

SOUTH AFRICA / JUDGMENT

Moses and Another v S (CA&R01/2018) [2019] ZAECHGC 72 (9 July 2019)

[2019] ZAECHGC 72

COURT

Eastern Cape High Court, Grahamstown

BEFORE

R E Griffiths, Hartle

CASE / FILE NUMBER

CA&R01/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN

CAPE DIVISION

:GRAHAMSTOWN

CASE NO.

CA & R 01/2018

In

the matter between:

JACQUES

MOSES

1st Appellant

JERMAINE

DE SOUZA

2nd Appellant

and

THE

STATE

Respondent

APPEAL

JUDGMENT

GRIFFITHS, J

- [1] The two appellants in this matter were convicted and sentenced in the Regional Court, Port Elizabeth. The first appellant was convicted of attempted murder (for which he received 15 years imprisonment), unlawful possession of a firearm (for which he received 8 years imprisonment), unlawful possession of ammunition (for which he received 18 months imprisonment) and possession of dagga (for which he received 2 months imprisonment wholly suspended). The court ordered that 10 years of the sentence in respect of count one and four years of the sentence in respect of count two were to be served concurrently with a sentence that the appellant was then serving. The second appellant was convicted of attempted murder for which he received 10 years imprisonment. Leave to appeal was refused by the Regional Magistrate but was granted by this court as against both conviction and sentence for the first appellant and as against conviction only for the second appellant.
- [2] Before the trial court the appellants were accused one and accused three respectively. They were charged together with a third person, one Shelton Armoed, as accused two. I shall in the balance of this judgment and for the purposes of convenience refer to Shelton Armoed as “accused two”.
- [3] The second appellant was initially also charged with counts two and three, being offences relating to the possession of firearms and ammunition. He was however discharged at the end of the state case on both these counts and thus for the remainder of the trial only faced one count, that of attempted murder.
- [4] Before the court it was common cause that during the evening of 13 August 2011 one Wendell Peterson (the complainant in count one) and others (who included Eugene Cornelius, Nathan Harrison and Clayton Francis) were enjoying a get together on the verge of a street in Hellenvale, Port Elizabeth. Wendell had been in possession of a licensed firearm. During the late evening a white Toyota Tazz stopped in front of them. The front and back passenger windows were wound down and shots were fired therefrom in Wendell’s direction. Wendell drew his firearm and retaliated. During the course of this firefight Wendell was struck in both wrists. The other members of the party either dived for cover behind another vehicle or ran for the house. It seems also to have been common cause that the intended victim was indeed the complainant, Wendell. It was further common cause that there had been a streetlight in the vicinity which had cast a certain amount of light on the scene. Although it appeared to have been accepted that there was also what is referred to as a “scatter light” in the vicinity, there was some dispute as to its distance from the scene and the amount of additional light it provided.

- [5] After the Tazz had driven off, Wendell was transported to a nearby hospital by Eugene Cornelius. In the parking lot of the very same hospital the first appellant was also found driving a Jetta. In the backseat of that Jetta was accused two who had also suffered a gunshot wound. Near accused two, on the floor of the Jetta, the police found a firearm. They also found spent cartridges.
- [6] It was furthermore common cause, or not disputed, that the very same Toyota Tazz that had been used in the drive-by shooting, was later found abandoned nearby. On the backseat of that vehicle certain blood stains were found. It was forensically established that this blood belonged to accused two. A cartridge was also found in that vehicle

which was linked with the firearm which had been found on the floor in the Jetta. The first appellant and accused two were found to have primer residue on their hands.

- [7] Before the court a quo the overriding issue on counts one to three was as to the presence and identification of both appellants in the Tazz. In this regard, the state led the evidence of two witnesses who had been present at the scene and who identified both appellants as having been in the Jetta. Both Nathan and Clayton testified that they had observed the first appellant in the front passenger seat whilst they had observed the second appellant behind the steering wheel of the Tazz. The first appellant had been in possession of a firearm which he had used to shoot at Wendell. The second appellant had not been involved in the shooting. Accused two had also been observed by them in the vehicle sitting on the left the backseat. He had also been in possession of a firearm, and had likewise shot at Wendell.
- [8] As against this evidence, both appellants denied their presence. The first appellant maintained that he had been in the vicinity at the time but had been at the house of a friend. At some stage he had heard screaming emanating from the road and had gone to investigate. He had found accused two lying partially in and partially out of the Jetta and had noted that accused two had suffered a gunshot wound. Despite the fact that there had been a number of people around the

Jetta at the time, he had immediately reacted by manhandling accused two back into the vehicle and by driving him to the hospital. On the way he had driven through a red robot and had been chased by the police. The police had stopped him at the hospital and he had been searched but nothing was found. In this regard, the police witnesses led by the state maintained that they had indeed searched him and had found both a firearm and a plastic packet containing dagga on him. Accused three simply denied that he had been present at the scene and that had he had been the driver of the Tazz. He admitted that he did indeed own a white Toyota Tazz but denied that the Tazz involved in the shooting and his were one and the same, pointing to the fact that his Tazz had what he referred to as “mag wheels” whereas the other had had ordinary wheels.

[9] The magistrate, in a full and well-reasoned judgment, concluded that the identifying witnesses were, in the circumstances, both honest and reliable. In doing so, he approached the evidence of Clayton with a degree of caution as Clayton had admitted to being a member of a gang and this incident had an undercurrent of gang warfare. Despite his

cautious approach in this regard, he regarded Nathan as being a good witness and found that his evidence was corroborated by that of Clayton, despite the presence of certain contradictions. I shall return to this later. He also found that the identificatory evidence was supported by the fact that accused two's defence (as put to the state witnesses before the demise of accused two) was to the effect that accused two had indeed been present in the Tazz but that he had not been in possession of a firearm. It was further put to the state witnesses that one Lucien Farkers, had also been present in the Jetta and had produced a firearm. He, accused two, had attempted to prevent Farkers from shooting at Wendell. The magistrate regarded accused two's presence as being an objective fact which underscored the reliability of the identification of the appellants by Nathan and Clayton as they both correctly identified accused two as having been in the Tazz.

[10] This being a court of appeal, it is once again apposite to bear in mind the proper approach that such a court should take in its assessment and evaluation of an appeal. In this regard:

"The fundamental rule to be applied by a court of appeal is that, while the appellant is entitled to a rehearing, because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity, or unless an examination of the record of evidence reveals that those findings are patently wrong. The trial court's findings of fact and credibility are presumed to be correct, because the trial court, and not the court of appeal, has had the advantage of seeing and hearing the witnesses, and is in the best position to determine where the truth lies. See the well known cases of R v Dhlumayo and Another 1948(2) SA 677 (A) at 705 and the passages which follow; S v Hadebe and others 1997 (2) SACR 641 (SCA) at 645; and S v Francis 1991 (1) SACR 198 (A) at 204c-f."[1]

[11] An appeal court should not, however, regard itself as being hamstrung by the rules set out in Dhlumayo's and subsequent cases, but should recognize a degree of flexibility depending on the type and nature of the evidence under review. In this regard:

"The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys, which the appellate court does not. These advantages flow from observing and hearing witnesses, as opposed to reading 'the cold printed word'. The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to 'tie the hands of appellate courts'. It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts, and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it."[2]

- [12] Before us, the main thrust of the arguments on behalf of the appellants was twofold. Firstly, it was contended that the magistrate committed, in effect, a misdirection by taking into account as common cause the presence of accused two in the vehicle and using this to reinforce the reliability of the identificatory witnesses. Secondly, it was contended that the nature and extent of the contradictions between the evidence of Clayton and that of Nathan were such that the magistrate was simply wrong in accepting their identification of the appellants in the face of the denial by the appellants that they had been present in the Tazz.
- [13] As regards the first issue, it is quite correct that the magistrate's reasoning in concluding that he could take into account accused two's presence in the vehicle was wrong. This was indeed conceded by the state. He came to this conclusion on the basis that it had been put to the state witnesses on behalf of accused two that he had indeed been present. Accused two had, however, not lived to testify under oath as to this fact. Accordingly, it remains simply an admission

against accused two's own interest which admission was not admissible as against his co-accused, the appellants. To this extent, therefore, the magistrate was incorrect.

- [14] However, in my view to say that this was a misdirection becomes illusory when one considers the full facts of the matter. As foreshadowed above, accused two's blood was found on the backseat of the very Tazz that had been involved in the drive-by shooting. It was common cause that accused two was indeed shot and that he had bled. These facts were not only testified to by the state witnesses, but also by the first appellant who said that he had rushed accused two to hospital. In addition, a firearm which was found on the floor of the Jetta very close to where accused two had been sitting, or lying, was connected to a cartridge found inside the Tazz. This evidence points ineluctably and independently to the very same fact upon which the magistrate relied, namely, the presence of accused two in the Tazz at the time of the drive-by shooting. In my view therefore whilst the route by which the magistrate came to this conclusion might have been defective, the conclusion itself was nonetheless unassailable. It was the conclusion upon which the magistrate relied as corroboration for the reliability of the identification of the appellants, not the reasoning. It is clear, therefore, that this point has no merit.
- [15] The second point relates to certain contradictions which emerged between the evidence of Nathan and Clayton. In particular, Nathan testified that Lucien Fakers had been present in the right hand backseat of the Tazz. It was submitted that Clayton had testified that Lucien had not been in the vehicle at all. This, it was further submitted, was a material contradiction which vitiated the reliability of the identification of the appellants. I do not however agree. On a proper reading of the evidence of the Clayton, including his evidence in chief, the questioning by the magistrate and his cross examination, it becomes clear that his evidence was to the effect that there may have been a fourth person in the vehicle but that he had not seen him. In chief his evidence was:

“U het reeds gese wie u hierdie aand in die kar gesien het. Reg? Nou wil ek vir u vra is dit moontlik dat daar n’ vierde person was of nie? --- Ek het nie gesien dat daar vier persone was nie my edele maar dit kan moontlik (wees).

HOF: U se dis moontlik maar u het dit nie gesien nie --- Ek het nie gesien nie.”

[16] Under cross examination the following interchange occurred between Clayton and the appellants’ representative:

“Nou verduidelik vir my hoe het jy hom misgekyk --- Want hy was nie daar nie my Edele.”

[17] The magistrate however cleared this up a short while later:

“Nee, nee u moet nou vir ons se. Jy het gepraat van drie persone. Jy het gepraat van Lucien Felkers was nie daar nie. Wat is jou getuienis? --- Edele ek het gese (onduidelik) kan nie spesiefik se dat Lucian Felkers daar was want ek het nie hom gesien nie my Edele.”

[18] It seems clear that the tenor of his evidence was to the effect that he could not say that there was not a fourth person in the vehicle, but that in the fluid circumstances prevailing, he had not seen such person.

[19] In any event, in my view the probabilities also favour this. It was accepted, and there has certainly been no suggestion otherwise, that these witnesses not only knew the appellants, accused two and Lucien Falkers, but that they had had no previous dispute or misunderstanding with any of this group such as to cause either of them to falsely claim the presence of any of them in the car. Indeed, in my view, this discrepancy (as reasoned by the magistrate) is a further reason as to why their evidence should be accepted. It is, of itself, a strong piece of evidence which establishes that there could not have been collusion between Nathan and Clayton to implicate the appellants. Had there been, they would undoubtedly have ensured that their evidence dovetailed in this regard. It was also put to the state witnesses that Lucien Falkers had accompanied the first appellant and accused two to the hospital. This also tends to support the fact that Lucien Falkers had been involved.

[20] There were a number of other minor contradictions between the evidence of Clayton and Nathan, such as whether the left side windows of the Tazz were wound down fully, or only half way. This, and other, minor discrepancies in their evidence were clearly borne of the fact that this was a volatile situation during the course of which there were a number of gunshots from either side. It is clear that these witnesses did not expect this attack and were compelled to seek cover as quickly as possible. They were able to clearly see the faces of the first appellant and accused two who were on the left side of the vehicle, with the windows down, and facing towards them a few metres away. The second appellant was behind the steering wheel and was also

reasonably visible. These three persons were well known to them and their focus was on them. The fact that, given these facts, there might have been certain discrepancies as those argued before us, is not only understandable, but to some extent establishes both the truthfulness and reliability of these witnesses.

- [21] In addition to the identificatory evidence of these two witnesses, there are a number of other aspects of the evidence which tend to corroborate their presence in the Tazz. As indicated, the first appellant was found a short while later in the parking area of the hospital together with the wounded accused two. He was found in possession of a firearm and a further firearm plus cartridge cases were found in that vehicle. He also had primer residue on his hands.
- [22] It has been argued that the evidence of the first appellant's witnesses, namely Roshane Williams and Gwyneth Jordaan, established that the first appellant could not have been present. Williams, in particular, maintained that he had been in the main house of the property to which the first appellant had gone that evening to see his friend who lived in a shack behind the house. He had seen him enter early that evening and he had only left after the time of the shooting incident. The magistrate reasoned that because Williams had no particular reason for observing the first appellant during this full time period, it may well have been so that the first appellant had left and returned during the course of this time. The incident occurred in the nearby vicinity and this evidence did not, therefore, provide an alibi. In my view, this reasoning is unassailable in particular because of the strength of the state case. Additionally, Williams was testifying as to an isolated event some five years before.
- [23] As regards the second appellant, it should not be forgotten that Eugene Cornelius testified that he had seen the second appellant driving past in a different Tazz a short while before the drive-by shooting had occurred. The second appellant, somewhat reluctantly, did concede that he may have driven in that area during the course of that evening. In my view this also tends to support the state's argument that he was indeed involved in the sense that he had been on a fact-finding mission to establish whether or not Wendell was present in this group before action was taken.
- [24] In all the circumstances, I am not persuaded that the trial court was wrong in its conclusion that the state established beyond a reasonable doubt that both the appellants had been present in the vehicle during the drive-by shooting. On that evidence, it is clear that the first appellant was directly involved in the actual shooting and there can be no doubt that he had the intent to kill Wendell. As regards the second appellant, once again the magistrate's reasoning is unassailable in concluding that the second appellant had made common cause with the first appellant and accused two in their attempt to kill Wendell. Not only had he reconnoitred the scene earlier that evening, but he had driven the very car which had taken them to the scene and which they had used to escape from it. These facts clearly point to his having formed a common purpose in this

regard.

- [25] As regards the question of dagga being found on the first appellant's person, the police witness had no reason to fabricate. De Mar testified that he had had many years' experience with dagga and confirmed that it was indeed such.
- [26] The first appellant received an effective sentence of 24 ½ years of which 14 years was ordered to run concurrently with a 13 year sentence he was then serving. In passing sentence, the magistrate duly took account of the personal circumstances of the first appellant namely that he was 42 years of age, he had a number of children who were dependent upon him and had passed grade 11 at school. He furthermore, quite correctly, did not take into account the fact that this appellant had certain previous convictions which were committed many years before. He pointed to the seriousness of this matter and in particular that it involved a clear intent to murder Wendell Peterson. He furthermore took into account the fact that gang warfare of this nature was highly prevalent in the area. Finally, and to some extent, he also held in mind that the cumulative effect of the sentences resulted in a lengthy sentence which he sought to ameliorate by ordering a portion to run concurrently with the sentence the first appellant was then currently serving.
- [27] It has been argued that notwithstanding this the cumulative effect of the sentences imposed on this appellant is excessively harsh. It has further been submitted that the disparity between this effective sentence and the sentence imposed upon the second appellant, namely 10 years imprisonment, is markedly disparate even taking into account the fact that the second appellant had, to some extent, demonstrated a degree of rehabilitation.
- [28] With these sentiments I agree. In my view, whilst there can be no doubt as to the seriousness of this matter, the cumulative effect of the sentences is harsh and the disparity between that effective sentence and the sentence which this court would have imposed in the same circumstances is sufficient for this court to interfere. In my view, because counts one, two and three namely the attempted murder, possession of a firearm and ammunition, were all committed during the same course of events, it would have been more appropriate for a portion of the sentences imposed on counts two and three to run concurrently with the sentence on count one.
- [29] In the circumstances, I would propose the following order:
1. The appeals by both the first and second appellants against their convictions are dismissed;
 2. The appeal by the first appellant against his sentences on counts one, two and three is upheld to the extent that the order by the magistrate in dealing with the concurrency of sentences on counts one and two with the sentence that the first appellant was then currently serving is set aside and substituted with the following:

“2.1 The sentences on counts two and three are ordered to run concurrently with the sentence on count one;

2.2 It is further ordered that 10 years of the sentence on count one is to run concurrently with the sentence which the first appellant is currently serving”

3. The amended sentence as reflected in paragraph two of this order is to be effective from the date when the second appellant was sentenced, namely 3 November 2017.

R E GRIFFITHS

JUDGE OF THE HIGH COURT

HARTLE, J. : I agree

COUNSEL FOR 1ST APPELLANT : Mr Geldenhuys

INSTRUCTED BY

: The Grahamstown Justice

Centre

COUNSEL FOR 2ND APPELLANT : Mr Dauberman

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INSTRUCTED BY

: Director of Public Prosecutions

HEARD ON : 26 JUNE 2019

DELIVERED ON : 09 JULY 2019

[1] S v Leve 2011 (1) SACR 87 (ECG) at paragraph [8]

[2] Bernert v ABSA 2011 (3) SA 92 (CC) at para 106

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