The aforesaid are further reasons that this Court finds to finally admit EXHIBITS M and M1 into evidence.

Having regard to all of the aforesaid, this Court has no hesitation in rejecting the respective versions of the accused as false beyond reasonable doubt.

The fact that there is no fingerprint or DNA evidence linking the accused to Pather's residence, and accused 1 and accused 2 to the Ranger vehicle, and the fact that the gunpowder residue test in respect of accused 1 and accused 2 were negative, as well as the fact that Pather did not identify anybody at the identification parade, are neutral factors.

There are many reasons why gunpowder residue tests can prove negative. Similarly, the lack of vaginal

injuries or a negative DNA finding in a rape matter does not automatically lead to a finding that the victim was not raped or that the suspect is not the rapist.

The lack of fingerprint evidence does not automatically exclude a housebreaker or robber from being the perpetrator.

As stated previously, the Court is required to consider the evidence in its totality and to adopt a common sense approach. Regarding the shot or shots fired at MacIntosh in the course of the car chase, this perpetrator remains unidentified; there is no reference thereto in accused 3's statement and there is no evidence that this was done on the basis of common purpose (with which the accused have been charged in the indictment).

Based on the evidence of MacIntosh, whose evidence the Court has no hesitation in accepting, the Court finds that the State has succeeded in proving beyond reasonable doubt that accused 1 and accused 2 were occupants in the said Ranger vehicle, were in unlawful possession of firearms and ammunition and who fired at MacIntosh upon exiting the said vehicle. This relates to count 2, count 3 and count 4 and is supported by the ballistic evidence, see EXHIBIT D.

The finding of Pather's robbed items in the said vehicle minutes after the robbery, which is not disputed, leads to

the inescapable inference that accused 1 and accused 2 were perpetrators of such robbery. This relates to count 1.

Regarding accused 3, his fingerprint was found on the said Ranger vehicle and this was admitted in terms of Section 220. See EXHIBITS E and E1. His version has been rejected. Furthermore, his statement has been admitted finally into evidence.

It is evident therefrom that he was an occupant in the said vehicle and one of the perpetrators on count 1. See pages 6 and 7 of EXHIBIT M1. It is further evident therefrom that he was in possession of a firearm (as testified to by Pather). See page 6 of EXHIBIT M1.

It is further evident therefrom that he fired three shots upon exiting the Ranger and in making his getaway- See page 7 of EXHIBIT M1. However, count 2 and count 3 pertain to the firearms recovered from accused 1 and accused 2. The State neglected to charge accused 3 himself with unlawful possession of the firearm and ammunition he himself wielded.

Counsel for the State, Mr Ngodwana, wisely in the Court's view, did not attempt to include accused 3 on count 2 and count 3 on the basis of joint possession. As a result of the aforesaid, accused 3 cannot be convicted on count 2 and count 3.

The Court can just add that accused 3 can further consider himself fortunate that the driver of the Avanza vehicle could not be traced and that the state neglected to charge him with the ammunition found in the black bag or with the other offences he admitted to in his statement.

Will the accused please stand.

Accused 1, on counts 1 to count 4, you are found guilty as charged. Accused 2, on counts 1 to count 4, you are found guilty as charged. Accused 3, on count 1, you are found guilty as charged. On count 2 and count 3 you are found not guilty. On count 4 you are found guilty as charged.

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KARAM, AJ

JUDGE OF THE HIGH COURT

DATE: .....