

SOUTH AFRICA / JUDGMENT

S v Zondo (A1533/2002) [2006] ZAGPHC 143 (27 January 2006) [2006] ZAGPHC 143

COURT

High Courts - Gauteng

BEFORE

B.R. Southwood, E.M. Patel

CASE / FILE NUMBER

A1533/2002

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IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

DELIVERED: 27/1/06

NOT REPORTABLE Case No: A1533/2002

SIBONGUMUSA ZONDO Appellant

and

THE STATE

Respondent

JUDGMENT

SOUTHWOOD J

- [1] At about 09:15 on 2 December 1997 and at the Secunda Business Centre a group of about 15 men armed with assault rifles and handguns robbed four employees of Khulani Springbok Patrols of four boxes containing money and a 38 special revolver as the security officers left the premises of the United Bank. The perpetrators loaded the boxes on to the back of a maroon Nissan LDV and made their getaway in this vehicle and a white Toyota LDV. At the scene of the robbery shots were fired by some of the robbers and apparently by members of the public who witnessed the robbery.
- [2] The two vehicles carrying the perpetrators turned into the main road to Evander and proceeded to travel along this road at a high speed not stopping at traffic lights or police road blocks. A large number of policemen were called to the scene and were involved in the

attempts to apprehend the perpetrators. Before leaving Secunda the maroon Nissan LDV turned off the main road into a residential suburb. There the vehicle stopped in the driveway of a private home and disgorged a number of passengers. These perpetrators jumped the boundary wall and in a neighbouring property robbed the owner of a Nissan Maxima of his vehicle. About seven of the perpetrators piled into the Maxima and attempted to drive away. One of the perpetrators, Richard Khuzwayo, was not able to get into the Maxima and he attempted to escape on foot. He climbed over a boundary wall and hid in a neighbouring property after concealing his firearm. Khuzwayo was at the time a member of the South African Police Service and he used his service pistol at the time of the robbery. Members of the SAPS dog unit found Khuzwayo and arrested him. They also found his service pistol. At the trial of the four accused during 2001 Khuzwayo testified for the state and his evidence was the basis upon which the appellant was convicted.

[3] The two LDV's encountered a number of police vehicles and policemen. At each encounter perpetrators on the back of the vehicles fired shots at the policemen. One policeman was wounded but the rest were not injured. These shooting incidents gave rise to most of the counts of attempted murder. There is no evidence that the appellant was armed or that he fired any shots at the policemen.

[4] At about 09:45 on the 2nd of December 1997 the maroon Nissan LDV arrived at Ellerines in Evander and the perpetrators in the vehicle attempted to rob Solomon

Nkosi of the manager's Toyota Conquest. At the same time the perpetrators transferred cashboxes from the maroon Nissan LDV to the white Toyota LDV. The perpetrators were not able to start the Toyota Conquest and after the cashboxes were transferred drove off in the white Toyota LDV. They left the maroon Nissan LDV at Ellerines. An assault rifle and handgun were found in the vehicle.

[5] In 2001 the appellant stood trial in the Secunda regional court. The appellant and his three co-accused were charged with robbery with aggravating circumstances in respect of the robbery of the cashboxes and 38 special revolver (count 1); robbery of the Nissan Maxima (count 2); ten counts of attempted murder in respect of members of the public and the SAPS (counts 3 – 12); attempted robbery of the Toyota Conquest at Evander (count 13); unlawful possession of assault rifles (count 14); unlawful possession of assault rifle ammunition (count 15); unlawful possession of semi-automatic pistols and revolvers (count 16) and unlawful possession of semi-automatic pistol and revolver ammunition (count 17). The regional magistrate acquitted accused 3 and 4 on all counts and convicted accused 1 of robbery with aggravating circumstances (count 1); unlawful possession of assault rifles (count 14); unlawful possession of assault rifle ammunition (count 15); unlawful possession of semi-automatic pistols and revolvers (count 16) and unlawful possession of semi-automatic pistol and revolver ammunition (count 17). The appellant was convicted on all counts.

- [6] The regional magistrate sentenced the appellant to an effective term of 20 years imprisonment: seven years imprisonment for robbery with aggravating circumstances; three years imprisonment for the robbery of the Nissan Maxima and the attempted robbery of the Toyota Conquest (the two counts being taken together for purpose of sentence); ten years imprisonment for the ten counts of attempted murder and five years imprisonment for the unlawful possession of firearms and ammunition – the regional magistrate ordered that the sentences for the attempted murders and the unlawful possession of firearms and ammunition be served concurrently. The regional magistrate sentenced accused 1 to an effective term of ten years imprisonment: seven years imprisonment for the robbery with aggravating circumstances and ten years imprisonment for the unlawful possession of firearms and ammunition – the regional magistrate ordered that the two sentences be served concurrently.
- [7] Accused 1 appealed against the convictions and sentences. On 15 May 2003 this court (Patel J and Jooste AJ) upheld the appeal in respect of the convictions and sentences for the unlawful possession of firearms and ammunition (counts 14 – 17). The appeal against the conviction of and sentence for robbery with aggravating circumstances (count 1) was dismissed. Accused 1 abandoned his appeal against the conviction of and sentence for robbery with aggravating circumstances. The appellant's appeal which was noted late was not considered by the court and was postponed.
- [8] The state led 27 witnesses at the trial. The regional magistrate noted that only one of these witnesses, Richard Khuzwayo, who was one of the perpetrators, implicated the appellant in the commission of the crimes. The regional magistrate was impressed by Khuzwayo. He could remember much of the detail of the incident and although there were matters that he could not remember these were of lesser importance and did not bear on the substance of his evidence. He co-operated with the police from the outset (he was arrested on 2 December 1997) and continued to do so until he testified on 12 June 2001. He freely and voluntarily pointed out things to the police and there is no evidence that he did so in return for any benefit or reward. There is no evidence that promises were made to him. Khuzwayo implicated accused 1 and the appellant but not accused 3 or 4.
- [9] The regional magistrate was also impressed by the appellant and his co-accused. They did not tailor their evidence or contradict themselves in any material respect. The regional magistrate concluded that there was no reason to doubt their credibility. Despite these findings the regional magistrate clearly did not accept that the appellant's version was reasonably possibly true. He clearly rejected the appellant's version and found him guilty on Khuzwayo's evidence.
- [10] The appellant's defence was an alibi. He testified that on 2 December 1997 he was in Springs purchasing stock for his wife's business. His explanation for Khuzwayo's evidence was that senior members of the SAPS in Secunda had decided to get rid of him by implicating him in the crimes. Khuzwayo had been asked to assist them and had agreed to do so. The regional magistrate did not believe this because it was not properly put to the state witnesses and

because of the inherent improbabilities of the version that there was a conspiracy to falsely implicate the appellant.

[11] In written heads of argument filed on behalf of the appellant it was contended that –

(1) the evidence of Khuzwayo, who was a single witness and an accomplice, was not clear and satisfactory in every material respect and accordingly should not have been accepted;

(2) Khuzwayo's version was improbable in at least the following respects –

(i) although able to give the appellant's name, surname and residential address he could not furnish the surnames and addresses of his friend Thembiso in Durban and the other men at QwaQwa;

(ii) although able to remember all the details of the robbery on 2 December 1997 he could not remember the details of the day he arrived in Secunda;

(iii) the appellant's version was reasonably possibly true;

(iv) there is no evidence to link the appellant to the robbery and attempted robbery of the motor vehicle;

(v) there is no evidence to link the appellant to the attempted murders – it is common cause that the appellant was not armed;

(vi) there is no evidence to establish that the appellant was in possession of the firearms and ammunition.

[12] The primary issue is whether the state proved that the appellant was one of the group of fifteen who robbed the security guards. Although the regional magistrate did not expressly say that he rejected the appellant's evidence in the light of Khuzwayo's evidence that is clearly what he did. Although he could not find that the appellant was not credible because of contradictions and improbabilities in his evidence he obviously did not accept that the appellant's version as reasonably possibly true.

[13] The regional magistrate correctly approached the evidence as a whole. He properly took into account that the accused's attorney did not put the appellant's version to the state witnesses. Neither the appellant's alibi nor the appellant's explanation of a conspiracy to falsely implicate him in the commission of the crime was put to the state witnesses or Khuzwayo in particular. This was a failure to comply with a fundamental requirement of our system – see *President of the Republic of South Africa vs South African Rugby Football Union* 2000

(1) SA 1 (CC) paras 58-65 and *S v Boesak* [2000] ZACC 25; 2001

(1) SA 912 (CC) para 24-28. In the circumstances of this case this failure was of crucial importance. The consequence is that the appellant's alibi and explanation for Khuzwayo's role cannot be considered or accepted.

- [14] It is not in dispute that Khuzwayo was a member of the SAPS stationed in Durban. He had never been to Secunda or Evander before. He had been telephoned and asked to take part in a robbery. He and a friend drove from Durban to QwaQwa and from there to Secunda where the robbery was planned. Khuzwayo participated in the commission of the robbery. He was arrested shortly afterwards and he agreed to assist the police. On 8 December 1997 he pleaded guilty to some of the charges and was sentenced to twenty years imprisonment, ten years suspended. As far as the appellant is concerned, Khuzwayo testified that when he and his friend arrived in Secunda they went to the appellant's home and then went with the appellant to the home of accused 1 at Embalenhle where they met other members of the group. At both places the robbery was planned, the appellant playing a leading role. It is not in dispute that at an identification parade held on 29 June 1998 Khuzwayo identified the appellant and accused 1 as members of the group and he pointed out their homes to the police. If Khuzwayo had not met them before and not been to their homes it is not clear how he could have identified them correctly and pointed out their homes to the police.
- [15] According to the appellant Khuzwayo was briefed by the police to do this. They wanted to get rid of him. They would give Khuzwayo some (undisclosed) reward if he assisted them. Incredibly, having identified the appellant at the identification parade and pointed out the appellant's home and having agreed to testify for the state, Khuzwayo then confessed to the appellant while they were both in the Barberton prison during April 2000 that he was going to falsely implicate the appellant. He also told the appellant that he was no longer prepared to assist the state.
- [16] The regional magistrate did not believe this and he cannot be faulted for not doing so. It is so far-fetched and improbable that it simply cannot be believed. It is also inconceivable that the police would conspire to falsely implicate the appellant merely because he had been on leave for a long time, lived in Secunda and drove a nice car. The regional magistrate therefore correctly rejected the appellant's alibi and explanation for Khuzwayo implicating him in the crimes. As pointed out, the failure to put the appellant's version is decisive. It cannot be accepted. In argument the appellant's counsel conceded that the regional magistrate correctly accepted Khuzwayo's evidence and found that the appellant was involved in the planning and execution of the robbery of the cashboxes and 38 special revolver at the Secunda Business Centre. The appellant's appeal against his conviction on this count therefore cannot succeed.
- [17] The next question is whether the appellant was correctly convicted of the other offences in the absence of direct evidence pertinently linking him to these crimes.

[18] The perpetrators of the robbery of the cashboxes at the business centre clearly had a common purpose. The question which arises is how far this common purpose extended. According to Khuzwayo the appellant planned and directed the robbery of the cashboxes and it was to be executed by a group of men armed with assault rifles and handguns. No agreement or plan was made with regard to subsequent acts by the members of the group. In *S v Malinga and Others* 1963

(1) SA 692 (A) at 694F-H the court considered the liability of the *socius criminis* as follows:

‘Now the liability of a *socius criminis* is not vicarious but is based upon its own *mens rea*. The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* would commit the act in question in the prosecution of their common purpose. *R v Hercules* 1954

(3) SA 836 (AD) at p831; *R v Nsele* 1955

(2) SA 145 (AD) at p151; *R v Bergstedt* 1955

(4) SA 186 (AD) at p188.

In considering the issue of the intention to kill, the test is whether the *socius* foresaw the possibility that the act in question in the prosecution of the common purpose would have fatal consequences, and was reckless whether death resulted or not. *R v Horn* 1958

(3) SA 457 (AD), and cases there cited.

In both of the foregoing tests the foresight may of course be proved by inference; and remoteness of the possibility is relevant to the subjective question of foresight thereof.’

The court found that where the four accused had planned a housebreaking expedition and knew that one of them was armed their common purpose embodied not only housebreaking with intent to steal and theft but also the getaway. The accused must have foreseen and therefore by inference did foresee the possibility that the loaded firearm would be used against the contingency of resistance, pursuit or attempted capture. Accordingly, the court found, the shot fired by one accused was, as far as their *mens rea* is concerned, the shot of each accused and must be imputed to each. Each accused was guilty of murder.

[19] This reasoning applies in the present case. The members of the group knew that some of the members were armed and they clearly foresaw that the firearms would be used during the getaway to deter pursuit or avoid capture. The appellant will be guilty of attempted murder in respect of each charge where it is proved that the perpetrators of the robbery fired shots at any of the complainants.

- [20] The respondent's counsel conceded that there is no evidence that any shots were fired by the robbers at the complainant in count 3, Van der Walt, and accordingly that the appellant was wrongly convicted on that count. The appellant's counsel conceded on the other hand that she could not argue that the appellant had been wrongly convicted on the other counts of attempted murder (4-12). She conceded that these acts were part of the common purpose for which the appellant was liable – see *S v Lungile* 1999
- (2) SACR 597 (SCA) paras 10-14 and 25-32.
- [21] As far as the robbery and attempted robbery of the two motor vehicles is concerned the statement of the court in *S v Malinga* supra does not apply. The appellant's liability must be considered in the light of the principles established in *S v Safatsa* 1988
- (1) SA 868 (A) at 894C-901H and *S v Mgedezi* 1989
- (1) SA 687 (A) at 705I-706C. According to these principles, in the absence of a prior agreement to commit the crime, the appellant would be liable only if he was present at the scene of the crime, had made common cause with those who were actually committing the crime, had manifested his sharing of the common purpose by performing some act of association with the conduct of the others and had the necessary mens rea.
- [22] In the present case the appellant was clearly not present when the perpetrators robbed the owner of the Nissan Maxima. The evidence shows that the perpetrators jumped off the back of the Nissan LDV and then jumped over some boundary walls before they came across the Nissan Maxima and took it from the owner at gunpoint. There is no evidence that the robbery was planned. The appellant was not present and therefore did not associate himself with the common intention of the perpetrators who robbed the owner of his vehicle. With regard to the Toyota Conquest there is no evidence at all as to who was present when the attempt was made to rob the vehicle. Again there is no evidence that the robbery was planned. The appellant's appeal in respect of his convictions on these two counts (2 and 13) must therefore be upheld.
- [23] In respect of the convictions on counts 14-17, the illegal possession of firearms and ammunition, the appellant's counsel argued that it had not been established that the appellant had been jointly in possession of the arms and ammunition in accordance with the principles stated in *S v Mbuli* 2003
- (1) SACR 97 (SCA). The appellant's counsel also argued that in respect of the unlawful possession of the assault rifles and assault rifle ammunition (counts 14 and 15) the state had failed to comply with the provisions of section 32(7) of the Arms and Ammunition Act 75 of 1969 which reads as follows –
- 'No prosecution shall be instituted under this section without the written consent of the Attorney-General'.

It is common cause that no written consent was issued for the prosecution of the contraventions of section 32(1)(a) (count 14) and section 32(1)(e) (count 15). It is clear that the possession of assault rifle ammunition should have been prosecuted as a contravention of section 32(1)(e) and not section 36 which governs ordinary ammunition. The appellant was charged with the wrong contravention. Counsel for the respondent conceded that if there was no written consent the convictions had to be set aside but argued that it was competent to convict the appellant of a contravention of section 2 and section 36 of the Act if such consent had not been given. However there is no provision in the Criminal Procedure Act which would make this a competent verdict. It appears that for this reason the appellant was wrongly convicted on counts 14 and 15.

[24] In any event in *S v Mbuli* supra the court held that where more than one person is alleged to be in possession of a firearm the principles of joint possession must be applied: i.e. facts must be proved from which the court can properly infer that –

- (1) the group had the intention (animus) to exercise possession of the guns through the actual detentor; and
- (2) the actual detentors had the intention to hold the guns on behalf of the group.

Only if both requirements are fulfilled can there be joint possession involving the group as a whole and the detentors, or common purpose between the members of the group to possess all the guns – para 17. The court held that mere knowledge by the others that a person is in possession of a firearm and even acquiescence by them in its use for fulfilling their common purpose to commit robbery is not sufficient to make them joint possessors for purposes of the Act – para 72.

[25] In the present case the appellant was never in possession of a firearm. However he did know that other members of the group had firearms which they intended to use in the commission of the robbery. This group was made up of people from various parts of the country. Each became involved in a robbery with his own firearm. Even if the appellant had required that they bring their firearms this did not mean that the group had the intention to exercise possession of the firearms through the actual detentor or that the actual detentors had the intention to hold the guns on behalf of the group. The appellant was therefore wrongly convicted of the unlawful possession of the firearm and ammunition (counts 14-17).

[26] The appellant's appeal must therefore succeed in respect of the robbery of the Nissan Maxima (count 2), the attempted murder of Van der Walt (count 3), the attempted robbery of the Toyota Conquest (count 13) and the unlawful possession of firearms and ammunition (counts 14-17). The appellant's appeal in respect of the robbery with aggravating circumstances (count 1) and attempted murder of various members of the public and the police (counts 4-12) will be dismissed.

[27] Regarding sentence there is no reason to interfere with the sentence of seven years imprisonment for robbery with aggravating circumstances. It was not contended that the sentence was vitiated by irregularity or misdirection or that the sentence was startlingly

inappropriate. In my view the sentence was light. A new sentence must be imposed for the convictions for attempted murder. These were closely related to the robbery and were part of the common intention. They will be taken together for sentence as was done by the regional magistrate. The appellant's counsel suggested that a sentence of seven years imprisonment would be appropriate. The respondent's counsel did not contend to the contrary.

[28] The following order is made –

I The appeal is upheld in respect of the following convictions –

- (i) Robbery of the Nissan Maxima (count 2);
- (ii) Attempted murder of Van der Walt (count 3);
- (iii) Attempted robbery of the Toyota Conquest (count 13);
- (iv) Contravention of sections 32, 2 and 36 of the Arms and Ammunition Act 75 of 1969 (counts 14-17)

and the convictions and sentences are set aside.

II The appeal is upheld in respect of the sentence of ten (10) years imposed in respect of the ten convictions for attempted murder and the sentence is set aside and substituted with a sentence of seven (7) years imprisonment.

III In terms of section 282 of Act 51 of 1977 it is ordered that the substituted sentence is deemed to have been imposed on 10 May

2002. The effective sentence is therefore fourteen (14) years imprisonment commencing on the 10th of May 2002.

B.R. SOUTHWOOD

JUDGE OF THE HIGH COURT

I agree

E.M. PATEL

HEARD ON: 23/1/2006

FOR THE APPELLANT: ADV S LE ROUX

INSTRUCTED BY: PRETORIA JUSTICE CENTRE

FOR THE RESPONDENT: ADV M J BRITS

INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTIONS

DATE OF JUDGMENT: 27/1/2006

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