

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**

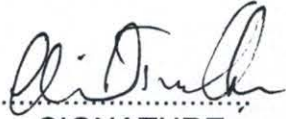
**CASE NO: A216/2017**

In the matter between:

**GIVEN WILLIAM MASHIANE**

Appellant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
06./11./17..... DATE		 SIGNATURE

**THE STATE**

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**JUDGMENT**

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Tuchten J:

- 1 The appellant was convicted by Sithole AJ on two counts of murder and on one count of robbery with aggravated circumstances and sentenced to 15 years imprisonment for each of the murders and 10 years for the robbery. The sentence on the robbery count was ordered to run concurrently with the sentences imposed for the murders. The effective sentence was therefore 30 years imprisonment.

- 2      Leave to appeal was refused by the judge in the court below but granted to this court in respect to both convictions and sentences by the Supreme Court of Appeal.
- 3      The convictions arose from a gang attack on an automatic teller machine (ATM) within a shopping complex in Witbank on 1 April 2011. The appellant was initially charged together with the alleged ringleader of the gang, Ronnie Motau. But Motau absconded and the trial proceeded against the appellant alone.
- 4      The unchallenged evidence was that two of the gang members passed themselves off as innocent snooker players, playing at a table in the complex. When guards from a security company arrived to load the ATM with cash, these gang members opened fire upon the security guards, killing two of them. One of the guards had brought money in a bag to load into the ATM. After killing the guards, the gang members fled with the bag of money.
- 5      The evidence adduced by the state implicating the appellant was that of a single accomplice witness, Selby Bafana Sibanyoni, who was warned under s 204 of the Criminal Procedure Act, 51 of 1977. Sibanyoni was a taxi driver. Early on 1 April 2011 he was hired by the ringleader of the gang, Motau. Motau told Sibanyoni that he would be

told what he had to do when he met Motau. Sibanyoni arrived at Motau's parents' house in Witbank shortly after 07h00 for this purpose and was told by Motau to transport the gang members and the appellant on the day in question. In the presence of the appellant, Sibanyoni was instructed to transport the gang members and the appellant because Motau and his men wanted to "take money from the ATM at ... [the] complex'. Motau had with him at this stage a red and black coloured bag.

- 6 This could not have been understood by Sibanyoni in any way other than that the gang was going to rob the ATM. Sibanyoni dropped off gang members at a place which he identified. The appellant remained with Sibanyoni in his vehicle and relayed instructions he received from Motau by telephone. This involved Sibanyoni driving to different places. Ultimately, Sibanyoni, with the appellant in his vehicle, came upon five gang members. Motau was at this stage not present but one of the five gang members picked up by Sibanyoni was carrying the red and black bag. Sibanyoni saw that the red and black bag contained a rifle. The five gang members had arrived at the agreed rendezvous point in a blue car. One of the gang members tried to clean the blue car of fingerprints. All five gang members got into Sibanyoni's vehicle. The gang members also had with them, in addition to the red and



black bag which had earlier been carried by Motau, a white plastic bag.

- 7 The appellant instructed Sibanyoni to drive to a place called Clarinet and showed Sibanyoni how to get there. At Clarinet, the appellant instructed Sibanyoni to drive to a house, later described as Motau's house, where they all alighted from Sibanyoni's vehicle. Sibanyoni observed that the white plastic bag had money inside it. The gang members went inside the house. Sibanyoni and the appellant waited outside. After about ten minutes, Sibanyoni was called inside and given R6 000. Sibanyoni then went outside and saw the appellant being called in.
- 8 What happened thereafter appears from evidence given by the appellant himself under oath. I may mention that the gist of the evidence of the appellant appears also from a statement made by the appellant to a police officer. The appellant unsuccessfully challenged the admissibility of the statement in the court below and persists in that challenge on appeal. It is unnecessary to consider whether the statement was properly admitted because the accused gave evidence under oath, in which the contents of the statement were largely confirmed. The danger of an incorrect conviction on the strength of a single witness or an accomplice witness was also eliminated by the

fact that the appellant in substance confirmed the evidence of Sibanyoni.

- 9 The appellant admitted that he was present at Motau's parents' home when Sibanyoni arrived on the morning in question. He also admitted travelling with Sibanyoni in Sibanyoni's vehicle to transport the gang members and that he, the appellant, received instructions from Motau which he relayed to Sibanyoni and gave instructions himself to Sibanyoni about where Sibanyoni should drive. He further admitted waiting outside Motau's house with Sibanyoni. He said that at that stage Sibanyoni told him that the gang members had been in possession of a firearm and that they had committed a robbery.
- 10 The appellant testified that at that stage he wanted nothing further to do with the matter. But, the appellant said, it was actually he, the appellant, who had handed over the white plastic bag containing the money to Motau. He admitted that after he handed the white plastic bag to Motau, Motau counted the money and gave the appellant R3 000.
- 11 The appellant said that he did not know where the money came from and did not know if it was his share of the robbery money. He told himself that it could have been money paid by Motau's staff.

- 12 The participation of the appellant in the robbery to which Sibanyoni testified largely became common cause after the appellant testified. All that remained in issue was the *mens rea* of the appellant. In the court below, the appellant asserted that he was an entirely innocent bystander to this murderous conspiracy and was not aware that anything unlawful was being contemplated.
- 13 In the court below, the appellant's version on this disputed issue was rejected and the appellant was found to have been knowingly complicit in the murders and the robbery.
- 14 Counsel for the appellant referred to the principles of common purpose and submitted that it had not been proved beyond a reasonable doubt that the appellant was aware that what was being planned was a robbery, involving firearms and that persons might be murdered by the gang in the furtherance of their murderous scheme. Counsel conceded that the appellant had been aware throughout that he was giving effect to a conspiracy to commit a crime. But counsel submitted, the evidence showed no more than that the appellant had been party to a scheme to commit theft.



- 15 I do not agree with counsel's submission. There was no need for the appellant to have been present at all except as a full member of the conspiracy. A large gang was assembled for the purpose of taking money from the security guards who were coming to load the ATM. Motau made no effort to conceal the rifle from Sibanyoni. It is highly improbable that he would have hidden it from the appellant. When the appellant, on his version, became aware that a firearm had been used, he made no effort to distance himself from the crimes but positively remained to get his money, which he must have known, and therefore did know, was his share of the proceeds of the robbery.
- 16 To add to this, the appellant lied about the extent of his knowledge of what was happening around him. There was simply no evidence before the court below to justify a finding that it was reasonably possible that the appellant, while partially complicity in the crimes, was unaware that violence and murder was being contemplated.
- 17 The circumstances in which an appeal court can reverse a trial court's finding on credibility are limited. Perhaps the leading case in this regard is *R v Dhlumayo and Another* 1948 2 SA 677 A, where the court laid down the principles which should guide an appellate court in an appeal purely on fact at pp705-6. Crucially, it is not sufficient for such an appellant to demonstrate that there is doubt about the

correctness of the trial court's decision. That decision must be shown to be wrong.<sup>1</sup>

18 I am unpersuaded that the court below came to a wrong conclusion in regard to the credibility of the appellant. On the contrary, I think that the exculpatory portions of his evidence were rightly rejected as false beyond a reasonable doubt. It follows that the appeal against conviction cannot succeed.

19 As to sentence, it was submitted that the sentence was too harsh. The appellant was 25 years old at the time and played a lesser role in the commission of the offence. His *mens rea* consisted of *dolus eventualis*. The cumulative effect of the sentences imposed resulted in an effective sentence substantially harsher than the sentence which I should have imposed. We are therefore empowered to interfere with the sentence of the court below.

20 I accordingly propose the following order:

1 The appeal against conviction is dismissed and the convictions imposed by the court below are confirmed.

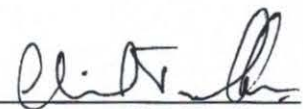
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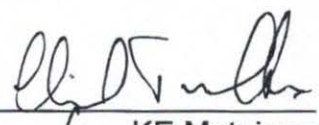
See also *S v Hadebe and Others* 1997 2 SACR 641 SCA 645h




- 2 The appeal against sentence succeeds to the following extent.
- The sentence of the court below is set aside and replaced with the following: On each of counts 1 and 2, the counts of murder, the accused is sentenced to 15 years imprisonment. On count 3, the count of robbery with aggravating circumstances, the accused is sentenced to 10 years imprisonment. The whole of the sentence on count 3 and ten years of the sentence on count 2 are to run concurrently with the sentence on count 1. The accused is therefore sentenced to an effective term of imprisonment of 20 (twenty) years.
- 3 The sentences imposed by this court are antedated to 16 April 2014, the day the appellant was sentenced was imposed in the court below.

  
NB Tuchten  
Judge of the High Court  
06 November 2017

I agree. It is so ordered.

  
for KE Matojane  
Judge of the High Court  
06 November 2017

I agree.

  
TA Maumela  
Judge of the High Court  
06 November 2017