

SOUTH AFRICA / JUDGMENT

Memani and Another v S (A75/2015)

[2015] ZAWCHC 156 (26 October 2015)

[2015] ZAWCHC 156**COURT**

Western Cape High Court, Cape Town

BEFORE

Gamble, Boqwana

CASE / FILE NUMBER

A75/2015

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IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: A75/2015

DATE: 26 OCTOBER 2015

REPORTABLE

In the matter between:

WANDISILE MEMANI.....1st APPELLANT

MONDE QINA.....2nd APPELLANT

And

THE STATE.....RESPONDENT

JUDGMENT: 26 OCTOBER 2015

GAMBLE, J:

INTRODUCTION

[1] The two appellants appeared before the regional magistrate, Blue Downs on five charges:

1.1 Attempted murder

1.2 Murder

1.3 Attempted murder

1.4 Robbery with aggravating circumstances; and

1.5 Illegal possession of a firearm.

[2] They were duly convicted on all five counts in March 2013 and were each sentenced as follows (no distinction being drawn between either appellant)

2.1 Count 1 (Attempted murder) – 15 years imprisonment

2.2 Count 2 (Murder) – Life imprisonment

2.3 Count 3 (Attempted murder) – 5 years imprisonment

2.4 Count 4 (Robbery with aggravating circumstances) – 15 years imprisonment

2.5 Count 5 (Unlawful possession of a firearm) - 5 years imprisonment.

Pursuant to the provisions of sec 39 of the Correctional Services Act 111 of 1998, all of the other sentences must run concurrently with the life sentences on count 2.

[3] The appellants now seek to appeal against the findings of the trial court. In respect of the 1st appellant his appeal is against sentence only. In respect of the 2nd appellant, his appeal is against both conviction and sentence on all counts. The appeals are brought in terms of sec 309(1) of the Criminal Procedure Act , 51 of 1977 (“the CPA”) as amended in 2013 , which grants the appellants an automatic right of appeal in circumstances where a sentence of life imprisonment is imposed.[1]

THE SHOOTING AT MFULENI

[4] The incident which gave rise to the appellants’ convictions occurred on 17 September 2009 at Mfuleni on the Cape Flats at a supply store called ‘Bafana Cash Store’ belonging to a Somali trader by the name of Mahamud Mahamed Abdi who ran the store with a relative Ahmed Mohamed Dhahir. On the morning in question Mr Abdi went to purchase stock from a wholesaler in Philippi known as “Cash and Carry”. The wholesaler provided a service to its clients in terms whereof stock purchased was delivered in one of its trucks to the trader’s premises. Accordingly at some time between 09h00 and 10h00 Mr Abdi and a driver from “Cash and Carry”, Mzuvukile Lutyu, drove to Mfuleni in a white Nissan Hardbody bakkie (‘the white

Nissan”) belonging to “Cash and Carry”. The goods which had been purchased were carried on the open load box of the white Nissan.

[5] On arrival at the store Mr Dhahir was waiting at the door to help unload the white Nissan. Mr Abdi stood on the back of the vehicle and tossed various items to Mr Dhahir who packed them in the shop. Mr Lutyu joined in and helped. Mr Dhahir testified that all of a sudden shots rang out. He looked up and saw a man standing behind the white Nissan holding a firearm in his hand. He saw shots being fired in the direction of Mr Abdi and the driver, who at that stage was standing in the vicinity of the driver’s door of the bakkie. Shots were fired

in Mr Dhahir's direction too but he was fortunate not to be hit.

- [6] A post-mortem examination later showed that Mr Abdi had been struck by a single bullet on the crown of his head - he had apparently been shot as he was bending down to pick up supplies on the back of the white Nissan. It appears that Mr Abdi collapsed on the back of the bakkie while two men, one of whom was the man who had discharged the firearm, jumped into the vehicle and sped off.
- [7] Mr Lutyu testified that he had been shot twice - once in the chest and once in the head. He was most fortunate to survive the attack with minimal injury, and to be able to give evidence about it. He testified that he was able to summon help from an ambulance on his cell phone and also reported to his employer what had happened. The white Nissan was equipped with a vehicle tracking system and in no time at all the local police were informed thereof. A representative of the tracking company located the GPS position of the vehicle and furnished that to the police. Two police officers on patrol in Mitchell's Plain received information as to the alleged whereabouts of the bakkie and hastened there. Upon their arrival they found the white Nissan parked in the street and saw somebody busy spraying blood off it with a garden hose. The two appellants were found in the immediate vicinity of the vehicle and a handgun was found behind the front seat. The appellants were arrested and taken into custody.
- [8] En route to the Mitchells Plain police station the police were informed by the 2nd appellant where the deceased's body could be found. As a result of that information other members of the police drove to a deserted area close to the False Bay College campus on the outskirts of Khayelitsha where they found the deceased covered with used cardboard boxes.

THE PROCEEDINGS IN THE REGIONAL COURT

- [9] At their trial in the regional court the appellants pleaded not guilty and chose not to disclose the basis for their defences. The State presented the evidence of several witnesses including Messers Dhahir and Lutyu and one Babalo Mhlati. Mhlati, a younger cousin of the 2nd appellant (he wrote his matric examinations at the end of 2009), had been with the 2 appellants on the day in question. When he testified it became clear that he had previously been arrested with the appellants and had been required to depose to a warning statement in regard to the events of the day in question. The witness alleged an assault by the police prior to deposing to that statement.
- [10] Later the prosecution evidently decided not to pursue charges against Mhlati, the thinking being that he might rather be used as a State witness. To this end he deposed to a detailed witness statement a considerable time after the killing. When Mhlati testified it was apparent that he could be considered to have been a potential accomplice of the appellants. Nevertheless, the State did not ask for the witness to be warned in terms of sec 204 of the CPA and his evidence must therefore be considered in light of the fact that he was not given the opportunity to fully unburden himself without being exposed to the possibility of prosecution.

- [11] The State witnesses collectively placed both appellants on the scene of the crime. Mr Dhahir positively identified the 1st appellant as the man who discharged the firearm. Mr Lutyu, while less convincing, also implicated the 1st appellant. Both eye witnesses also confirmed the presence of two assailants, one of whom was the gunman Mhlati implicated both appellants in the attack that took place at the store, while a police officer also found traces of primer residue on the hands of the 1st appellant – a fact which suggested that he had recently handled a firearm which had been discharged.

THE EVIDENCE OF BABALO MHLATI

- [12] Mhlati placed himself and both of the appellants on the scene of the crime in Mfuleni. He described how the firearm involved (a .38 Special revolver) had been procured by a friend (referred to only as 'Mazwe') from somebody in the Strand the day before the attack, after the 2 cousins and Mazwe, had driven there to that end. He told how the 2nd appellant had handed the firearm to the 1st appellant at his home in Delft upon their return from the Strand. Mhlati also told the court how he, the two appellants and Mazwe had been involved in an attempted robbery earlier on the same day as the Mfuleni shooting at a business in Parow where the firearm in question had been discharged by the 1st appellant. From the evidence it appears that the Parow robbery had been unsuccessful and that the victim (the owner of a spare parts business) had returned fire at the robbers. The 1st appellant admitted that he had discharged the firearm during the Parow incident.
- [13] Thereafter, said Mhlati, the gang of would-be robbers, who were travelling in an Isuzu bakkie (and which for convenience I shall call "the robbers' bakkie"), went in search of a fresh target. He said that the 1st appellant mentioned a place in Phillipi where they might find Somali people. They then drove to a shop where they saw a bakkie being loaded by people they believed to be of Somali origin. Mhlati said that the 2nd appellant then handed the 1st appellant some ammunition with which to re-load the revolver that he had on him – the same revolver, it seems, that he (2nd appellant) had procured in the Strand. Evidently, the 1st appellant brazenly told his friends in Philippi that if they did not accompany him he would do the job himself. Apparently he and the 2nd appellant thereafter got out of the robbers' bakkie and approached the alleged Somali persons, but the 2 aspirant robbers were unable to confront them before they drove off.
- [14] Mhlati described how they then tailed the white Nissan in their bakkie which was driven by Mazwe. They turned off the R300 highway at the Hindle Road off-ramp and followed the white Nissan into Mfuleni (which lies to the east of the R300 and to the north of the N2) where it drove up to a shop. The robbers' bakkie was parked some distance away from the shop and while Mazwe and he remained in their vehicle, said Mhlati, the appellants set off down the road towards the white Nissan with the 1st appellant walking ahead. He went on to describe how the 1st appellant opened fire on the scene, and how the white Nissan thereafter sped off with the 2nd appellant as the driver.

THE ISSUES ON APPEAL

[15] In light of the fact that the 1st appellant does not attack his conviction this court can safely assume, as did the trial court, that he was the shooter on the day in question. Although in the trial court the 1st appellant denied shooting at the Mfuleni scene and claimed that the primer residue found on his hands was linked to the Parow shooting,

his version was riddled with lies and improbabilities and little more need be said about his involvement in the Mfuleni incident. I shall revert later to his appeal against sentence but would merely observe at this stage that on appeal the 1st appellant offers no challenge to the facts surrounding the event as found by the trial court.

[16] The 2nd appellant persists in his appeal against conviction on all counts and against all of the sentences imposed. The notice of appeal filed on his behalf by his erstwhile attorney in December 2013 is a long and convoluted document. It does not accord with the rules of court in that it contains long passages of legal doctrine and argument interwoven with narrative about the events in question. It is truly problematic to establish precisely what the grounds of appeal are. Fortunately, Mr du Preez, counsel who now represents the 2nd appellant, was able to make sense of it and address us fully on the merits of the appeal and on sentence.

AN OVERVIEW OF THE EVIDENCE BEFORE THE TRIAL COURT

[17] The regional magistrate gave a detailed judgment and evaluated all of the evidence. He observed that the evidence of Mhlati had to be approached with caution given that he was essentially in the position of an accomplice witness. I agree with that approach, save to say that the witness cannot really be blamed for attempting to downplay his role in the events of that day, given that he had not been offered indemnity from prosecution. There were also discrepancies between Mhlati's evidence, his warning statement and his witness statement which further necessitated the careful assessment of his testimony. Fortunately, however, there is sufficient corroboration of Mhlati's evidence, whether by way of other direct testimony, objectively verifiable facts or consideration of the probabilities. And, as I shall attempt to demonstrate later, the contentious aspect of the 2nd appellant's evidence is of narrow ambit.

[18] That being said, the evidence of the eye witnesses (Messers Dhahir and Lutyu) who were able to observe what was happening albeit in a volatile and moving environment, described the conduct of the two robbers that they observed on the scene in terms which certainly suggest that they were acting in concert. The witnesses described how the robbers took off in the white Nissan and sped off with the hapless deceased and the 1st appellant on the back of the bakkie and the 2nd appellant in the driver's seat. Given the stance adopted by the 1st appellant on appeal there is no debate regarding his presence on the scene nor that he opened fire on the scene. In addition, before the trial court the 2nd appellant admitted that he was on the scene with the 1st appellant and that he drove the white Nissan from there to Mitchells Plain, claiming in his defence that he was an unwilling partner in the murder and

subsequent robbery. This defence is the only issue truly in contention in the 2nd appellant's evidence.

- [19] The 2nd appellant's version, briefly, was that after Mawze had stopped the robbers' bakkie a short distance away from the cash store, he had accompanied the 1st appellant as the latter walked down the road to go and collect a debt allegedly due to him by an unidentified person of Somali extraction. The 2nd appellant said that when they got to the white Nissan the 1st appellant suddenly drew out a firearm and began shooting. He claimed he was caught unawares and when the 1st appellant shouted at him to drive the bakkie away from the scene he complied with this instruction. The 2nd appellant said that as he drove off he saw that the 1st appellant was on the back of the bakkie with the deceased. Somewhere along the way he stopped very briefly so that the latter could climb into the cab with him. After they had dumped the body of the deceased in the veld, the 2nd appellant said that the 1st appellant had ordered him to drive to Delft (which lies approximately to the west of Mfuleni) but that he had ignored him and driven in a southerly direction (towards the sea at Strandfontein) on his way to the home of his friend Sithembiso Nene in Mitchells Plain, where he was almost immediately apprehended by the police.
- [20] Before the trial court the 1st appellant identified Mhlati as the shooter and Mazwe as the person who accompanied Mhlati as they walked down the road at the Mfuleni scene. He said that he and the 2nd appellant had remained seated in the robbers' bakkie when this happened. The 2nd appellant on the other hand identified the 1st appellant as the shooter while Mhlati, as I have said, testified that he and Mazwe waited in the robbers' bakkie while the 2 appellants went off on foot to steal the white Nissan. He claimed to have seen the 1st appellant shooting at the deceased and the 2nd appellant driving the white Nissan away from the scene with the 1st appellant on the back.
- [21] The evidence of the co-perpetrators implicating the 2nd appellant is truly a mishmash of allegation and counter allegation but ultimately the test is whether his purported exculpatory version presented to the trial court can be considered to be reasonably possibly true in the circumstances. In my view the correct way to evaluate that claim is to look at the testimony of the eye witnesses, (Messers Dhahir, Lutyu, and Mhlati) and assess the veracity of the 2nd appellant's version in the light of that evidence, his performance in the witness box and the general probabilities.
- [22] We are bound to respect the credibility findings of the regional magistrate, who was impressed with the eye witnesses as reliable and honest, notwithstanding the fact that the scene was mobile, that they were emotionally charged with fear and that their opportunity for observation was of short duration. The fact that both appellants placed themselves on the scene, albeit at the periphery (in the case of number one) and less involved (in the case of number two) reduces the likelihood of mistaken identification by the eye witnesses. But what is more important about the latter's evidence is the way in which they describe the behaviour of the 2 assailants, suggesting that they were acting in concert.

ASSESSMENT OF THE EVIDENCE OF THE 2ND APPELLANT

[23] The veracity of the 2nd appellant's claim that he did not know that his co-perpetrator was armed as they walked down the road, that he did not know that a robbery was about to take place, and that when it did, he was seemingly coerced by the 1st appellant into driving the white Nissan away from the scene, must be considered in light of the following evidential material –

- The 2nd appellant's admission that he had accompanied Mazwe and Mhlati the day before the killing to the Strand where a .38 Special revolver was acquired from a certain Tshipa ;
- Mhlati's allegation that after the 3 returned from the Strand the firearm was handed to the 1st appellant by Mazwe in his and the 2nd appellant's presence;
- The 2nd appellant's evasiveness in the witness box about the acquisition of the firearm notwithstanding that he was admittedly in
the car and had briefly handled the firearm on the way back from the Strand;
- The common cause fact that the following day all 4 men travelled together in their bakkie to Parow where at least the 1st appellant went into the motor spares business armed with the revolver with the intention of robbing the owner;
- The common cause fact that shots were fired during the Parow incident by the 1st appellant and the owner of the business and that the former returned to the robbers' vehicle with the firearm still in his
possession;
- The evidence by Mhlati regarding the 2nd abortive robbery at the Philippi store and, importantly, his evidence that the 2nd appellant had provided the 1st appellant with ammunition to re-load the firearm, as also the fact that the 1st appellant was willing to 'go it alone' if need be – an indication that he was prepared to use the firearm if necessary;
- Mhlati's allegation that when the white Nissan left the shop in Philippi it was followed by the robbers' vehicle both along the R300 highway and when it turned off in the general direction of Mfuleni ;
- Mhlati's evidence that, whereas he and Mazwe wanted to go in the direction of Delft, the 1st appellant insisted that they follow the white Nissan into Mfuleni;
- Mhlati's evidence that as they turned off the R300 the 1st appellant had the firearm in his hand;
- The common cause evidence that the robbers' bakkie followed the white Nissan through the streets of Mfuleni and that eventually it was stopped a short distance away from the cash store, at all times with the white Nissan in their line of sight;

- Mhlathi's evidence regarding the 1st appellant's utterance as he was alighting from the robbers' vehicle at Mfuleni to the effect that they should approach the white Nissan, and that at the same time the 2nd appellant had said that he was going to drive the white Nissan;
- The common cause fact that when they left Mfuleni the 2nd appellant drove the white Nissan at high speed towards Khayelitsha with the 1st appellant still on the back of the bakkie;
- The common cause fact that the robbers' bakkie was also driven (in convoy as it were) towards Khayelitsha at high speed;
- The 2nd appellant's admission in evidence that he helped dispose of the body in the veld not far from his home in Ilitha Park in Khayelitsha, and that he then drove the white Nissan to his friend's house in Mitchells Plain, in the process ignoring the instruction by the 1st appellant to drive to Delft (which is where he, Mazwe and Mhlathi stayed), and which I have noted, is in a completely different direction to Mitchells Plain;
- The 2nd appellant's initial assertion, during the cross examination by his attorney of Mhlathi, that there was no attempted robbery in Parow that day;
- The fact that during their evidence in this matter both appellants readily admitted that there had been an attempted robbery in Parow earlier in the day, that they had been involved therein and that they subsequently tendered guilty pleas in another court in regard thereto;
- The detailed vehicle log of the white Nissan presented in evidence by the employee of the tracking company, the contents whereof I shall discuss later.

[24] The trial court listed an extensive list of improbabilities in the 2nd appellant's version which it found pointed to his guilt. I generally agree with the regional magistrate's findings in this regard but do not intend traversing them in any detail because many of them are effectively dealt with by the considerations I have referred to above. The trial court went on to find that these improbabilities rendered the 2nd appellant's version not reasonably possibly true in the circumstances. Interestingly, the regional magistrate chose not to discredit the 2nd appellant as such, something which in my view would have been entirely justified given his poor performance in the witness box.

[25] In light of the problems surrounding the credibility and reliability of Mhlathi's evidence, one cannot say conclusively (as the regional magistrate found) that the State's case established that the 2nd appellant was a willing participant in the intentional killing of the Mr Abdhi. But, as will be seen shortly, the focus of the case against the 2nd appellant was not this aspect but rather his involvement in the robbery of the white Nissan. I am of the considered view that the

extent of the participation of the 2nd appellant in the robbery at Mfuleni can be determined on his own version. This has its foundation, firstly, in the cross examination

of Mhlati by the attorney for the 2nd appellant in which it was suggested that the 2nd appellant's version would be that after the shots were discharged by the 1st appellant (clearly the shots fired at the deceased and the eye witnesses), he pointed the firearm at the 2nd appellant and told him to drive the white Nissan. Next, there is Mhlati's agreement with the attorney's suggestion that his client did not know that a shooting was imminent, adding that he too was unaware thereof – the import of the witness'

conclusion being the fact that the 1st appellant made no mention thereof as he alighted from the robbers' bakkie.

[26] Thereafter, in the cross examination of the 1st appellant, the attorney for the 2nd appellant suggested that his client jumped into the bakkie out of fear for his co-accused. The 1st appellant denied this given his defence that he did not at any stage alight from the robbers' bakkie at the cash store. However, in his evidence-in-chief the 2nd appellant did not specifically testify regarding any threat from the 1st appellant, or that he experienced a sense of compulsion to steal the white Nissan when the shots went off –

“Toe u nou sien die persoon[Mr Abdhi]word geskiet wat het u gedink? --- Ek was geskok.

Toe wat doen u? --- Terwyl ek nog so gestaan het en so toe sê hy [the 1st appellant] vir my ek moet die voertuig ry.....

.....En wat het u gedink toe hy vir u sê jy ry die bakkie en hy wys die vuurwapen na u toe. Wat het u gedink? --- Ek kon niks anders doen behalwe om te ry nie dis wat ek gedink het.

Wat het u gedink wat gaan beskuldigde 1 doen as u nie in die bakkie klim nie? --- Ek kan nie vir hom dink nie.

Nee, nee, ek sê nie u moet dink vir hom nie. Wat het u gedink gaan beskuldigde 1 doen as u weier om in die bakkie te klim? --- Ek het niks anders gedink nie. Ek het niks anders gedink nie, want as hy so daai kon gedoen het, het ek geen ander keuse gehad behalwe om te ry nie, want ek kan nie vir hom dink nie. Ek het nie geweet wat in sy gedagte (sic) aangaan nie.” (Emphasis added)

[27] Under cross examination by the 1st appellant's attorney, the 2nd appellant did not deviate from this response –

“Remember in Parow you said according to your version you heard a shot and then you ran away or were you not shocked in Parow? --- In general you will be shocked when you hear some gunshots so I was shocked and I ran.

Which is what you could have done also here in Mfuleni? --- How could I ran (sic) away because I was instructed to drive the bakkie and he [the 1st appellant] was looking at me. “

The cross examination by the State was of limited ambit and did not traverse the 2nd appellant's state of mind, either during the shooting or the subsequent robbery.

THE DEFENCE OF COMPULSION

[28] The passages which have been highlighted above do not in my view establish a factual basis for the alleged defence of compulsion (or ‘necessity’ as it is more properly referred to in our law) in relation to the robbery, which was the defence suggested in the cross examination of the eye witnesses. The leading case in this regard remains Goliath[2] in which Rumpff JA delivered the judgment for the majority , Wessels JA dissenting. The judgment of Rumpff JA contains an extensive study of the common law principles of the defence of necessity in, inter alia, South Africa, England, Scotland, the United States and Continental Europe. It is not necessary for the purposes of this judgment to restate the position in our law other than to say the following.

[29] A defence of necessity can now be raised in a case of murder.[3] Whether a defence of necessity will lead to an acquittal will be dependent on the particular circumstances of the case at hand and a careful consideration of the entire factual matrix which must be examined and adjudicated upon with the utmost care. As the majority decision in Goliath demonstrates[4], a defence of necessity in criminal proceedings involves considerations of reasonableness, morality and ethics.

“By die toepassing van ons strafreg, in die gevalle wanneer die handeling van ‘n beskuldigde volgens objektiewe standaarde beoordeel word, geld die beginsel dat aan die beskuldigde nooit hoër eise gestel word nie as wat redelik is en redelik beteken in hierdie verband dit wat van die gewone deursnee-mens in die besondere omstandighede verwag kan word. Dit word algemeen aanvaar, ook deur die etici, dat vir die gewone mens in die algemeen sy eie lewe belangriker is as die lewe van ‘n ander. Alleen hy wat met ‘n kwaliteit van heroïsme bedeed is, sal doelbewus sy lewe vir ‘n ander offer. Indien die strafreg dus sou bepaal dat dwang nooit as verweer teen ‘n aanklag van moord kan geld nie, sou hy vereis dat ‘n persoon wat ‘n ander onder dwang dood , afgesien van die omstandighede, moes voldoen het aan ‘n hoër vereiste as wat aan die deursnee-mens gestel word. So ‘n uitsondering op die algemene beginsel wat in die strafreg toegepas word, skyn my nie geregverdig te wees nie.”[5]

[30] Hercules[6] concerned a case of murder in the context of an intention on the part of 3 co-perpetrators to commit a robbery. The facts, which relate to an incident that occurred more than 60 years ago, bear a fair resemblance to the case at hand. The appellant and 2 others set out on the night in question to rob. The appellant was in possession of a toy revolver, while one of the others (W) was armed with a proper revolver. The material facts were set out by van den Heever JA as follows -

“In the first abortive attempt to hold up a shopkeeper, in which appellant took no active part, [W] fired and wounded the shopkeeper whereupon the robbers ran away. Thereupon the party essayed another shop, where, upon the proprietor evincing an intention to resist, [W] fired a shot which killed a bystander, [G].

[W]’s defence was that he had no intention to kill as he thought the revolver was loaded with blanks. Appellant maintained that he went on the second and fatal robbing expedition under duress, as [W] threatened to shoot him if he did not accompany him. Appellant moreover stated in evidence that when he and [W] were about to enter the second shop, he saw a person whom he knew and by whom he would be recognised within the building; he was just about to retire in order to avoid recognition when the shot [which killed G] was fired [by W].”

[31] It is important to note that the trial in *Hercules* was before a jury and much of the decision on appeal revolved around the directions given by the trial judge to the jury and possible irregularities in relation thereto. In any event, on the facts before them the jury had convicted W of murder and the appellant of culpable homicide, believing that the evidence showed that W had exercised a certain amount of coercion over the appellant, and that this had impacted on his mens rea to the extent of negating dolus.

[32] Van den Heever JA commenced his analysis of the law by referring to the judgment in *Geere*[7] where at 322 H - 323 B Schreiner JA said the following -

“Where in murder one is dealing not with an actual desire to kill but with an intention that is ‘legal’ or imputed and the common purpose of several persons is in question, the inquiry relates to the intention to do the dangerous act, together with the contemplation of the probable or possible fatal result and the recklessness as to whether it comes to pass or not. To have a sufficient common purpose to murder, the persons need not plan together to bring about the death, any more than the single accused must be shown to have aimed at the death before he can be found guilty of murder. So, in the case of culpable homicide it is enough, to make all responsible for the death, that there was a common purpose to do the unlawful act or acts which caused the death, without the elements of contemplation of the death and recklessness, which would make them guilty of murder.”

I should add that Schreiner JA, with reference to *Duma*[8] and *Shezi*[9], observed in *Geere* that he was not dealing with the effect of the use of a lethal weapon by one of the actors on the mind-set of the others who were not so armed.

[33] In *Hercules*[10] van den Heever JA dealt firstly with the forms of mens rea that were consistent with the evidence in that case.

“It is clear therefore that by putting into execution an unlawful common purpose if an unintended death results a person may commit culpable homicide.

It does not follow, however, as was suggested in argument, that where a common purpose is established the same intent or absence of it must be imputed to all who take part in its execution. Because of the difficulty of proving a person’s mental processes it will often be difficult to differentiate in this regard between the joint wrong-doers. It is a matter of inference, however; but it cannot be based, as the learned Judge [a quo] stated in his summing up, on what the appellant ought to have foreseen, but upon what he must have foreseen. Apart from recklessness whether death, the probability or possibility of which was foreseen, results, that is dolus in law, a person cannot commit murder by negligent conduct.”

[34] Van den Heever JA went on to remark that our Roman Dutch authorities recognise that the criminal intent of each individual participant in an offence based on the principle of common purpose “was not necessarily coextensive with that of his accomplice”. The learned Judge of Appeal highlighted the following passage in Parry[11] where Innes CJ summarised the approach thus –

“The fallacy of that argument lies in the assumption that the guilt of a socius criminis who assists in the commission of a crime is necessarily dependent on the guilt of the actual perpetrator. The true position is that though such a socius is equally guilty, his guilt results from his own act and his own state of mind. It is the existence of criminal intent in each of those who jointly commit a crime which entails upon each a criminal responsibility. Mens rea must exist independently in both - not in the chief actor alone.”

[35] As I have already said, there can be little doubt that the intention on the part of the 1st appellant during this incident was to kill. The regional magistrate found that the murder was premeditated and that the appellants had *dolus directus*. The correctness of this finding in respect of the 1st appellant is not something which falls to be determined in this appeal given that he has not sought to appeal his conviction. However, the enquiry in relation to the 2nd appellant’s guilt is to be determined as follows.

- Firstly, did the State establish beyond reasonable doubt an *actus reus* on the part of the 2nd appellant?

- Secondly, once such *actus reus* is proved, did the State establish what the form of the 2nd appellant’s criminal intention was? More particularly, was it his intention to kill Mr Abdhi or to rob him? And in relation to the former was there *dolus directus* or *eventualis* ?

THE ACTUS REUS

[36] The first enquiry requires the court to consider whether there was unlawful voluntary conduct on the part of the 2nd appellant.[12] The evidence of Mhlathi generally places the 2nd appellant in the company of the 1st appellant at Mfuleni immediately before the shooting, as they alight from the robbers’ bakkie and walk down the road in the general direction of the cash store. There is no suggestion on the part of Mhlathi or the 2nd appellant that the latter was in any way threatened or coerced by the 1st appellant to do so. The 2nd appellant himself testified that he willingly accompanied the 1st appellant as the latter allegedly went to collect money from a Somali person: he was manifestly a voluntary participant at that stage.

[37] The evidence of Mhlathi in fact went further than just placing the 2nd appellant on the scene. He testified in chief that as the 2nd appellant left their vehicle he said that he was going to drive the white Nissan - on Mhlathi’s version there was no talk of going to collect a debt owed to the 1st appellant. If that evidence is to be believed then there can be little doubt that the State had established that the 2nd appellant had formed the intention, at least, to steal the vehicle. There was no direct challenge under cross examination by the 2nd appellant’s legal

representative to this allegation by Mhlati, his version being encompassed in the “debt collection” allegation. I shall revert to a more detailed assessment of Mhlati’s evidence shortly.

[38] The actus reus of the 2nd appellant is evident as he drives the white Nissan away from the scene of the shooting and stops, firstly in the veld to dump the body, and then a short while later in Mitchells Plain where the vehicle is delivered into the safe-keeping of Nene. Was this part of the 2nd appellant’s actus both unlawful and voluntary? Certainly, the intentional removal and subsequent retention of control over the white Nissan occurred

without the consent of Mr Lutyu and was manifestly unlawful.

[39] As to voluntariness, the evidence of Mhlati establishes that the 2 appellants set off down the road together, either to rob the Somali trader either of his recently purchased stock, or Lutyu of the white Nissan, or to commit both offences. Is his evidence

- that the 2nd appellant announced an intention to drive the bakkie away from the scene while the 1st appellant openly brandished the firearm - sufficiently reliable and worthy of credence? I believe that it is, and I say so for a number of reasons.
- Firstly, there is the fact that Mhlati is the cousin of the 2nd appellant and given that it was common cause that there was no family feud or animosity between them, he does not appear to have a reason to falsely implicate the latter;
- Secondly, there is his allegation that the 2nd appellant was a fellow passenger in the car which drove to the Strand the previous day to procure a firearm, a fact confirmed by the 2nd appellant;
- Thirdly, there is Mhlati’s testimony regarding the participation of both appellants as accomplices in the abortive attack on the Parow spares shop earlier that day – participation which was corroborated by the guilty pleas offered in the criminal proceedings arising from that incident;
- Fourthly, Mhlati’s evidence as to the route taken by the white Nissan from Philippi to Mfuleni that morning is corroborated by the vehicle tracking log. This lends credence to his version that the robbers were also in Philippi that morning on a surveillance mission and that they followed the white Nissan to Mfuleni. If the robbers had not driven to Philippi that morning it is difficult to understand how Mhlati would have known of the route taken by the white Nissan from Parow to Mfuleni?
- Finally, Mhlati’s evidence sits more comfortably with the probabilities- that this was a gang of robbers on the prowl that day for a target(s) to rob. As part of the weighing up of the factual matrix associated with those probabilities, it is unlikely that the 2 appellants walked down the road in Mfuleni to collect a debt but rather to steal, by force if necessary.

[40] In conclusion, in considering the voluntariness of the 2nd appellant’s conduct regarding seizure of the white Nissan, I must have regard to his own testimony and the allegations made to suggest compulsion, which I have set out above. I do not believe that the 2nd

appellant put up a case to sustain any claim that he was coerced by the 1st appellant to participate that day. His evidence established no more than that the 1st appellant shouted at him to take control of the vehicle, something quite feasible in the mayhem that follows an attack such as this. Accordingly, I am satisfied that the actus reus of the 2nd appellant as a co-perpetrator in the robbery was conclusively established on the evidence before the court a quo.

MENS REA OF THE 2ND APPELLANT

- [41] What then of the 2nd appellant's mens rea? In the light of my findings above there can be little debate that he had the direct intention to rob the white Nissan and the supplies that were still on it when he and the 1st appellant reached it.
- [42] Mens rea in the form of *dolus eventualis* is a concept which has troubled both academics and practitioners for ages. Recently, in *Humphreys*[13] the Supreme Court of Appeal pronounced on the issue once again in a case involving a notorious incident on the outskirts of the Cape Metropole in which the driver of a school bus ignored the warning signs and booms at an unguarded level crossing and collided with an oncoming train causing the death of 10 of the scholars and injuries to another 4. In the High Court the appellant was convicted of murder.
- [43] On appeal Brand JA delivered the unanimous judgment of the court, finding that the evidence established the appellant's guilt on a charge of culpable homicide and not murder. It is apposite for the purposes of this appeal to refer to the following passages of the judgment:

"[12] Nonetheless.....the fact remains that a voluntary act and dolus are two discrete requirements for a conviction of murder. It follows that the presence of the one does not presuppose the existence of the other. Despite the establishment of voluntary conduct, the question therefore remains: did the court a quo correctly find that the appellant had the requisite intent to cause the death of 10 of his passengers and attempt to take away the life of 4 of the others? In arriving at the conclusion that he did, the court accepted, rightly in my view, that the appellant had desire to bring about the death of his passengers. Consequently it found that the appellant did not have dolus directus or direct intent. What the court did find was that he had intent in the form of dolus eventualis or legal intent. In accordance with trite principles, the test for dolus eventualis is twofold:

- (a) Did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and
- (b) Did he reconcile himself with that possibility (see e.g. *S v De Oliveira* 1993(2) SACR 59 (A) at 65i-j)?

Sometimes the element in (b) is described as 'recklessness' as to whether or not the subjectively foreseen possibility ensues (see e.g. *S v Sigwahla* 1967(4) SA 566 (A) at 570). I shall return to this alternative terminology, which sometimes gives rise to confusion.

- [13] For the first component of *dolus eventualis* it is not enough that the appellant should (objectively) have foreseen the possibility of fatal injuries to his passengers as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form. One should also avoid the flawed process of deductive reasoning that, because the appellant should have foreseen the consequences, it can be concluded that he did. That would conflate the different tests for *dolus* and negligence. On the other hand, like any other fact, subjective foresight can be proved by inference. Moreover, common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logical step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the appellant would not have shared this foresight, derived from common human experience, with other members of the general population.”
- [44] Brand JA then considered the facts before him and came to the conclusion that the trial court had correctly established the element of subjective foresight on the part of the appellant. Turning to the second element of *dolus eventualis* (reconciliation with the foreseen possibility) Brand JA cited the judgment of Jansen JA in *Ngubane*[14] at 685A-H and continued as follows:
- [16] The question is, therefore, whether it had been established that the appellant reconciled himself with the consequences of his conduct which he subjectively foresaw. The court *a quo* held that he did. But I have difficulty with this finding. It seems to me that the court *a quo* had been influenced by the confusion in terminology against which Jansen JA sounded a note of caution in *Ngubane*. That much appears from the way in which the court formulated its finding on this aspect, namely – freely translated from Afrikaans- that the appellant, ‘appreciating the possibility of the consequences nonetheless proceeded with his conduct, reckless as to those consequences’.
- [17] Once the second element of *dolus eventualis* is misunderstood as the equivalent of recklessness in the sense of aggravated negligence, a finding that this element had been established on the facts of this case seems inevitable. By all accounts the appellant was clearly reckless in the extreme. But, as Jansen JA explained, this is not what the second element entails. The true enquiry under this rubric is whether the appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was immaterial to him whether these consequences would flow from his actions. Conversely stated, the principle is that if it can reasonably be inferred that the appellant may have thought that the possible collision he subjectively foresaw would not actually occur, the second element of *dolus eventualis* would not have been established.”
- [45] If this approach is applied to the facts at hand the following emerges:

45.1 The 2nd appellant knew the day before the incident occurred that a firearm had been acquired. Common sense would have informed him that the acquisition of such a weapon was either for purposes of self-defence or for the use in some crime involving force;

45.2 The 2nd appellant knew that the firearm was handed to the 1st appellant on the same day that it was procured;

45.3 The 2nd appellant willingly accompanied, inter alia, the 1st appellant the following morning. Common sense would have informed him that the 1st appellant may have been armed;

45.4 The 2nd appellant willingly participated in the events at the spares shop in Parow, and later acknowledged his involvement in an attempted robbery when arraigned before court;

45.5 The 2nd appellant knew that the 1st appellant had discharged a firearm at the Parow scene. Common sense would have informed him that it was the same firearm that had been fetched in the Strand and, further, that it may be used again by the 1st appellant.

45.6 The 2nd appellant was in the robbers' vehicle when it left Parow and drove to Philippi, and then followed the white Nissan to Mfuleni.

Common sense would have informed him that his fellow passengers (and most certainly the 1st appellant) were looking for a new target to rob.

45.7 The 2nd appellant willingly alighted from the robbers' bakkie with the 1st appellant in Mfuleni, in circumstances where there was no compelling necessity to do so.

45.8 And finally, the 2nd appellant actively associated himself with the furtive intention of the 1st appellant by driving the white Nissan away from the scene, helping dispose of the body and taking active steps to get rid of the vehicle and the incriminating forensic evidence thereon.

[46] The only reasonable conclusion to be drawn from these facts is that the 2nd appellant shared the foresight of the consequences of his conduct, as one would have expected of any member of the general population based on common human experience. That conclusion having been arrived at, as Brand JA put it -

“(t)he true enquiry.....is whether the [1st] appellant took the consequences that he foresaw into the bargain; whether it can be inferred that it was

immaterial to him whether these consequences would flow from his actions.”

[47] In the light of what had happened earlier in the day in Parow, the 2nd appellant could not be heard to say that the shooting in Mfuleni came as a surprise to him. He willingly accompanied a man who he knew was armed, who had earlier discharged that firearm in the course of an abortive robbery and who was obviously intent on committing another robbery. He took the potential consequences into the equation and ran the risk inherent in the “bargain”. Self-evidently it did not matter to the 2nd appellant whether it became necessary to shoot at the robbery victim or not. In such circumstances our law will hold that the 2nd appellant had a common purpose with the 1st appellant to rob Mr Abdhi and is

further guilty of the murder of the deceased with mens rea in the form of dolus eventualis.

- [48] As far as the counts of attempted murder are concerned it is apparent that when the 2nd appellant elected to run the risk of death ensuing in the event of the firearm being discharged by the 1st appellant, common sense would have told him that more than one shot may have had to be discharged and that others may be hurt in the course of the multiple discharge of rounds from the firearm. He therefore also had the requisite intention for attempted murder on the basis of dolus eventualis. Finally, as far as the alleged contraventions of the Firearms Control Act are concerned, I am satisfied that the evidence establishes that inherent in the common purpose to rob was the necessity for someone in the group to possess a firearm and sufficient ammunition to successfully complete the job.
- [49] In the circumstances the 2nd appellant was correctly convicted on all charges save that the mens rea in respect of the murder and attempted murder charges was in the form of dolus eventualis rather than premeditated and with dolus directus as the trial court held.

SENTENCE

- [50] Turning to sentence, the trial court found that no substantial and compelling circumstances as contemplated in Sec 51 of the Criminal Law Amendment Act, 105 of 1997, were established in respect of either of the appellants in regard to the murder charge. As far as the 1st appellant is concerned, I agree. His conduct was indeed callous and premeditated and he demonstrated no remorse for such a brutal attack on a man lawfully going about his daily business. Further, one has to bear in mind that this incident took place in 2009 not long after the tragic incidents of xenophobia which occurred throughout South Africa in the preceding year or so. The alleged exchanges which took place between the robbers prior to their arrival in Philippi, and immediately thereafter, suggest that they regarded Somali traders as “soft” targets who were vulnerable to attack by thugs like the appellants and their cohorts that day. In regard to the 1st appellant, life imprisonment is, in my view, the only appropriate sentence on the count of murder.
- [51] However, I am persuaded that there are substantial and compelling circumstances for not imposing the ultimate sentence on the 2nd appellant on count 2. In saying so I have regard to the following factors.
- [51.1] His relative youthfulness at the time of the incident, coupled with the probability that while not coerced he was influenced by the 1st appellant (who was older than him) to do what he did;
- [51.2] his mens rea which has been found to be in the form of dolus eventualis;
- [51.3] he immediately told the police where the body of the victim was to be found, thereby enabling the crime to be speedily investigated and, importantly, so that the deceased's next-of-kin could bury him properly;
- [51.4] the 2nd appellant did not brandish the firearm on the day in question;

[51.5] he spent three and a half years in custody awaiting the completion of the trial.

In my view an appropriate sentence for the 2nd appellant on the murder count would be 22 years imprisonment.

[52] Turning to the sentences on the remaining counts I am unable to find that the trial court misdirected itself in anyway. The judgement on sentence is detailed and well considered and I can see no basis for interference or for drawing any distinction between the two appellants' respective sentences on counts one, three, four and five. However in respect of the second appellant I have regard to the cumulative effect of the various sentences on a man of relative youth and as an educated youngster, one who may have the potential to assess the wrongness of his ways and leave prison a reformed person. In order to temper the cumulative effect of the sentences then it seems to me appropriate to order that the sentences on counts one, three, four and five should run concurrently with the sentence on count two.

ORDER OF THE COURT

[53] In the circumstances the following order is made:

AD THE FIRST APPELLANT

The appeal against the sentences is dismissed.

AD THE SECOND APPELLANT

A. The appeal against the convictions is dismissed and the convictions of the regional magistrate, Blue Downs, are confirmed.

B. The appeal against the sentences is successful in respect of count 2 only and the sentence of life imprisonment imposed by the regional magistrate on that count is set aside and replaced with the following–

“ 22 jaar gevangenisstraf ”

C. The sentence imposed by the regional magistrate is further varied by the addition of the following at the conclusion thereof –

“ Die vonnisse op beskuldigde 2 opgelê op klagtes 1, 3, 4 en 5 sal, ingevolge art 280 van die Strafproseswet, 51 van 1977, saam loop met die vonnis van 22 jaar op klagte 2.”

D. The appeal of the second appellant against the sentences is otherwise dismissed.

E. The sentence of 22 years imprisonment is ante-dated to 15 March 2013.

GAMBLE, J

I agree.

BOQWANA, J

- [1] Initially a petition to this court for leave to appeal prior to the 2013 amendment to the CPA (which operated retrospectively to 2010) was refused. In light of the fact that it was common cause that the appellants now enjoyed the right to appeal under the amended section, it is not necessary to deal with this issue further.
- [2] S v Goliath 1972(3) SA 1 (A)
- [3] Prior to Goliath necessity was not available as a complete defence on a charge of murder. See, in particular, R v Werner 1947 (2) SA 828 (AD) at 837 and the other cases cited by Rumpff JA at 8 D et seq.
- [4] 25 A-E
- [5] “In the application of our criminal law, in those instances where the actus of an accused person is to be judged according to objective standards, the applicable principle is that no accused person is to be subjected to such higher demands as may be reasonable, and reasonable in this regard means that which can be expected of the ordinary citizen due regard being had to the circumstances at hand. It is generally accepted, by ethicists too, that the ordinary citizen’s own life is more important than that of another. It is only those who are possessed of the quality of true heroism who will give up their lives for another. In the event that the criminal law would thus stipulate that necessity is never available as a defence on a charge of murder, it would postulate that a person who kills another in circumstances of necessity, regardless of the circumstances, is subjected to more onerous considerations than the ordinary citizen. Such an exception to the general rule applicable in our criminal law does not seem to me to be reasonable” (Own free translation)
- [6] R v Hercules 1954(3) SA 826 (AD)
- [7] R v Geere and others 1954 (3) SA 319 (AD)
- [8] R v Duma and Another 1945 AD 410
- [9] R v Shezi and Others 1948 (2) SA 119 (AD)
- [10] 830H – 831B
- [11] R v Parry 1924 AD 401 at 406
- [12] JM Burchell South African Criminal Law and Procedure Vol 1 (3rd Ed) at 33 et seq.
- [13] S v Humphreys 2013(2) SACR 1 (SCA)

[14] S v Ngubane 1985(3) SA 677 (A)

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