

SOUTH AFRICA / JUDGMENT

Govender v S (221/2022) [2023] ZASCA 60; 2023 (2) SACR 137 (SCA) (3 May 2023)

[2023] ZASCA 60

COURT

Supreme Court of Appeal

BEFORE

Schippers, Carelse, Nhlangulela, Siwendu,
Unterhalter

CASE / FILE NUMBER

221/2022

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 221/2022

In the matter between:

PRENASHAN GOVENDER APPELLANT

and

THE STATE

RESPONDENT

Neutral Citation: Govender v The State (221/2022) [2023] ZASCA 60 (3 May 2023)

Coram: SCHIPPERS and CARELSE JJA, and NHLANGULELA and SIWENDU and UNTERHALTER AJJA

Heard: 24 February 2023

Delivered: 3 May 2023

Summary: Criminal Law – murder – common purpose – conviction on direct and circumstantial evidence – presence at scene, active association and intent proved – failure to testify – conviction upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Mokgoathleng J, Makhoba J and Van der Westhuizen AJ sitting as court of appeal):

The appeal is dismissed.

Siwendu AJA (Schippers and Carelse JJA and Nhlangulela and Unterhalter AJJA concurring):

[1] The appellant was charged in the Gauteng Division of the High Court, Johannesburg (the high court) with two counts of murder and various contraventions of the Firearms Control Act 60 of 2000 (the Act).[1] He was convicted on the murder charges and sentenced to life imprisonment on each count. An appeal against conviction and sentence

to a full court of the high court (the full court) was dismissed. He was granted special leave to appeal to this Court.

[2] The conviction follows the fatal shooting of two persons on 12 August 2018 at a restaurant and club in Kyalami, Johannesburg (the club), at which the appellant, his wife and a group of friends, had attended a function. The appellant and his co-accused, Mr Lloyd Lester Latchman (Accused 1), were convicted mainly on the evidence of Mr Mboni Maswanganye, Ms Kerisha Nair and Mr Tambo Dickson. The appellant was Accused 2 in the proceedings in the trial court.

[3] Mr Maswanganye is an Uber driver who was called to the club by the appellant to take his wife home to Randburg. His evidence, in summary, is as follows. On arrival at the club, he found the appellant and his wife waiting outside. He parked his vehicle close to the building, next to the stairway leading up to the club. It was after midnight and the place where Mr Maswanganye had parked was well lit. The appellant's wife asked him to wait for two other passengers. Mr Maswanganye noticed that the appellant was carrying a firearm underneath his jacket, just below his waist.

[4] While waiting for the two passengers, a man, later identified as 'Bilal', came out of the club with a bloody nose, followed by a man wearing a red bandana. They were part of the appellant's group. The appellant and his wife were outraged at what happened to Bilal. The appellant removed his loaded firearm from its holster and held it in his hand. A scuffle ensued when the man with the red bandana attempted to restrain the appellant from going into the club and told him to go home; whatever had happened was over.

[5] During this scuffle, Accused 1 appeared. The appellant, who still had the firearm in his hand, walked with Accused 1 up the stairs, in the direction of the club. When they were halfway up the stairs, Accused 1 took the firearm from the appellant. Accused 1 did not grab or forcefully take it. Five to seven seconds later, Mr Maswanganye heard gunshots. Shortly after the shots were fired, a man (later identified as the deceased, Mr Theolan Nair) came running from the club. He held his arm on his chest and shouted that he had been shot. He was followed by Accused 1 who, Mr Maswanganye testified, was armed with a silver firearm. Mr Maswanganye was seated in his vehicle. Accused 1 opened the rear door of Mr Maswanganye's vehicle, shouting, 'Where is he? Where is he?', referring to Mr Nair. The

appellant's wife was seated in the back of the vehicle. Accused 1 then left the vehicle and went in the direction that Mr Nair had gone. Mr Maswanganye saw Accused 1 leaving in a white BMW without number plates. The last time he saw the appellant was on the stairs, where Accused 1 had taken the firearm.

[6] Mr Maswanganye, who himself was carrying a firearm, wanted to leave immediately when Accused 1 came to his vehicle, but the appellant's wife restrained him from doing so. She wanted to be assured of the appellant's whereabouts. When she saw the white BMW leaving, she indicated to Mr Maswanganye that he should leave. The appellant did not travel with his wife to his home in Randburg, in Mr Maswanganye's vehicle.

[7] Ms Nair worked at the club and was married to the late Mr Theolan Nair. She testified that there was an argument inside the club between Accused 1 and Mr Nair. Her husband's friend, Mr Yashlin Pillay, was also involved in the argument. A crowd gathered around them and a fight broke out. When Ms Nair decided to approach the crowd, the bouncers had already removed persons involved in the fight from the club, including Accused 1 and Mr Nair. About five to ten minutes later, Accused 1 returned to the club with a gun in his hand and fired a shot at the ceiling. Thereafter he shot Mr Pillay in his chest at point blank range. The patrons ran for cover. Mr Pillay died at the scene. At that point, Mr Nair was hiding behind a pillar in the club, but Accused 1 had seen him. Mr Nair

fled and Accused 1 followed him down the stairs. While she was running behind them, Ms Nair heard a shot. She saw Accused 1 jumping into a white BMW which sped off. It had no number plates. Subsequently, Ms Nair found her husband, who had been shot in the shoulder area. Attempts by paramedics to resuscitate him were unsuccessful. The autopsy report states that Mr Nair died of a penetrating gunshot wound of the thorax.

[8] Mr Dickson was one of the bouncers. He testified that a fight broke out in the club between patrons. Accused 1 and the appellant were part of a group involved in the fight. Mr Dickson said that he spoke to the people involved and had calmed down the situation. He took Accused 1 outside the club and spoke to him, while his fellow bouncers dealt with the other persons who were involved in the fight. However, Accused 1 subsequently returned, after which Mr Dickson heard gunshots coming from inside the club. The patrons, who took cover when the shots were fired, only ran out of the club after Accused 1 and the appellant had left. When Mr Dickson went back into the club, he discovered that someone had been shot.

[9] Accused 1 testified in his own defence. He said that he had met the appellant at the club and that they were together almost the entire night. At some stage the appellant informed him that he was leaving because his wife was ill. The appellant left the club. Shortly afterwards Accused 1 also left, greeted the appellant and his wife at the Uber vehicle and left the club in his own car. Accused 1 testified that he had not seen a firearm on the appellant, and said that the appellant had not been involved in a scuffle with anybody. Accused 1 denied that he had taken a firearm from the appellant, or that he shot anybody at the club.

- [10] The appellant chose not to give evidence in his defence, despite the fact that he had instructed his counsel to put the following version to Mr Maswanganye. A group of people had come down the stairs, 'when the scuffle was taking place between accused 2 and the man in the bandana'. Somebody had dispossessed the appellant of his firearm at the stairs. The appellant 'ran upstairs to try and retrieve and find [the person] who took his firearm'.
- [11] The main issue on appeal is whether the appellant acted in common purpose with Accused 1 in the murder of the deceased. Counsel for the appellant submitted that the trial court's findings on the facts were based on 'conjecture and speculation', and that it had made 'huge quantum leaps in respect of the evidence before it'. As to the decision of the full court, there was no evidence, so it was submitted, 'to suggest that the appellant's actions were in any way linked to that of Accused 1.' He had not 'formed a common purpose with Accused 1'; and the requisites for a conviction based on common purpose had not been met.
- [12] There was no evidence of a prior agreement between Accused 1 and the appellant to murder the deceased. However, a finding that a person acted together with another in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of the participants.[2] The State was therefore required to prove that the appellant had actively associated himself with the execution of the common purpose.

The concept of active association is wider than that of agreement, since it is seldom possible to prove a prior agreement. Consequently,

it is easier to draw an inference that a participant associated himself with the perpetrator.[3]

[13] This court in Mgedezi,[4] outlined the following requirements for active association in common purpose. The accused must have:

- (a) been present at the scene where the violence was committed;
- (b) been aware of the assault on the victim by somebody else;

intended to make common purpose with the person perpetrating the assault;

manifested his sharing of a common purpose by himself performing an act of association with the conduct of the perpetrator; and

- (e) have the requisite mens rea. Dolus eventualis is sufficient: the accused must have foreseen the possibility that the acts of the perpetrator may result in the death of the victim,

and reconciled himself with that eventuality.[5]

[14] The State proved all these requirements in the present case. The appellant removed his firearm from its holster and held it in his hand, with the intention of going into the club to avenge the assault on Bilal. That is why he had to be restrained, why a scuffle ensued and why he did not leave the club. His friend with the red bandana had implored him to leave the scene and the Uber was right there. The appearance of Accused 1 did not deter the appellant from going towards the club to settle a score: he retained the firearm in his hand

and proceeded towards the club. Only when he was halfway up the stairs did Accused 1 take the firearm from the appellant. His counsel rightly conceded that he had voluntarily relinquished possession of the firearm to Accused 1.

[15] The reason why the appellant did not proffer any resistance to the taking of his firearm and why, even then, he did not dissociate himself from the common purpose by leaving the club, is clear: he knew that Accused 1 was going to use the firearm to do precisely what he (the appellant) had intended to do from the outset – to avenge the assault on Bilal. The appellant thus knew, or foresaw the possibility, that Accused 1 was going to use the firearm in the club which could result in the death of a person, but nonetheless reconciled himself with that possibility.[6] The State thus proved the requisite intent on the part of the appellant.

[16] The natural reaction of an unsuspecting person who accompanies another armed with a deadly weapon, is to completely distance himself from the events about to unfold.[7] Instead, the appellant accompanied Accused 1, who was armed with the appellant's firearm. He must have foreseen that Accused 1 would use the firearm, which he did. This was not a case where the common purpose arose spontaneously or on the spur of the moment.[8] Five to seven seconds after he had taken the firearm from the appellant, Accused 1 fired a number of shots, fatally wounding the

two deceased. Thus, both direct and circumstantial evidence point to the presence of the appellant at the scene when these shots were fired. Where else could he have gone with Accused 1?

[17] On these facts, the submissions by the appellant's counsel are unsustainable. There is direct evidence placing the appellant on the scene of the murders: Mr Dickson testified that after the shots had been fired, Accused 1 and the appellant ran out of the club. Of course, Mr Dickson could never have known that they were together in the club on the night in question, unless he had seen them. Mr Dickson described the clothes that both Accused 1 and the appellant were wearing, and said that Accused 1 had a tattoo on his arm. All of this evidence, crucially, went unchallenged. It merely underscores the appellant's acts of association with the conduct of Accused

1. And Mr Dickson was adamant that the patrons came running out of the club, screaming, only after Accused 1 and the appellant had left the scene. That evidence, unsurprisingly, was not contradicted – nobody else had fired gunshots in the club. They were the ones who caused mayhem which resulted in the death of two persons.

[18] What is more, Mr Dickson's evidence is corroborated by the evidence of both Mr Maswanganye and Ms Nair. After the shooting, Mr Maswanganye was restrained from leaving the club because the appellant's wife wanted to ascertain his whereabouts. But when she saw the white BMW leaving the scene, she instructed Mr Maswanganye to leave. The appellant did not travel home to Randburg in the Uber. So how did he leave the scene, if not with Accused 1 in the BMW?

- [19] Ms Nair testified that Accused 1 jumped into a BMW which sped off. Who else, other than the appellant, could have driven the BMW? And both witnesses could not have been mistaken – it was a white BMW with no number plates. So, nothing turns on the fact that Mr Maswanganye initially stated that he saw the appellant getting into the BMW, but later said that the last time he had seen the appellant was on the stairs when Accused 1 had taken firearm from him. The only reasonable inference to be drawn from the proved facts, is that the appellant fled the scene together with Accused 1, in the BMW.
- [20] Then there is the appellant's failure to report the loss of his firearm to the police. This was rightly considered by the full court as but another fact pointing to the appellant's guilt. The evidence makes it clear that his allegation that somebody had dispossessed him of his firearm and that he ran up the stairs in order to retrieve it, can safely be rejected as false. The inference is ineluctable that both Accused 1 and the appellant knew that the firearm had been instrumental in the killing of the deceased; and that they were intent on suppressing that evidence.
- [21] On the totality of the evidence, which comprised mainly direct evidence but also circumstantial evidence, the case against the appellant was damning and called for an answer. Despite this, he chose to remain silent. In this regard, the dictum by Holmes JA in Mthethwa[9] bears repetition:
- ‘Where . . . there is direct prima facie evidence implicating the accused in the commission of the offence, his failure to give evidence, whatever his reason may be for such failure, in general ipso facto tends to strengthen the State case, because there is nothing to gainsay it, and therefore less reason for doubting its credibility or reliability.’
- [22] If he was innocent, the appellant could have met the State's case with ease, particularly in the light of the allegation that he had been dispossessed of his firearm (and therefore it could not have been used by Accused 1 to shoot the deceased). Further, his counsel put it to Mr Maswanganye that a witness would be called if the need arose to testify that the appellant had left the venue for his own safety as soon as the gunshots were fired; and that he did not see the shooting. The witness was never called. The full court was perfectly entitled to conclude that the evidence against the appellant was sufficient to sustain a conviction.[10]
- [23] The appellant was thus rightly convicted on two counts of murder. As this Court stated in Chabalala.[11]

‘The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence . . . To have remained silent in the face of the evidence was damning. He thereby left the prima facie case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt.’

- [24] The appeal against sentence can be dealt with briefly. The appellant was convicted of murder committed in furtherance of a common purpose, which carries a mandatory life sentence.[12] The prescribed minimum sentence is the sentence that should ordinarily be imposed in the absence of weighty justification. A court may not depart from the prescribed sentence lightly and for flimsy reasons.[13]
- [25] As the full court observed, murder is a heinous crime. In this case the killing of the deceased was brazen. Mr Pillay was shot at point-blank range. Immediately thereafter, Mr Nair was followed and shot in circumstances where his wife, who had just witnessed the murder of Mr Pillay, unsuccessfully tried to warn him that Accused 1 was armed. The patrons in the club were terrified and ran for cover. The full court's finding that there were no substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence, cannot be faulted.
- [26] In the result, the appeal is dismissed.

N T Y SIWENDU

ACTING JUDGE OF APPEAL

Appearances

For the appellant: JJCS Meiring Instructed by: BDK Attorneys, Johannesburg Symington & De Kok Attorneys, Bloemfontein For the respondent: E K Moseki Instructed by: The Director of Public Prosecutions, Johannesburg The Director of Public Prosecutions, Bloemfontein

- [1] For present purposes, the appellant's conviction of contravening section 120(10)(a) of the Firearms Control Act – giving possession of a firearm to a person who is not allowed to possess it – is relevant. The appellant was sentenced to six months' imprisonment for this offence.
- [2] C R Snyman Criminal Law (5 ed 2012) at 265.
- [3] Snyman fn 2 at 267.
- [4] S v Mgedezi and Others 1989
- (1) SA 705 (A) at 705 I.
- [5] Snyman fn 2 at 268.
- [6] S v Ngubane 1985 (3) SA 677 (A) at 685 F
- [7] S v Kramer en Andere 1972 (3) SA 331 (A) at 334F.
- [8] Snyman fn 2 at 266; S v Mambo 2006 (2) SACR 563 (SCA) para 17.
- [9] S v Mthethwa 1972

(3) SA at 769D, emphasis in the original.

[10] S v Boesak

[2000] ZACC 25; 2001

(1) SACR 1 (CC) para 24.

[11] S v Chabalala 2003

(1) SACR 142 (SCA) para 21.

[12] Section 51(1) of the Criminal Law Amendment Act 105 of 1997, read with Part 1, item (d) of Schedule 2 thereto.

[13] S v Malgas 2001 (1) SACR 469 (SCA) paras 9 and 25.

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