THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 143/01
REPORTABLE

In the matter between:

SYDNEY THABO MAMBO — **FIRST APPELLANT**
EUGENE THABO MOROANE — **SECOND APPELLANT**
REGINALD HLAKO — **THIRD RESPONDENT**

and

THE STATE — **RESPONDENT**

Coram: Navsa, Brand JJA et Cachalia AJA

Heard: 15 May 2006

Delivered: 31 May 2006

Summary: Three accused escaping from lawful custody. Court orderly murdered in the process. Murder not reasonably foreseeable by one of the accused. Conviction of murder on the basis of the common purpose doctrine not competent. Sentence – Prescribed sentence of 15 years' imprisonment for robbery. Whether substantial or compelling circumstances exist.

Neutral citation: This judgment may be referred to as *Mambo v The State* [2006] SCA 74 (RSA)

JUDGMENT

CACHALIA AJA

[1] The three appellants had been arrested on armed robbery and related charges arising from a carjacking incident, appellants 1 and 3 on 19 December 1996, and appellant 2 on 3 January 1997. They appeared in the Pretoria Magistrate's Court from time to time, but remained in custody at all times since their arrest, while their fourth co-accused was released on bail.

[2] On 19 May 1998, having been in custody for approximately one and a half years, they appeared in court 7, situated on the third floor of the building. Appellant 2 and the fourth co-accused were represented by attorney, Marius Scheepers. Appellants 1 and 3 conducted their own defences. After the State had closed its case on that day, Scheepers applied for a discharge of his two clients. Judgment was reserved and the case postponed to the 18th of August. Bail was denied to appellants 1 and 3. Though appellant 2's bail was reduced from R4 000 to R2 000, it was still unaffordable. He had to return with the two other appellants to the holding cell adjacent to the court. At that time there was another awaiting-trial prisoner in the cell, Abel Makhubela, who features prominently in what is to follow.

[3] The three appellants followed the court orderly back to the holding cell. Makhubela was already in the cell. As the orderly unlocked the gate of the holding cell for the three appellants to enter, he was overpowered, disarmed and fatally wounded by a gunshot from his own firearm. Other than the appellants, Makhubela was the only witness to this incident.

[4] The three appellants departed from the scene hastily, being separated in the process. Makhubela too left the holding cell, apparently to seek help. The first appellant, who had been injured on his right arm by the same gunshot that caused the death of the court orderly, made his way down to the first floor where he was apprehended by two police officers; appellant 2 left the building and boarded a taxi to Rustenburg; the third appellant who was armed with the deceased orderly's firearm, hid in one of the courts overnight and escaped from the building the following morning. Appellants 2 and 3 were subsequently arrested.

[5] The three appellants were indicted in the Pretoria High Court before Motata AJ (as he then was) for the murder of the court orderly (count 1), robbery of his firearm[1] (count 2), the unlawful possession of this firearm and the ammunition inside it[2] (counts 3 and 4), and also of escaping from lawful custody[3] (count 5). Appellant 1 pleaded not guilty to all the charges; appellant 2 pleaded guilty only to the charge of escaping from custody. Appellant 3 pleaded guilty to all but the murder charge. At the end of the trial the appellants were each convicted on the murder, robbery and escaping from custody charges while appellant 3 was also convicted on counts 3 and 4. The trial court found that they had planned their escape, robbed the orderly of his firearm and then fatally wounded him while escaping. It held that they had acted with a common purpose. The appellants were sentenced to separate terms of life imprisonment on the murder and robbery counts and to five years' imprisonment for escaping from custody. Appellant 3 received an additional sentence of five years' imprisonment on counts 3 and 4, which were taken together for the purpose of sentence. The three appellants each received an effective sentence of life imprisonment. They now appeal against their convictions and sentences with leave of the trial court.

[6] The convictions of the appellants were based squarely on the testimony of Makhubela. Understandably, the thrust of the appellants' attack against their convictions is directed at his evidence. According to Makhubela, appellant 3 intimated his intention to escape with appellants 1 and 2 before they were taken back to court. He invited Makhubela and another awaiting-trial prisoner to join them. They did not respond to his invitation and there was no further discussion on the matter. This is not disputed.

[7] Makhubela testified about the incident in question. His version is as follows: when the orderly unlocked the gate of the cell so that the appellants could enter, appellant 1 who was immediately behind the orderly, gripped the orderly around his neck with his left arm whilst his right hand tightened around

[1] Robbery with aggravating circumstances as contemplated in s 1 of the Criminal Procedure Act 51 of 1977.
[2] In contravention of ss 2 and 36 of the Arms and Ammunition Act 75 of 1969.
[3] In contravention of s 48(1) of the Correctional Services Act 8 of 1959.

his abdominal area. At the same time, appellant 2 reached for the orderly's lower legs and tugged at them causing him to lose his balance and keel over. This caused appellant 1 to drop to a kneeling position as he held on to the top half of the orderly's body. Simultaneously, appellant 3 reached for the firearm in the orderly's holster on his right hip and grabbed it with both his hands. At this point, as the orderly wrestled to free himself from the clutches of appellants 1 and 2, appellant 1 uttered the word '*skiet*' (as translated). In response, appellant 3 cocked the weapon and, whilst bending over the struggling orderly, fired a single shot at him. The bullet entered his abdominal area, after penetrating appellant 1's right arm whilst he was holding the orderly in a grip. The three appellants left the scene hurriedly through court 8. Immediately thereafter Makhubela left the unlocked holding cell and entered court 7 where he informed someone about what had just transpired. He then proceeded down to the first floor where he encountered two police officers. Shortly thereafter he saw appellant 1 walking towards them. He pointed at appellant 1 as being one of those who had been involved in this incident whereupon the police arrested the appellant.

[8] Appellant 1 presented a completely different version of the incident. He testified that as the orderly unlocked the gate of the cell, appellant 3 pushed the orderly on to him causing both of them to fall over. At that moment, appellant 2 disappeared. As they were falling, appellant 3 grabbed the orderly's firearm, cocked it and pointed it at the orderly. Appellant 1 raised his right hand and implored appellant 3 three times not to shoot, but to no avail. Appellant 3 discharged the firearm injuring appellant 1 on his right arm and killing the orderly. According to appellant 1, he then fled through court 8. He proceeded to court 7 to look for help, but no one was present there. He then took the elevator to the first floor where he saw Makhubela and two police officers, one of whom was Sergeant Mokome. Mokome asked him how he had injured his arm. He responded that he had been shot at court 7. This was denied by Makome who testified that appellant 1 told him that he had been injured by the door of the court. Mokome's evidence is destructive of appellant 1's denial that he did not intend to escape.

[9] On appellant 2's version, which was corroborated by appellant 1, he played no part in the events that led to the orderly's death. He testified that as the orderly unlocked the gate of the holding cell, he heard the orderly make the exclamatory sound: 'Yo!' As he turned, he noticed the orderly, and appellant 1, falling down. At the same time, he observed appellant 3 reaching for the orderly's firearm. At this point, appellant 2 left through court 8. Because there was no one there he returned to court 7 where he met Scheepers. Before he could say anything to Scheepers they heard a gunshot. He then told Scheepers what had occurred. This caused Scheepers to depart hastily. Appellant 2 first followed Scheepers for a while but then ran away and boarded a taxi to Rustenburg. He was arrested five days later.

[10] Scheepers was called to testify in support of appellant 2's version. His testimony however gave appellant 2 no comfort. He testified that he was standing in the corridor outside court 7 when he was told that the orderly had been shot. Immediately after this, he saw appellants 2 and 3 standing in the corridor about 20 metres away. They were both gesticulating. He observed that one of appellant 3's hands was behind his back. He was afraid and hurried away to find the magistrate. Scheepers' evidence is therefore destructive of appellant 2's version that he had been talking to Scheepers at the time the gunshot was fired, when, clearly according to Scheepers, he had not. This was, quite correctly, conceded by counsel who appeared on his behalf.

[11] Appellant 3 testified that they had discussed escaping about six months before the incident. But, appellant 2 had not been interested as he had been granted bail. On 19 May, they agreed on a plan to escape whilst in the holding cell before they went to court. The plan was that appellant 1 would strangle the orderly while he and appellant 2 would take his weapon and then lock him up in the cell. When they returned to the holding cell later that day, appellant 1 grabbed the orderly around his neck as he was unlocking the gate of the cell. He began to wrestle with the orderly for the firearm. At that stage, appellant 2 ran away. In the process of struggling to seize the firearm from the orderly, the firearm was accidentally discharged, but he was not aware at the

time that the orderly had been fatally wounded. He ran through court 6 and hid in another court overnight. The following morning he escaped. He subsequently gave the firearm to one Nicolaas Setlhabelo for safekeeping. In return Setlhabelo gave him R200.

[12] As mentioned earlier, the State's case was based on Makhubela's testimony of his observation of the incident. His evidence was criticised by the appellants mainly on the basis that according to his version, the orderly had been shot from the front, through his abdomen while on the undisputed medical evidence the bullet had entered him from behind. What also counts against him, counsel for the appellants contended, is that when confronted in cross-examination with the fact that his evidence was irreconcilable with the medical findings, he obstinately persisted in his version.

[13] It is apparent, on any version, that as the orderly was overpowered, a struggle ensued. It is most likely that, in the process, the orderly's body would have turned as the gunshot was being fired and that Makhubela, might not have observed this. His persistence that the orderly had been shot from the front must therefore be considered in this light. But the fact that he has been shown to have been fallible in this regard does not, in itself, justify the negation of his evidence as a whole, although it does, of course, sound a note of caution.

[14] With regard to his evidence as a whole there was no general attack on the quality of his testimony. Nor could there have been. He maintained his version despite searching cross-examination from counsel for each of the appellants. And he had no demonstrable interest or bias against the appellants. There are four aspects of his evidence which, I think, are directly relevant. The first is whether there was a prior plan to escape; the second, whether appellant 3 cocked the firearm before firing, the third relates to appellant 2's involvement in the incident and the fourth whether appellant 1 uttered the word '*skiet*'. I deal with each in turn.

[15] As to the first issue: it is inherently probable that the escape would have been preceded by some discussion and planning. This probability is underscored by the way in which the plan was eventually carried out. Makhabela's evidence of the discussion in the cell concerning the planned escape was undeniably truthful. As to the second issue, Makhubela is corroborated by appellant 1. Moreover, he is supported by the evidence of Mokome to the effect that the practice at the court was that the firearms of the court orderlies were never cocked and that every morning, including the morning of the incident, the deceased orderly participated in a parade where all firearms were checked to ensure that they were in proper working order. As to the third issue I find appellant 2's version inherently improbable. Furthermore, he is contradicted in material respects by Scheepers who was his own witness. As to the final issue, no reason has been suggested, and I can think of none, why Makhubela would have fabricated this incriminating evidence against appellant 1. Likewise, I can think of no reason why, in the circumstances, he would have been mistaken on this aspect.

[16] Other than the evidence by appellant 3 on the plan to escape, there is no evidence that this involved murder. There can be no doubt that it included the forceful dispossession of the orderly's firearm. Each of the appellants was therefore not only properly convicted of escaping from lawful custody, but also of robbery.[4] Appellant 3 cocked the firearm, aimed it at the orderly and fired. He was therefore correctly convicted of murder on the basis of a direct intention to kill the orderly.

[17] Appellant's 1 and 2 were found guilty of murder on the basis that they shared a common purpose with appellant 3. The evidence against appellant 1, that he uttered the word '*skiet*' as appellant 3 cocked the firearm, which I found to be true, in my view constitutes sufficient proof that he shared a common purpose with appellant 3 – which might have been formed on the

[4] See *S v Salmans* 2006 (1) SACR 333 (C) at 340d-f where it was held that any force applied to the person at a victim, however slight, was sufficient to constitute robbery. The case involved the robbery of a cellphone.

spur of the moment – to cause the death of the orderly. He too, was therefore correctly convicted of murder.

[18] All that appellant 2 did, however, was to grab hold of the orderly's legs as the appellants overpowered him. This act, submitted counsel for the State, was sufficient to warrant his conviction on the charge of murder. By participating in the plan to escape, which involved the forceful dispossession of the orderly's firearm, so it was contended, he must have foreseen the possibility that this could result in the death of the orderly and reconciled himself to this possibility. He would therefore, on the basis of this argument, have had intention, in the form of *dolus eventualis*, to murder. I disagree. It is clear that the plan to escape involved disarming the orderly and locking him up in the cell. But the mere fact that the appellants intended to rob the orderly in the execution of their plan to escape does not warrant the inference – as the only reasonable one – that he subjectively foresaw the possibility of the shooting.

[19] I turn to consider the sentences that were imposed by the trial court. Where an accused has been convicted of robbery or of murder, a court is obliged to impose a mandatory sentence in accordance with s 51 of the Criminal Law Amendment Act 105 of 1997 under certain circumstances, unless it is satisfied that substantial and compelling circumstances exist that justify the imposition of lesser sentence.[5] There are two schedules to the Act that are applicable in the present matter. The first is Part I of Schedule 2 under s 51(1), and the second, Part II of Schedule 2 under s 51(2) of the Act. Part I of Schedule 2 prescribes a minimum sentence of life imprisonment in respect of a murder conviction in certain circumstances. It reads as follows:

'The obligatory life sentence is to be imposed for *murder* when

(a) it was planned or premeditated;

(b) the victim was –

[5] Section 51(3)(a). See *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222 (SCA)) on how a court should conduct an enquiry as to whether substantial and compelling circumstances are present.

(i) a law enforcement officer performing his/her functions as such, whether on duty or not; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977, at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) Rape; or

(ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977 (Act 51 of 1977); or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.'

[20] Part II of Schedule 2 prescribes, in the case of first offender, a minimum sentence of 15 years' imprisonment for, amongst others, the offence of robbery where there are 'aggravating circumstances' present. Section 1 of the Criminal Procedure Act 51 of 1977 defines 'aggravating circumstances' in relation to robbery to mean –

'(i) the wielding of a fire-arm or any other dangerous weapon;

(ii) the infliction of grievous bodily harm; or

(iii) a threat to inflict grievous bodily harm,

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence.'

In the light of the proved facts aggravating circumstances were, in this case, present in respect of the robbery. This appeal is therefore to be determined on this basis.

[21] I can find no misdirection by the trial court in respect of the imposition of the prescribed sentence of life imprisonment for their murder convictions. Part I of Schedule 2 obliges the court to impose the mandatory sentence of life imprisonment if any one of the circumstances enumerated in this Schedule is present when a murder is committed. In the present matter there were three such circumstances present; a law enforcement officer was the victim, the death of the victim was caused by the accused in committing the offence of

robbery with aggravating circumstances and the offence was committed in the execution of a common purpose. However it is apparent that the trial court erred in imposing separate sentences of life imprisonment on the two appellants in respect of the robbery charge. The prescribed sentence for robbery as mentioned above is 15 years' imprisonment for a first offender. Both appellants 1 and 3 were first offenders at the time of the commission of these offences. Appellants 1 and 3 should therefore have been sentenced to life imprisonment for the murder, and 15 years' imprisonment for the robbery.

[22] Appellant 2, as I have found, was incorrectly convicted on the charge of murder. His sentence on this count therefore falls away. In addition to having been convicted of escaping from lawful custody, he should have been convicted only of robbery with aggravating circumstances. As mentioned above, as a first offender, the prescribed minimum sentence is fifteen years' imprisonment. However this sentence may be departed from if substantial and compelling circumstances exist which justify the imposition of a lesser sentence. (Note 5 above.)

[23] Appellant 2 was a young man of twenty one when he was arrested for the first time on 3 January 1997. He had been in custody for almost one and a half years before this incident occurred and never in trouble with the law before this. The evidence against him on the carjacking charge was such that he had no case to answer. He was so advised by his attorney when the application for his discharge was made in terms of s 174 of the Criminal Procedure Act 51 of 1977 on the day of the incident. His expectation therefore was that he would be released. The learned magistrate was, however, unable to deliver a judgment on the discharge application on that day. Instead he postponed the trial, including the decision on the discharge application for three months, to the 18th of August. His decision, later that day, to reduce the appellant's bail from R4 000 to R2 000 would have given the appellant no comfort as the reduced amount was also unaffordable. He was vulnerable to the suggestion by his co-accused that they should escape. In the event, the appellant was discharged three months later, but too late to avoid the tragic consequences that followed.

[24] After he had been rearrested, he spent another one and a half years in custody before his trial was finalised. In deciding what an appropriate sentence should be in his case, this and the earlier period must be taken into account. These circumstances are in my view sufficiently substantial and compelling to justify the imposition of a lesser sentence than the prescribed 15 years' imprisonment.

[25] In my view an appropriate sentence for the robbery is 10 years' imprisonment of which two years should be served concurrently with the sentence imposed for escaping from custody.

[26] In the result the appeal is successful only to the extent reflected in the order that follows:

26.1 The convictions of appellants 1 and 3 on the charges of escaping from lawful custody (count 5) and of murder (count 1) and the related sentences are confirmed;

26.2 The convictions on the charge of robbery in respect of appellants 1 and 3 are confirmed, but the sentences of life imprisonment that were imposed are set aside and replaced with a sentence of 15 years' imprisonment;

26.3 The conviction and sentence imposed on appellant 3 in respect of counts 3 and 4 (the unlawful possession of firearms and ammunition) are confirmed;

26.4 The conviction of appellant 2 on the charge of murder (count 1) and the sentence of life imprisonment that was imposed is set aside;

26.5 The conviction and sentence imposed on appellant 2 in respect of the charge of escaping from lawful custody (count 5) is confirmed;

26.6 The conviction of appellant 2 on the count of robbery (count 2) is confirmed, but the sentence of life imprisonment is set aside and substituted by a sentence of 10 years' imprisonment. It is ordered that two years of this sentence be served concurrently with the sentence of five years' imprisonment that was imposed in respect of charge of escaping from lawful custody and the sentence is antedated to 10 December 1999.

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A CACHALIA

ACTING JUDGE OF APPEAL

CONCUR:

NAVSA JA

BRAND JA