

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

**DELETE WHICHEVER IS NOT
APPLICABLE**

(1) REPORTABLE: ~~YES~~ / NO.

**(2) OF INTEREST TO OTHER
JUDGES: ~~YES~~ / NO.**

(3) REVISED.

DATE 26/05/2023

SIGNATURE

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CASE NO:CC64/20

In the matter of:

FANNIE MORRIS MBUYANI

Applicant

And

The State

Respondent

JUDGMENT

Mlotshwa AJ:

1. This matter came before Bam J who is presently unavailable. This matter was disposed of in August 2022.
2. There were initially 6 accused before the court. Accused 3 absconded during the trial and his trial was therefore separated from the rest of the accused. At the end of the State case the court *mero motu* discharged accused 5 in terms of **section 174 of the Criminal Procedure Act, 51 of 1977** as there was no evidence against him.
3. The four remaining accused including the applicant were all found guilty of the following counts:
 - (i) Robbery with aggravating circumstances committed on 7 January 2020 on the N4 Freeway, Employees of SBV Security Pty Ltd, transporting cash, robbed of an amount of more than R25 million rand in cash;
 - (ii) Contravention of **section 22(2) of the Explosives Act, Act 15 of 2003**, in that explosives were used to damage or destroy the vehicle transporting the cash;
 - (iii) Contravention of **section 16(2)(a) of Riotous Assemblies Act, Act 17 of 1956** in that the accused conspired to rob the SBV Security and or its employees;
 - (iv) Contravention of **section 13 of the Firearms Control Act, Act 60 of 2000**; unlawful possession of prohibited firearms;
 - (v) Contravention of **Section 90 of the Firearms Control Act**; unlawful possession of ammunition.
4. The applicant was sentenced as follows:
 - (1) Count 1: 25 years imprisonment;
 - (2) Count 2: 10 years imprisonment;
 - (3) Count 3: 5 years imprisonment;
 - (4) Count 4: 15 years imprisonment;
 - (5) Count 5: 5 years imprisonment.

- (6) The court ordered that the sentences on counts 2, 3 and 5 and 10 years of the sentence on count 4 to be served concurrently with the sentence on count 1. Making the effective sentence to be 30 years imprisonment.
- (7) The accused were further ordered to compensate SBV jointly and severally, the one paying the other to be absolved, the amount of R24 850 000.00.
5. The applicant was accused 2 in the trial and is herein applying for leave to appeal against both the conviction and the sentence. Accused 1, 4 and 6 have already filed their applications for leave to appeal against both the conviction and sentence which applications were dismissed by the Honourable Justice Bam.
6. The applicant further applied for the condonation of the late filing of the application for leave to appeal, citing the problem of obtaining transcripts of the trial and the fact that he had to engage new attorneys to assist him with the application.
7. In order to succeed with this application, the applicant will have to show that there are prospects of success on appeal. In **Smith v The State**¹ it was held that:
- “(7) What the test of reasonable prospects of success postulates is a dispassionate decision based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore, the applicant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorized as hopeless. There must, rational basis for the conclusion that there are prospects of success on appeal”.*
8. The case involves an incident on the afternoon of 7 January 2020 on the N4 Highway close to Bronkhorstspuit where an SBV armored security vehicle transporting cash collected from various sources was attacked and robbed of an amount in excesses of R25 million.
9. According to the witnesses it transpired during the trial that the robbery was more of an “inside job” orchestrated mainly by current employees of SBV working with former SBV employees and few nonattached individuals.
10. The State relied heavily on the evidence of two so-called 204 witnesses, Mr Tolo and Mr Masilela. The State further relied on the evidence of a telephone analysts, a Mr Moller, who was a former police officer and now working for SBV.

¹ (475/2011) [2011] ZASCA 15 (15 March 2011)

11. During the hearing of this application, Advocate Van Wyngaardt for the applicant argued that the Honourable trial judge erred in accepting the evidence of the 204 witnesses as it contained material inconsistencies and contradictions and further that the witnesses contradicted the facts as deposed to in their witnesses' statement.
12. It was further argued that the judge erred in finding that Tolo, Masilela and Moller corroborated each other.
13. It was further argued on the applicant's behalf that the Honourable trial Judge did not apply the necessary cautionary rule in respect of the 204 witnesses.
14. It was further argued that Mr Moller was not duly authorized to conduct the investigations and that as he was employed by the complainant, he should not have compiled the report analyzing the cell phone records. It was contended that the witness was not objective and that he had a motive to falsely implicate the applicant.
15. It was further contended that the bulk of the investigations was conducted by the complainant's employees or investigators contracted to the complainant.
16. It was further contended that the Honourable Judge erred in not accepting the evidence of the applicant as well as of his witnesses who testified that the applicant's motor vehicle on the date of the alleged meeting with the 204 witnesses was used by his brother.
17. The Honourable Judge, it was argued, erred in finding that the State proved that the applicant had a common purpose to commit the offence with his co-accused.
18. The Honourable Judge failed, it was further argued, erred in finding that the applicant contravened the provisions of section 22(2) of Act, 15 of 2003, that is the causing the explosion of the complainant's armored vehicle as he was not at the scene when the robbery took place.
19. It was further argued that the Honourable Judge erred in convicting the applicant for the contraventions of the sections in respect of Act 60 of 2000, that is the possession of the unlicensed firearm and ammunition as the applicant was not at the scene of the robbery and the State did not prove beyond reasonable doubt that the applicant had the intention to jointly possess any of the firearms and or ammunition with any of the actual robbers or that the "actual" robbers had the intention to jointly possess the firearms and ammunitions with the applicant.
20. It was contended on behalf of the applicant that the effective sentence of 30 years imprisonment induces a sense of shock and that it is so unreasonable that no reasonable court would have imposed same.

21. It was contended that the Honourable Judge failed to take into account that;
 - a. The applicant was first offender and relatively young;
 - b. Is a family man;
 - c. Is a father of minor children and responsible not only for their financial wellbeing but also for their emotional wellbeing;
 - d. He can be rehabilitated;
 - e. No one was injured during the robbery.
22. It was argued that the Honourable Judge over-emphasized the seriousness of the crime and the interests of the society;
23. In imposing 10 years in excess of the prescribed minimum sentence on count 1 the Honourable Judge erred in that he over emphasized the aggravating circumstances and under emphasized the mitigating factors.
24. The evidence of the 204 witnesses although with some inconsistencies and contradictions here and there remained unshaken. It will be recalled that these witnesses and the applicants were colleagues. So there is no issue of mistaken identities. They testified that they had numerous physical meetings where the nitty gritty of the robbery was discussed and what role was to be played by each participant.
25. It is so that the applicant called a witness that his vehicle was not used by him (the applicant) on a day of one of the alleged planning meetings. This was to counter the evidence of one the tracking companies that the applicant's motor vehicle was tracked to the venue of the meeting. But the applicant inexplicable failed to explain away the evidence of Mr Moller that the Applicant's cell phone was also at the venue where his vehicle was tracked to be.
26. Regarding the evidence of Mr Moller the court found that he was previously an expert with the police, and he was a Lieutenant colonel when he resigned from the police. The court addressed this issue and found that his evidence was admissible.
27. The trial Judge was satisfied that when considering the evidence in its totality the State did succeed in proving beyond reasonable doubt.
28. Insofar as the count of robbery I agree with the Honourable trial Judge that the State proved beyond reasonable doubt that the applicant conspired and did in fact took part through the doctrine of common purpose to rob the SBV armoured vehicle.

29. Adv Van Wyngaardt heavily criticized the trial Judge in convicting the applicant on the charges of

- (i) Contravention of **section 22(2) of the Explosives Act, Act 15 of 2003**, in that explosives were used to damage or destroy the vehicle transporting the cash;
- (ii) Contravention of **section 3 and 4 of the Firearms Control Act, Act 60 of 2000**; unlawful possession of prohibited firearms;
- (iii) **Contravention of Section 90 of the Firearms Control Act**; unlawful possession of ammunition.

As the applicant was not at the scene of the robbery and that the State failed to prove that the actual robbers carried the firearms and the explosives on behalf of the applicant.

30. Advocate Mashuga for the State was adamant that the applicant was correctly convicted of these charges.

31. The test for joint possession of an illegal firearm and ammunition is well established. The mere fact that the accused participated in a robbery where his co-perpetrators possessed firearms does not sustain beyond reasonable doubt, the inference that the accused possessed the firearm and ammunition jointly with them. In *S v Nkosi*² it was held that this is justifiable only if the factual evidence excludes all reasonable inferences other than (a) that the group had the intention to exercise possession through the actual detonator and (b) the actual detonator had the intention to hold the guns on behalf of the group. See also *Leshilo v The State*³, *S v Mbuli*⁴.

32. In support of his contention Adv Mashuga relied on the case of *Nkabinde v The State*⁵ which found that the appellants in that matter jointly possessed the firearms ammunitions.

33. The facts on the *Nkabinde*⁶ matter are distinguishable from the facts *in casu*. In the matter all the appellants were all the scene of the robbery. They travelled together in one vehicle from which the firearms were thrown out of the windows. So, an inference that they all possessed the firearms and ammunition jointly was justified under those circumstances. Whereas in this matter, the appellant was nowhere near the scene of the robbery.

² 1998 (1) SACR 284 (W)

³ (345/2019) [2020] ZASCA 98

⁴ 2003 (1) SACR 97 (SCA)

⁵ (115/17) [2016] ZASCA 75

⁶ *supra*

34. This court is of the view that there may be substance in the argument of Advocate Van Wyngaardt and that another court may find in favour of the applicant in so far as counts 4 and 5, that is the counts relating to the possession of the unlicensed firearms and ammunitions.
35. However, this court does not agree with Advocate Van Wyngaardt that the Honourable trial court erred in convicting the applicant on the main count on count 2 that is the contravention of Section 22(2) of the Explosives Act, 15 of 2003, that is of causing the explosion of the armoured SBV vehicle as the bombing of the vehicle was the means of getting to the cash that was carried by the vehicle.
36. This court agrees with the trial court that no extenuating circumstances existed to enable the court to deviate from the minimum sentences as laid out in the Criminal Law amendment Act 105 of 1997 but however has concerns with the sentence of 25 years imprisonment in respect of the count of robbery with aggravating circumstances for a first offender.
37. This court engaged Advocate Mashuga for the State as to the justification of imposing 10 extra years on the applicant instead of the 15 years imprisonment as per **section 51 of Act 105 of 1997**. Mashuga argued that the sentence was stiff as a result of the brazen nature of the robbery on a busy highway. That may be so but as was argued on behalf of the applicant no one was killed or injured in this robbery. The court is of the view that another court may find that the sentence of 25 years is harsh and induces a sense of shock considering that in Nkabinde⁷, the accused were sentence to 15 years imprisonment for the robbery under similar circumstances.
38. This court is of the view that the sentences imposed on count 2, 3, 4 and 5 are not harsh and do not induce a sense of shock at all.
39. This court is of the respective view that another court may acquit the applicant on counts 4 and 5 and that the sentence of 25 years for the robbery may be found to be harsh.
40. Accordingly, I make the following order:
- (a) The application for condonation is granted.
 - (b) The application for leave to appeal against conviction:
 - i. on the count of robbery with aggravating circumstances;

⁷ supra

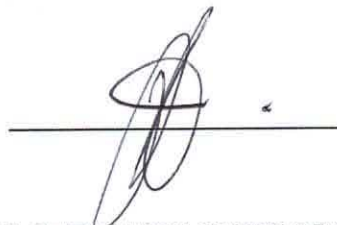
- ii. Conspiracy to commit robbery with aggravating circumstances and;
- iii. The contravention of **section 22(2) of the Explosives Act 15 of 2003**

is dismissed

(c) The application to appeal against conviction:

- i. on count 4 and 5 which is the contravention of **section 4 of the Firearms Control Act, Act 60 of 2000**; unlawful possession of prohibited firearms; and
- ii. on contravention of **Section 90 of the Firearms Control Act**; unlawful possession of ammunition;
- iii. As well as the leave to appeal the sentence imposed on count 1, that is the robbery with aggravating circumstances,

is granted.



Mlotshwa AJ

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Appearances

ON BEHALF OF THE APPELLANT : ADVOCATE Van WYNGAARDT

INSTRUCTED BY : NHLAPO MOLOTO ATTORNEYS

ON BEHALF OF THE RESPONDENT: ADVOCATE MASHUGA

INSTRUCTED BY : THE DIRECTOR OF PUBLIC PROSECUTIONS