

SOUTH AFRICA / JUDGMENT

Cele and Others v S (AR 237/2001)

[2012] ZAKZPHC 7 (1 January 2012)

[2012] ZAKZPHC 7**COURT**

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Koen, Mokgohloa, Ploos van Amstel

CASE / FILE NUMBER

AR 237/2001

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IN THE HIGH COURT OF SOUTH AFRICA

(KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG)

CASE NO.: AR 237/2001

In the matter between:

BHEKAMACELE CELE1st Appellant

LUBANZI CELE2nd Appellant

NOKWE SHEZI3rd Appellant

and

THE STATERespondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The appellants, who were respectively accused 1, 2 & 3 in the Court a quo were convicted by the trial judge (Hurt J and two assessors) of:

(a) Conspiracy to commit robbery in contravention of s18 (2) (a) of the Riotous Assemblies Act No 17 of 1956 (Count 1);

(b) Murder (Count 2);

- (c) Unlawful possession of a firearm in contravention of s2 read with ss 1 and 39 of the Arms and Ammunition Act 75 of 1969 ('the Act') (Count 3);
- (d) Unlawful possession of ammunition in contravention of s 36 read with ss 1 and 39 of the Act (Count 4).
- [2] The counts were all taken as one for the purposes of sentence. The first and third appellants were sentenced to 20 years' imprisonment each. The second appellant was sentenced to 15 years' imprisonment.
- [3] Leave to appeal was granted by Van Zyl J to the second appellant in respect of his conviction in counts 3 and 4 and to all three appellants in respect of the sentences imposed. By letter dated the 5 December 2011 the first appellant indicated that he no longer wishes to proceed with his appeal and that he withdraws the appeal.
- [4] The evidence established that the appellants, one Mbhele and Thembelani conspired to rob the deceased, Hilda Chiya of money. The first appellant had a firearm in his possession. The second appellant and initially also the third appellant were not armed at all. The rest were all armed with knives. These weapons were to be used to inspire fear in the deceased. The plan was not to kill anybody but only to rob the complaint. The first and third appellants would enter the home of the deceased and steal her money whilst the second appellant, Thembelani and Mbhele would stand guard outside.
- [5] En route, the first appellant produced a firearm and fired one shot into the air. The third appellant then asked for the firearm,
- which the first appellant then handed to him. Having taken possession of the firearm, the third appellant pointed the firearm at the second appellant. When asked what he was doing the third appellant said to the second appellant that 'you are a coward, you are scared of an object that does not have ammunition.' The third appellant retained possession of the firearm as they proceeded to the deceased's home.
- [6] Having arrived at the deceased's home the first appellant knocked at the door. The second appellant, Mbhele and Thembelani stood guard. The deceased appeared inside the building armed with a spear and 'made some noise'. As she appeared at the window, the third appellant shot her with this firearm. The second appellant was shocked. He and the others, but excluding the third appellant, ran away. More shots were fired as they ran. The third appellant later joined them some distance from the scene. He still had the firearm which he was carrying in his hand. The first appellant then asked him for the firearm which the third appellant handed to him. The first appellant then told the third appellant to go back to the scene of the shooting and fetch the cartridges which would have been left there. The third appellant refused to do so. When asked about the shots that he fired at the deceased, the third appellant responded that 'if I shot someone, it is none of your business, it is my business.'

[7] In his defence, the second appellant claimed to have tagged along with a group of men not knowing what their intentions were. He was later allegedly compelled to join them to rob the deceased. However, he elected not to testify.

[8] The requirements for a conviction of unlawful possession of a firearm and ammunition where the accused did not have actual possession thereof were stated in *S v Nkosi*¹ where the court said:

‘the issues which arise in deciding whether the group (and hence the appellant) possessed the guns must be decided with reference to the answer to the question whether the State has established facts from which it can properly be inferred by a court that:

- (a) the group had the intention (animus) to exercise possession of the guns through the actual detentor and
- (b) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns.’

[9] In *S v Mbuli*² the Supreme Court of Appeal approved the aforesaid requirements stated in *S v Nkosi* and further commented on the provisions of the Arms and Ammunition Act, which are not dissimilar to those forming the subject matter of counts 3 and 4, as follows:

‘[71] What is prohibited by both those sections is the existence of a state of affairs (i.e. having possession of an armament, or a firearm as the case may be) and a conviction will be competent only if that state of affairs is shown to exist. That state of affairs will exist simultaneously in respect of more than one person if they have common (or joint) possession of the offending article. Their contravention of the relevant section in those circumstances does not arise from an application of the principles applicable to common purpose (which is concerned with liability for joint activity) but rather from an application of ordinary principles relating to joint possession. Common purpose, and joint possession, both require that the parties concerned share a common state of mind but the nature of that state of mind will differ in each case. Perhaps Olivier J A had in mind the principles of joint possession, rather than the doctrine of common purpose, when he said in *S v Khambule* 2001 (1) SACR 501 (SCA) at para

[10] that there is no reason in principle why a common intention to possess firearms jointly could not be established by inference, but I do not agree with the further suggestion that a mere intention on the part of the group to use the weapons for the benefit of all of them will suffice for a conviction.’

[10] In *S v Nkosi*, on facts not dissimilar to that in *casu* relating to the possession of firearms, and in *S v Mbuli* on facts likewise not dissimilar to those in *casu*, save that the possession related to a hand grenade, the court in each instance concluded that it was not the only reasonable inference to be drawn from the evidence that the accused all possessed the offending

firearm jointly. It is equally possible that the firearm was possessed by only one of the accused, in casu, the first and third appellants. Mere knowledge by the second appellant that other assailants were in possession of a firearm and even acquiescence by the him in its use for fulfilling their common purpose to commit robbery, is not sufficient to make the second appellant a joint possessor for the purposes of the Act.

- [11] The present is not an instant such as occurred in *S v Manene*³ where during the course of robberies a large number of articles including firearms and ammunition were stolen by a group acting in concert to deprive the possessors of these items of property. On those facts, the only reasonable inference that could be drawn was that the group had the common intention to possess all of the firearms and the ammunition and to hold it on behalf of the group. See also *S v Mathobela*⁴.
- [12] The learned Judge in the court a quo had concluded that 'we find that all three accused are guilty on counts 3 and 4, it being part of their common purpose to use the pistol and ammunition.' The common purpose to use the pistol and ammunition, was no doubt a finding justified on the evidence supporting the conviction of conspiracy to commit robbery and the murder. However the evidence does not exclude every reasonable inference other than the inference that there was a joint intention to possess the firearm in question.
- [13] Accordingly the appeal by the second appellant in respect of counts 3 and 4 must succeed and the second appellant's conviction on those two counts set aside.
- [14] As regards sentence, the learned trial judge referred to parliament having in 1997 enacted legislation which obliged courts to impose heavy sentences and stated that parliament decreed 'that where a person is murdered in the course of a robbery, the minimum sentence which the courts should impose, should be life imprisonment. It was only in cases where the courts found what are called substantial and compelling circumstances to be present, that the court had a discretion not to impose life imprisonment.'
- [15] Taking into account that the first and third appellants were young men slightly over 18 years of age at the time, and the second appellant 17 years' and a few months but not yet 18, and that he felt that it would be in accordance with justice for him to give them the opportunity of taking their places in the community again, as well as that the second appellant by all accounts played a very minor roll in the offences, the learned trial judge imposed the sentences which he did. Implicit in his reasoning was a finding that substantial and compelling circumstances were present which would justify a deviation from the prescribed minimum sentence of life imprisonment.
- [16] As the legislation, being the Criminal Law Amendment Act No 105 of 1997 imposes 'heavy sentences for this type of offence', its provisions should be read restrictively and in favorem libertatis.
- [17] The evidence does not establish that this was a murder in the course of a robbery with aggravating circumstances.

[18] The relevant provisions in part 1 of Schedule 2 to the Criminal Law Amendment Act No. 105 of 1997 in respect of which a prescribed minimum sentence of life imprisonment would apply, read as follows:

‘Murder, when –

...

...

the death of the victim was caused by the accused in committing or attempting to commit or having committed or attempted to commit one of the following offences:

(i) ...

(ii) robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977);

(d) ...’

[19] This was not a robbery with aggravating circumstances and probably not yet even an attempt to commit a robbery with aggravating

circumstances. Indeed the conviction was correctly one of contravening s 18 (2) (a) of the Riotous Assemblies Act 17 of 1956 (Conspiracy to commit robbery with aggravating circumstances).

[20] The learned trial judge, with respect, erred in seemingly proceeding on the basis that the prescribed minimum sentence was one of life imprisonment.

[21] In the light of this misdirection, this court is accordingly at liberty to consider the issue of appropriate sentences afresh.

[22] The appropriate category within which the murder falls is part 2 of Schedule 2 to the Criminal Law Amendment Act 105 of 1997. In respect of first offenders the prescribed minimum sentence is 15 years' imprisonment.

[23] The learned trial judge correctly concluded that the first and third appellants should be treated on the same basis. Although the third appellant had consumed liquor which might have clouded his judgment, he was the one who pulled the trigger. The first appellant, although not firing the fatal shot, provided the firearm and appeared to have suggested the robbery at the outset. They were both just over 18 years of age at the time. Due consideration is also given to their age and prospects of rehabilitation.

[24] In the case of the second appellant there were the additional mitigating considerations that he was not armed and by all accounts

played a very minor role in the offences.

[25] As against the aforesaid personal considerations, the killing of the deceased, a mature lady, solely in pursuit of personal gain and greed, outweighs the youthfulness of the first and third appellants⁵. I am not persuaded that there are substantial and compelling circumstances present which would justify a deviation from the prescribed minimum sentence of 15 years imprisonment in respect of them. However, in respect of the second appellant consideration must be given to the very minor role played him, his youthfulness and the fact that he might have been under the influence of his co-accused,

as mitigating factors justifying a lesser sentence.

[26] Although the first appellant has withdrawn his appeal, in view of the conclusion we have arrived at in respect of the third

appellant, justice demands that in the exercise of its inherent powers, this court also adjust the sentence in respect of the first

appellant.

[27] As the learned trial judge had done, it seems appropriate that all the counts be taken as one, that is counts 1 to 4 in respect of the first and third appellants, and counts 1 and 2 in respect of the second appellant, for the purposes of sentence.

[28] An order is accordingly granted in the following terms:

1. The appeal by the second appellant against his convictions on counts 3 and 4 is upheld;
2. The second appellant's conviction on counts 3 and 4 is set aside and he is found not guilty of counts 3 and 4;
3. The appeal by the second and third appellants against their sentences is upheld;
4. The sentences of 15 years' and 20 years' respectively in respect of the second and third appellants are set aside and substituted with the following:

In respect of accused 2, counts one and two are taken as one for the purpose of sentence and he is sentenced to 10 years' imprisonment.

In respect of accused 3, his conviction on counts 1 to 4 is taken as one for the purpose of sentence and he is sentenced to 15 years' imprisonment;

5. In the exercise of its powers, this court directs that the sentence of 20 years' imposed in respect of the first appellant be

set aside and substituted with one of 15 years' imprisonment.

KOEN J

MOKGOHLOA J

PLOOS VAN AMSTEL J

1 1998

(1) SACR 284 W at 286h - i

2 2003

(1) SACR 97 (SCA) at p 114h - 115, paras [71] to [73].

32008 JDR 1088 (E)

42007 JDR 786 (T) at para [16].

5S v Matyityi 2011 (1) SACR 40 (SCA),

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