

SOUTH AFRICA / JUDGMENT

Phillip v S (A306/2019) [2021] ZAGPPHC 727 (26 October 2021)

[2021] ZAGPPHC 727**COURT**

North Gauteng High Court, Pretoria

BEFORE

Barit, V Tlhapi, A Basson

CASE / FILE NUMBER

A306/2019

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION****Appeal****Case Number: A306/2019****In**

the matter between:

P.J.
MADIE
PHILLIP Appellant
and
THE
STATE Respondent**JUDGMENT**

Barit, AJ

Introduction

[1] The appellant in this matter, appearing as accused no. 2 in the trial court, was charged in the High Court of South Africa (Western Circuit Division), Rustenburg with the following:

- i. Murder
- ii. Murder

- iii. Robbery with aggravating circumstances
 - iv. Contravention of section 2 of Act 75 of 1969 (unlawful possession of firearms)
 - v. Contravention of section 36 of Act 75 of 1969 (unlawful possession of ammunition).
- [2] The appellant was legally represented and pleaded not guilty to all the charges. At the conclusion of the trial on 20 March 2003 the appellant was found guilty as charged, with respect to all the charges (as was the first accused). Subsequently, on 17 April 2003 the appellant was sentenced as follows:
- i. Count 1, life imprisonment.
 - ii. Count 2, life imprisonment
 - iii. Count 3, fifteen years' imprisonment
 - iv. Count 4, three years' imprisonment
 - v. Count 5, one year imprisonment
- [3] On 25 April 2003 the trial court refused the appellant's application for leave to appeal.
- [4] The appellant by means of a petition was granted leave to appeal against conviction.

The

facts

- [5] The appellant, together with accused no 1 (W. N. Kilimbashe) and three others, during the evening of 9 September 2000 leading into 10 September 2000, killed during a robbery at the "Central Café" in Koster, Mr Jose Sotero De Canha (the owner of the Café). Olebile Marks Mangope (an off-duty police officer), a patron at the Café, was also killed whilst trying to escape the scene. Also at the Café was Mr Joel De Canha, the son of Jose Cetera De Canha. Ms Rebecca Dikgale and Simon Modise, who were also at the Café, were robbed of a 7.65 mm pistol, an amount of R1000, groceries and CDs.
- [6] The incident occurred when five men entered the Café where they had a meal. One of the five was the appellant. A sixth person was waiting in a getaway car outside the café. During the time the five were in the Café, they shot and killed the owner of the Café (Mr Jose Cetera De Canha), shot and killed a patron (Mr Mangope) and further committed robbery and thefts. The appellant admits he was part of the five and that he was present at the scene of the incident. He, however, claimed that he was not the shooter and denied that had knowledge that his colleagues were there to commit the robbery and that he had any intention of doing so himself.
- [7] The appellant admitted that he left the scene of the incident together with the other parties involved in what occurred in the Café, in a getaway motor vehicle which had been waiting outside the Café.

- [8] The appellant was identified by Mr Joel De Canha, Ms Rebecca Dikgale, and Mr Simon Modise, as the person who shot the deceased in count 1.
- [9] The appellant is now appealing the conviction mainly on mistaken identity as to whether he was in fact the shooter. It was submitted on his behalf that he had “no hand in the commission of the offences”.

Discussion

[10] Three main points must be considered:

- i. Common purpose
- ii. The getaway
- iii. The identification of the appellant

Common purpose

- [11] It is clear from the evidence that the perpetrators acted in concert with a common purpose to overcome any resistance in order to appropriate valuable items. In this regard the Appeal Court in *S v Mgedezi and Others* (1989) 2 All SA 13 (A) held that the applicants in that matter were guilty of murder on the basis that they had acted in a common purpose. The court said that they all “had a common desire” to cause the death of the deceased and each played a role in the furtherance of that common purpose. In this case, the court found that the applicants “had actively associated themselves with the execution of the common purpose” and hence were “guilty of murder on the basis of common purpose”.
- [12] In *S v Jacobs* (2019) ZACC 04 the High Court similarly found the applicants guilty of murder on the basis that they had acted in a common purpose. They had unlawfully and intentionally killed the deceased by assaulting him with a chair, clenched fists and booted feet. It was held that they “all had a common desire to cause the death of the deceased”, and that each played a role in the furtherance of that common purpose.
- [13] In *S v Nkosi* 1998 (1) SACR 284 (W) [paras 8-13 and 14-21] some members of a gang of robbers were found in unlawful possession of arms and ammunition. On the basis of “the common purpose to rob”, this was also attributable to the other members of the gang. The attempted murder of two policemen who pursued the robbers in their escape was also attributable to the rest of the gang because that kind of situation must have been foreseen and accepted by them.
- [14] In *S v Khambule* 2001 (1) SACR 501 (SCA), one of the robbers stole a rifle from a security officer. The Appeal Court held that a weapon in the possession of security guard would have been foreseen to have been seized and the robbers had associated themselves with it. The contention by the defence that the other robbers did not have the common purpose to take the rifle was rejected by the court.

[15] In the matter before this court, the trial judge, Pako J. in his judgement, stated with respect to both the appellant and accused number one as follows:

“I find that in actual fact the two accused together with four others committed these offences. They were acting in concert when committing these offences and they were acting in furtherance of a common purpose. They killed the two deceased in furtherance of that common purpose of robbing and they were in possession of the firearms as well as ammunition”.

The getaway

[16] The appellant left the Café, with those who committed the crime in their getaway car. The trial judge concluded:

“He (the appellant) says he did not take part at all... but what is surprising is that according to his own evidence, when he went outside, he realised the car in which they were travelling to Koster was no longer there... While still looking for the car, that car stopped next to him... He then ran into the car. What is stranger is that the robbers came out of the Café and they also got into the car. They all drove away in the same car.”

That about sums up the situation. They all fled together from the scene of the crime in the getaway car.

[17] In summation therefore: All the evidence pointed to the six participants in the events that happened at the Café, as having arrived together, acted in concert, and then made their getaway together in the waiting getaway car.

The identity

[18] In the course of the case, before the court a quo, the two accused (i.e. accused number one and the appellant) put their identity in issue. The trial judge made particular reference to the identity factor and appears from the judgement that the trial court has diligently applied his mind to this issue. In the trial court's judgement the following is stated:

“It is trite law that if identity is an issue, the evidence of an identifying witness should be approached with utmost caution and that is exactly what I am going to do. The reason being that an honest witness may make a mistake by pointing out a wrong person. So when evaluating and considering the evidence, I must consider as to whether there is any possibility of these witnesses making any mistake regarding the identity of the people they alleged they saw performing certain acts.”

When the court has to consider this issue, the court will have to take into account certain factors which may affect or influence one's power of observation.

[19] It was common cause that the appellant was at all times present at the scene of the incident. The only issue on appeal, according to the appellant, was whether he took part in the commission of the offences. The appellant is alleging that he was not the shooter. This issue was canvassed during the trial. The witnesses testified that the appellant took part in the shooting and was able to explain in detail the part the appellant played in the incident.

[20] Evidence of identification was dealt with in the matter of S v Mthetwa 1972

(3) SA 766 (A) 768:

“Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest and; the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility and eyesight; the proximity of the witness, the opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused’s face, voice, build, gait and dress; the results of identification parades, if any; and, of course the evidence by or on behalf of the accused. The list is not exhaustive. These factors or such of them as are applicable in a particular case, are not individually decisive but must be weighed once against the other, in the light of the totality of the evidence, and the probabilities...”

See also S v Ngcina 2007 1 SACR 19. (SCA) and S v Franzenburg 2004 1 SACR (E) 188.

[21] It can be seen that various of the factors as mentioned in the Mthetwa case apply to our appeal. These include:

- i. The opportunity for observation in terms of the placing of the order for food,
- ii. The time that they spent in the Café including the fact that they were eating
- iii. The corroborating evidence of the State witnesses
- iv. The nature of the evidence of the witnesses

[22] The identity of the appellant, as the shooter, was further confirmed by the son of the owner of the Café and other witnesses – all of whom were present during the incident. The identity of the appellant as being in the Café was admitted by the appellant. The only point of departure between the appellant’s evidence and that of the other witnesses who were at the Café is the fact that the appellant denies that he was the “shooter”.

[23] With respect to the actions of the appellant during the robbery, witness Rebecca Dikgale, was the best placed to identify the role of the appellant. She testified that it was the appellant who placed the order for the chips, which she then prepared. Her observation of him can therefore not be faulted. Further, the duration of their stay prior to the robbery must also be taken into account. They sat and had their meal before the robbery. Rebecca unequivocally identified the appellant as the one who shot her employer and that he was the one who jumped over the counter and took possession of the firearm belonging to her employer.

[24] The three witnesses, namely the deceased’s son, Simon Modise, as well as Rebecca, identified the appellant as the one who had protruding dreadlocks from the beanie he was wearing. The appellant, maintained that it was a person with the name “Ace” who had the dreadlocks. Dreadlocks or no dreadlocks, the version with respect to this appears to be completely a fabrication, when regard is had to the further evidence of the appellant with respect to the weaving of dreadlocks after his arrest in prison.

[25] If regard is had to the incident, the number of witnesses who observed the same events and the duration of their stay in the Café, it is evident that this was not a hit and run incident, but a well-planned robbery.

[26] In the appellant's heads of argument reference is made to the case of *R v Shekelele and Another* 1953 (1) SA 636 (T) at 638 where Dowling J stated with respect to identification:

"A bald statement that the accused is the person who committed the crime is not enough."

In the appellant's matter before the court, such was not the case.

[27] From the established facts of this case, the appellant was the shooter and no mistaken identity took place. Further, on the strength of the common purpose factors, the accused's appeal must fail.

Summing Up

[28] In *S v Munyai* 1986 (4) SA 712 (V) at 715 G, Holmes JA stated:

"A court must investigate the defence case with a view to discerning whether it is demonstrably false or inherently so improbable as to be rejected as false."

In this appeal before this court, the trial court's judgement did investigate the defence case."

[29] The appellant's appeal in respect of his conviction can therefore only succeed if the trial court's findings were vitiated by material misdirection or if it is shown from the record to be clearly wrong (*R v Dhlumyaio and Another* 1948 (2) South Africa 677 (A) at 698). This was not the case in the appeal before this court. There is therefore no reason to interfere with the conviction imposed by the trial judge.

[30] In the circumstances, I make the following order:

1. The appeal against conviction is dismissed.
2. The conviction and sentence imposed by the trial court are upheld.

L Barit

ACTING JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

I agree:

V Tlhapi

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT

A Basson

JUDGE OF THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA

DATE OF HEARING: 02 August 2021

DATE OF JUDGMENT: 26 October 2021

APPEARANCES:

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Instructed by: Legal

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For the Respondent: Adv J.P. Krause

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