

SOUTH AFRICA / JUDGMENT

Lehsilo v S (A801/2015) [2017] ZAGPPHC 1084 (12 October 2017)

[2017] ZAGPPHC 1084

COURT

North Gauteng High Court, Pretoria

BEFORE

Khumalo, Holland-Muter

CASE / FILE NUMBER

A801/2015

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IN THE REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION. PRETORIA)

CASE NO:A801/2015

12/10/2017

MOSHIDI LESLEY LESHILO

APPELLANT

and

STATE

RESPONDENT

JUDGMENT

KHUMALOJ

INTRODUCTION

- [1] The Appellant was arraigned and convicted on 11 June 2014 by the Regional Court, Pretoria on charges of housebreaking with intent to commit an offence unknown to the state ("Count 1"), possession of a prohibited firearm ("Count2 ") and of ammunition ("Count 3"). The charges were taken together for the purpose of sentence and a sentence of 15 years imprisonment was imposed. He is with leave of the trial court appealing against both conviction and sentence.

- [2] The Appellant was arraigned with another suspect and were referred to as Accused 1 and 2, respectively. It is very significant to indicate that the 1st charge proffer against them in the indictment was; house breaking with intent to rob, robbery with aggravating circumstances as intended in s 1 of Act 51 of 1977 read with the provisions of Section 262 and s 260 of the Criminal Procedure Act ("the Act"), being alleged that on 28 August 2013 the two unlawfully and intentionally broke open and entered into Jabulani Mahlangu's ("the complainant") residence with intent to rob, unlawfully and intentionally assaulted Mahlangu and with force took to wit, R1799 (One Thousand Seven Hundrend Rand) cash, a property or property in Mahlangu's lawful possession.
- [3] Both the Appellant and Accused 2 were legally represented and pleaded not guilty to all the charges. Exercising their right to remain silent they did not proffer any statements in explanation of plea. Accused 2 was acquitted of all charges.
- [4] A brief background to the matter is that the complainant and his wife Sarah, ran an informal business of a spaza shop from their residence. On the alleged day, in the early hours of the morning around 3 o'clock, two men broken into their residence. One of the intruders was brandishing a gun. The complainant wrangled with him for the gun and managed to wrestle it away. The gunholder however managed to run away. The second intruder, that is the Appellant, was apprehended by the complainant assisted by a neighbour ("Mr Nkosi") allegedly still inside the complainant's residence. After the incident the complainant discovered that the day's takings that were on the table were missing, hence the charge referred to a robbery.
- [5] Appellant denies that he was the intruder or that he was apprehended inside the complainant's residence. He alleges that he was apprehended by a mob whilst walking in the street, coming from a tavern. The mob brought him to the complainant's residence. Identification was therefore in dispute.
- [6] The trial court found the state to have proven beyond reasonable doubt the guilt of the Appellant whilst rejecting his version and hinted alibi as not reasonably possibly true.
- [7] Evidence on behalf of the state was led by the complainant, his wife Sarah, their neighbour Mr Nkosi ("Nkosi"), and the girlfriend of the Appellant's co- Accused. On behalf of the defence both the Appellant and the Accused 2 testified each on their own behalf.
- [8] The complainant's testimony was that at about 3 o clock, in the morning of 28 August 2013, him and his wife were awoken by a sound of a firearm being bridged. He then noticed an intruder brandishing a firearm and asked him what he wanted. The intruder, who had the firearm pointed at him, asked him if he wanted him to shoot him. In that time he noticed a second intruder coming into the room. The complainant swiftly took a blanket and threw it at the first intruder. A struggle ensued between him and the first intruder and a shot went off. He wrestled the firearm away from the first intruder who managed to run away. He then pointed the gun at the second intruder, who is the Appellant ("Accused 1"). Their neighbour, Mr Nkosi, then came to his assistance and the Appellant was apprehended. Lighting in their

room was sufficient, therefore he could recognise the first intruder as one of the customers who bought airtime from his tuckshop, whom he identified as Accused 2. The

firearm was kept in a safe place by his wife until it was handed over to the police. The corrugated iron on the kitchen side was lifted, where the Appellant gained entry and the R 1 700.00 cash, the previous day's takings they left on the table was missing.

[9] According to Sarah, after they were awakened by a sound of a firearm being bridged, a fight ensued between the complainant and the first intruder wrestling for the firearm. In the meanwhile a second intruder who is the Appellant had entered the room. A shot went off whilst the complainant managed to wrestle the firearm away from the first intruder who then ran away. At that time Mr Nkosi, their neighbour arrived at their residence, he opened the gate and assisted Jabulani in apprehending the Appellant. She confirmed that the two intruders gained entrance to their residence by removing/lifting the corrugated iron sheet.

[10] Mr Nkosi's testimony was that he was awoken by a woman's screams and proceeded to his neighbour's residence. When he went through the gate he noticed a man trying to open the burglar door. As he was approaching the residence, Sarah opened the door. Jabulani and the person he saw at the burglar door were grabbing each other. He also testified of a shot that penetrated his shack, exited and struck a pole on the outside of his house and of a spent bullet he found there. He said after he apprehended the Appellant, he handed him to the members of the community whilst he went to fetch his phone in order to call the police. When he came back he found that the community had assaulted the Appellant. The bullet was handed over to the police together with the firearm. He confirmed that the Appellant was the person he found and apprehended inside the complainant's

residence.

[11] The girlfriend of Accused 2 confirmed that the Appellant and Accused 2 stay on the same premises. She maintained that Accused 2 was with her when they went to sleep the previous night and left their abode early in the morning.

[12] Appellant's version was that he was coming back from a tavern at around 03h00 in the morning when two people came running past him. He was thereafter surrounded by members of the community who assaulted him accusing him of robbery. The complainant came to the scene whilst he was being assaulted and pointed a firearm at him. He went back to his residence when he saw the lights of the police vehicle that was approaching them. He denied being inside the complainant's residence. Under cross examination he alleged that Nkosi was one of the people who apprehended him and assaulted him in the street. He said he was

tied to the gate and the complainant came from the house and pointed a firearm at him.

- [13] Accused 2 denied being involved in the incident and alleged to have been with his girlfriend until the next morning. He said he left between 5h00 and 6h00 in the morning. He confirmed that he resided in the same yard with the Appellant and was a customer at the complainant's tuckshop.

GROUNDS OF APPEAL

AD CONVICTION

- [14] The Appellant is appealing his conviction on the ground that the court was misdirected in finding that the state proved his guilt beyond reasonable doubt on the three counts, alleging that:

[14 .1] In respect of the 1st charge on housebreaking, the complainant and his wife testified that the entry to the room was gained by bending and lifting the corrugated iron. He had denied that he was in the complainant's residence, however if the court accepts the evidence of the state witnesses, that he was in the premises, it has not been proven that he was involved in the removal of the corrugated iron. The element of housebreaking was therefore not proven against him. In *S v Memani* 1990 (2) SACR 4 (TkA) it was emphasised that the mere fact that X was present at the scene of crime but had not performed any act through which he associated himself with the commission of the crime was insufficient to hold him liable for the crime in terms of the doctrine of common purpose.

[14.2] In respect of the conviction on housebreaking with intent to commit a crime unknown to the state, the court found him to have acted in consort with the first intruder to enter the house when it is improbable if not impossible for a person to have common purpose with another to commit an offence, if such an offence is unknown. The doctrine of common purpose does not find application.

[14.3] In respect of the 2 charges of possession of a firearm and ammunition, the complainant's evidence was that he did nothing as the complainant was pointing him with a firearm that complainant got from the first intruder. He is said to have just stood there. The firearm was in possession of the first intruder and at no stage in his possession.

- [15] The legislature has made it possible to charge and convict a person of housebreaking with intent to commit an offence unknown to the prosecutor, If it is difficult for the state to ascertain which crime the housebreakers intended to commit, which sets out two possibilities: firstly, the perpetrators may be charged with housebreaking with the intention of contravening some trespass ordinance or statute: see *S v Konyana* 1992 1 SACR 451 (O), Secondly, they may be charged with "housebreaking with intention of committing a crime unknown to the prosecutor" in terms of s 95 (12) of the Act and be convicted in terms of s 262 and 263 of the Act of such a crime.

- [16] The Appellant's contention that it is improbable if not impossible for a person to have common purpose with another to commit an offence, if such an offence is unknown has no merit. Besides, for the Appellant's conviction on the housebreaking with intent to commit an

unknown offence there was no need to prove common purpose. The first intruder and the Appellant got in the complainant's residence by lifting and bending a corrugated iron sheet which was a barrier to the residence. None of the occupants saw them doing it. Their taking part in doing so was inferred from their being inside the residence

without being let in by anybody and the corrugated iron sheet found lifted and bent. The only inference that can be drawn is that the two were each responsible for (the break in) removal of the iron sheet through which they had entered the residence. Therefore Appellant's argument that if there is no main culprit or perpetrator there cannot be an offence is misdirected. This is not a situation of an involvement as an accomplice, Appellant was a co-perpetrator. The element of housebreaking was proven against him. Also this is not an instance of an absence of a main perpetrator. From the evidence of the state witnesses it was established that there was another perpetrator, he just could not be identified.

[17] It was 03h00 in the morning when the complainant and his wife woke up to the presence in their room of the first intruder, later joined by the Appellant. The two do not reside there nor are they related to the occupants. They were not let in, therefore had no reason to be inside the complainant's residence at that early hour of the morning. They together broke into the complainant's residence, at that time of the morning with the other brandishing a firearm. The only reasonable inference that can be drawn from those circumstances is that their intention was to commit a crime. The Appellant was therefore rightly convicted by the trial court of housebreaking with intent to commit a crime unknown to the prosecutor; see *S v Slabb* 2007 (1) SACR 77 (C) at [9] to [11].

[18] The argument that Appellant was only at the scene of the crime but had not been proven to have actively participated in the commission of a crime does not hold water. By entering the complainant's residence through lifting the corrugated iron sheet, following the first intruder, Appellant actively participated in the actions which were geared towards realising their intended criminal activity. He was put out of action when the complainant overpowered and wrestled the firearm away from the first intruder and pointed it at him. It is for that reason that he stood there and could not do anything. His alleged inactiveness afterwards was not voluntarily,

and therefore does not absolve him from liability.

[19] Furthermore all the state witnesses had testified, notwithstanding Appellant's denial, that he was apprehended inside the residence of the complainant. I am satisfied that Appellant was a co-perpetrator with the first intruder, actively participated in breaking into the complainant's home, by gaining entry through lifting or removal of the corrugated iron sheet. Consort being understood as to mean in collaboration. A perpetrator may commit a crime either personally or through the acts of another. see *R v Mlooi* 1925 AD 131; *R v Parry* 1924AD 401.

- [20] In respect of the conviction on possession of a firearm and ammunition, Appellant was there with the first intruder to commit an offence that was unknown to the prosecution. Which was inferred from their illegal entry into the complainant's residence at that time of the morning. The fact that the first intruder held a firearm which he bridged on entering the room, whilst the Appellant followed thereafter, is evidence of a common purpose not only as to the use of the firearm but also on reliance upon such use. Therefore Appellant would be guilty of any an offence committed by the first intruder with the gun.
- [21] However the Appellant is challenging joint possession of the firearm and ammunition upon which he was found guilty on common purpose, as it links him to actual possession. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that he had (a) an intention to exercise possession of the firearm through the first intruder (actual detent or), and (b) the first intruder had an intention to hold the gun on behalf of both of them; see *S v Kwanda* 2013 (1) SACR 137 (SCA). This was not explored by the court a quo which based its conviction on common purpose and the Appellant's knowledge that the first intruder was holding a firearm. I disagree with the proposition that Appellant's conviction on this charge could be based solely on common purpose since the doctrine is irrelevant where an agreement has been proved by means of evidence that is direct or circumstantial or both. It only applied where such a prior agreement could not be proved.
- [22] The correct approach on joint possession of firearms was summed up as follows by Joffe Jin *S v Motsema* 2012 (2) SACR 96 (GSJ) at para [29]:
- "I therefore conclude that, on the basis of *S v Nkosi* and *S v Mbuli*, the law may now be stated as follows:
1. There is no rule of law to the effect that, when an armed robbery is committed by two or more persons with a common purpose to commit the armed robbery, joint possession of the weapons used in the robbery is to be inferred.
 2. Joint possession of the weapons can only be inferred if the facts proved leave no room for any reasonable inference other than that:
 - (a) each participant in the common purpose to rob, who had physical control of a weapon, intended not merely to use it, but also to possess it, both for himself and also on behalf of one or more other participants ; and
 - (b) each alleged joint possessor, who did not himself have physical control of a weapon, intended that one or more of the weapons should not merely be used, but should also be possessed by another participant on his behalf.'

- [23] The fact that Appellant entered the complainant's residence after the first intruder who was holding a gun and had bridged the firearm, indicates Appellant's intention to benefit from the possession and use of the firearm by the first intruder, and the first intruder's intention to possess and use the firearm for the benefit of himself and the Appellant. It is also prove that he had an intention to possess the firearm through the first intruder.

AD SENTENCE

- [24] The Appellant is appealing the period of 15 years imprisonment imposed upon him on the ground that the sentence is shockingly inappropriate and the trial court failed to properly consider the mitigating circumstances relating to his age, the period spent and the mental anguish he suffered whilst awaiting sentence and that he was a first offender. Its argued on his behalf that a suspended sentence should have been imposed.
- [25] It is trite that sentencing is within the trial court's province, and the appeal court is not to interfere with the trial court's discretion unless if it is established that such discretion was not exercised judiciously and therefore not in line with valid and established governing sentencing principles (see 5 v PB 2013 (20 SACR 533· (SCA) at [19] A. The trial court is therefore afforded a wide discretion in its assessment of punishment. In doing so the court must have due regard to the triad consisting of the crime, the offender and the interest of society; see S v Zinn 1969
- (2) SA 537 (A)..
- [26] A court of appeal will therefore reduce a sentence of imprisonment where the trial court has failed to consider the number of years to be imposed in a judicial manner by not enquiring into the proportionality between the offence in question and the period of imprisonment to be imposed, such that the period of imprisonment is not reasonable in relation to the seriousness of the offence; see 5 v Basi (unreported, GNP case no A682/2011, 31 May 2013) at [23]; S v Mzazi 2006 (1) SACR 100 (E).
- [27] The court a quo confirmed having taken into consideration the Zinn triad and therefore taken into account Appellant's youthfulness at the time when he committed the offences. It also opined that if it was not for the fact that the offences he committed were of a heinous nature, it would have considered imposing a suspended sentence. Reference was also made to his unemployment and disability to pay a fine. The court then weighed these factors against the aggravating factors of the prevalence and serious nature of the offences. Declaring its duty to protect society against such crimes by sending a message that will discourage like-minded persons and stop this behaviour, it proceeded to impose a sentence of 15 years imprisonment, even though it had considered a fact that the Appellant was not only a youth but also a first offender who merited an application of mercy in his sentencing.

- [28] During sentencing the period that the Appellant had spent in custody was not mentioned. However at the time of sentence on 16 June 2014 he was 21 years old and Counsel mentioned that he was 20 years old when he committed the crime, which was on 28 August 2013 according to the charge sheet. He had therefore spent only 10 months within which the trial was heard and finalised. The submission made in regard to his long period of time spent awaiting trial, which had caused him anguish has no merit.
- [29] It is an undeniable concern that even the sanctity of a home does not offer or guarantee protection to one's safety. Therefore any conduct that continues to put such safety at risk must be discouraged with the seriousness and urgency the situation calls upon. Violent conduct cannot be tolerated. The fact that the Appellant and his co-perpetrator intruded the complainant's abode, placing lives at risk by welding a firearm which co- incidentally was discharged, aggravates the situation and increase the Appellant's moral blameworthiness. Had it not been for the complainant's bravery, the end result could have been worse. The aggravating features of the case justify a long imprisonment sentence and I do not agree that the factors indicated, that is Appellant's youthfulness and clean record per se, are cumulatively of such mitigating effect to excuse a consideration of a suspended sentence. Imposing a suspended sentence would be making the personal interest of the Appellant to prevail above those of the public instead of finding a balance.
- [30] The sentence imposed was therefore not shockingly inappropriate as alleged, but proportionate to the crime the Appellant has been convicted of; see *S v Director of Public Prosecutions, North Gauteng; Pretoria v Gcwala & Others* 2014 (2) SACR 337 SCA at [16]
- [30 .1] The appeal against conviction and sentence is dismissed.

N V KHUMALO J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

I concur

HOLLAND-MUTER AJ

ACTING JUDGE OF THE HIGH

COURT

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