

SOUTH AFRICA / JUDGMENT

S v Mchunu and Others (146/16)

[2017] ZAGPPHC 1313 (28 June 2017)

[2017] ZAGPPHC 1313**COURT**

North Gauteng High Court, Pretoria

BEFORE

BAM

CASE / FILE NUMBER

146/16

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Source record**IN THE HIGH COURT OF SOUTH
AFRICA****GAUTENG LOCAL DIVISION,
JOHANNESBURG****Case Number: 146/16****In**

the matter of:

THE
STATE
vs
MBONGENI
MCHUNU
Accused
1
SPHESIHLE
ZWANE
Accused 2
CEBO
MDLOLO
Accused 3
ZAKHENI
MVELASE
Accused 4
SIYABONGA
KHUMALO
Accused 5
ZAMOKUHLE
NAFTAN DUZE
Accused 6
THEMBA

FELOKWAZI
MCAMBI
Accused 7PATRICK
SENZO
MTSHALI
Accused 8

JUDGMENT

BAM J

Appearances :

For the State:

Adv J Badenhorst.

For accused 1, 2, 3, 5, 6 and 8: Adv L Cindi.

For accused 4:

Adv E Crispy .

For accused 7:

Adv T Mpanza.

1. The accused are charged as follows : Count 1: Accused 1 to 8:

Contravention of Section 18(2)(a) of the Riotous Assemblies Act, 17 of 1956 -- Conspiracy to commit robbery with aggravating circumstances.

Count 2: Accused 1 to 8.

Contravention of Section 120(10)(b) of the Firearms Control Act, 60 of 2000 - Possession of a firearm - by accused 1 to 3 and 5 to 8 - with intent to commit an offence or to use the firearm to resist arrest or prevent the arrest of another person.

(It was controversial whether accused 4 was charged with this offence. It will be discussed below.)

Count 3: Accused 1 to 8. Murder.

Count 4: Accused 1 only.

Contravention of Section 3/alt sect 4 - of the Firearms Control Act, 60 of 2000 - Unlawful possession of a firearm/prohibited firearm - "Dashprod Model SAR M14" semi-automatic rifle ;

Count 5: Accused 1 only.

Contravention of section 90 of the Firearms Control Act - Unlawful possession of ammunition.

Count 6: Accused 2 only.

Contravention of section 4 of the Firearms Control Act - Possession of a prohibited firearm ("AK 47") fully automatic firearm.

Count 7: Accused 2 only.

Contravention of section 90 of the Firearms Control Act - Unlawful Possession of ammunition.

Count 8: Accused 3 only.

Contravention of section 3/ alt section 4 of the Firearms Control Act

In respect of accused 4 the State did not prove that he was in physical possession of any firearm as required in *S v Mbuli* 2003 (1) SACR 97 SCA.

27.7 It follows that all the accused have to be acquitted on count 2.

28. Count 3 - murder

28.1 In respect of count 3 the test is subjective. In this case the required form of mens rea is *dolus eventualis*. In *S v Mgedezi* 1989(1) SA 687 (A), approved in *S v Thebus* 2003(6) SA 505 CC, par 20, the legal limits of *dolus eventualis* are stated as follows: "... he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

In *PRINCIPLES OF CRIMINAL LAW* (Fourth Edition) - Jonathan Burchell, p252, defined *dolus eventualis* as follows:

"*Dolus eventualis* exists where the accused foresees the possibility that the prohibited consequence might occur, in substantially the same manner in which it actually does occur, or the prohibited circumstance might exist and he or she accepts this possibility into the bargain (i.e. is reckless as regards this possibility).

The requirements of *dolus eventualis* in consequence crimes are, therefore: (a) foresight, (b) possibility, (c) correlation between foreseen and actual manner of consequence occurring, and (d) recklessness.

28.2 It is not always an easy task to determine what any accused subjectively foresaw, accordingly subjective foresight can be determined by way of inferential reasoning. See *S v Dougherty* 2003(4) SA 229 (W). I will return to this issue.

28.3 What has to be determined is whether the accused, in planning the armed robbery, subjectively foresaw the likelihood that they would be confronted by the police; that shots would be exchanged between them and the police, that the police would open fire at them, either in self-defence or in order to detain and arrest them; that they would point their firearms, or fire at the police to avoid being arrested, and that somebody, be it a policeman, a member of the gang, or a member of the public, could be shot and killed. See *S v Nkombani and Another* 1963(4) SA 877 (A), and *S v Munonyo and Others* 1990(1) SACR 360 A at 346a.

28.4 The accused, throughout, denied that they conspired and/or intended to commit armed robbery, and that they were armed at all. Accordingly, in view of the fact that they were successfully prevented to execute their plans, there was no direct evidence about what they did foresee. However, as alluded to above, their subjective foresight can be determined by inferential reasoning. See *S v Humphreys* 2013(2) SACR 1 SCA. In this regard the following was said in *5 v Mini* 1963(3) SA 188 (A), 55: "In attempting to decide by inferential reasoning the state of mind of a particular accused at a particular time it seems to me that a trier of fact should try mentally to project himself into the position of that accused at that time. He must of course also be on his guard against the insidious subconscious influence of ex post facto knowledge."

28.5 It is further important to keep in mind, that, in drawing a negative inference against the accused, and it has been emphasized in many authorities, that the inference sought to be drawn must be the only one that can reasonably be drawn from the circumstances. See *S v Campos* 2002(1) SACR 233 (SCA), para 38.

28.6 In considering whether the death of the deceased was indeed foreseen by the accused, it was emphatically stated in *5 v Horn* 1958(3) SA 457 (A) that the probability of the consequences is not required but that the realisation of the possibility of such death is sufficient.

28.7 The contention of defence counsel that the accused did not, and could not have foreseen that the deceased could be killed in the circumstances, cannot be accepted. It is a matter of fact that armed robbers, when confronted by the police, will attempt to avoid arrest and in doing so would probably open fire at the police, or threaten the police with their firearms, which, in return, would draw fire from the police in order to defend themselves and/or arrest the perpetrators. Death of a human being in such circumstances is a probable consequence, satisfying a stricter test than the required possibility (*S v Horn*). The consequential death of the deceased was therefore a real probability and foreseen by the accused, and they, nevertheless, proceeded to execute their plans concerning the armed robbery. What has to be kept in mind is that the conspiracy was past its initial phase and had developed to the extent that the conspirators, by driving off, armed to the teeth, were executing their plans.

28.8 It follows that the requirements of *dolus eventualis* are met, proving that the accused are liable for the death of the deceased.

29. In respect of the additional charges against accused 1, 2, 3, 5 and 6, concerning the unlawful possession of firearms and ammunition:-

accused 1 - counts 4 and 5 (Dashprod semi-automatic rifle and ammunition);

accused 2 - counts 6 and 7 (AK 47 automatic rifle and ammunition);

accused 3 - counts 8 and 9 (Dashprod semi-automatic rifle and ammunition);

accused 5 - counts 10 and 11 (.38 revolver);

accused 6 - counts 12 and 13 (9mm pistol); I am satisfied that the State's evidence, alluded to above, should be accepted. The said accused were found in physical possession of the respective firearms. All the resort under Section 4 of the Act.

30. In respect of the additional charges against accused 7 and 8 - pointing of firearms at the policemen. The evidence of the two policemen was clear and satisfactorily. The fact that accused 7 and 8 were actively involved in the conspiracy and that the rest of gang was armed, make it most probable that they were also armed. The fact that no firearm was found in physical possession of either accused 7 or 8, is of no avail to them. They had ample opportunity to get rid of the firearms before their arrest in view thereof that the third person in the Corolla also disappeared. The denial of the two accused

of having pointed their firearms at the police must be considered against, inter alia, the lie of accused 7 in respect of the black

balaclava and the consistency of the how accused 8 sustained the wound to his arm with the evidence of the relevant policemen.

31. Accused 1, 2, 3, 4, 5, 6, 7 and 8:

Count 1 – Conspiracy to commit robbery with aggravating circumstances: Guilty.

Count 2 -Contravention of section 120(10)(b) of the Firearms Control Act, 60 of 2000.

Not Guilty.

Count 3 - Murder:

Guilty.

In addition:

Accused 1;

Count 4: Guilty - Main count.

Count 5: Guilty.

Accused 2;

Count 6: Guilty -- Main count.

Count 7: Guilty.

Accused 3:

Count 8: Guilty --Main count.

Count 9: Guilty.

Accused 5:

Count 10: Guilty- Main count.

Count 11: Guilty.

Accused 6:

Count 12: Guilty -- Main count.

Count 13: Guilt y.

Accused 7 and 8:

Count 14: Guilt y.

AJ BAM

JUDGE OF THE HIGH COURT

28 June 2017

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