THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 091/15
Not Reportable

In the matter between:

MADODA DOPLA NUBE **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Nube v The State* (091/15) [2015] ZASCA 136 (30 September 2015)

Coram: Bosielo, Pillay and Dambuza JJA, Van der Merwe and Gorven AJJA

Heard: **26 August 2015**

Delivered: **30 September 2015**

Summary: Appeal against convictions and the sentences imposed for robbery with aggravating circumstances, attempted murder, six counts of murder, unlawful possession of firearm and ammunition – conspiracy and common purpose – the appellant a member of a group which planned to commit a heist – the appellant attending various meetings where the plan, time and method of executing the heist discussed, refined and agreed upon – the appellant claiming to have withdrawn from the conspiracy to commit the heist – confirmation of court a quo's finding that the appellant's conduct did not amount to effective dissociation from the conspiracy and common purpose to commit the heist.

ORDER

On appeal from: Eastern Cape Local Division, Port Elizabeth (Goosen J sitting as a court of first instance).

The appeal is dismissed.

JUDGMENT

Bosielo JA (Pillay and Dambuza JJA, Van der Merwe and Govern AJJA concurring):

[1] The appellant and six others stood trial before Goosen J in the Eastern Cape Local Division, Port Elizabeth charged with a number of offences being robbery with aggravating circumstances as defined in s 1(*b*) of the Criminal Procedure Act 51 of 1977 (CPA), and read with the provisions of s 51(1) and Part 1 of Schedule 2 of the Criminal Law Amendment Act 105 of 1977, statutory conspiracy with, or, procurement of other persons to commit robbery with aggravating circumstances (as defined in s 1(1)(*b*) of the CPA) (in contravention of s 18 of the Riotous Assemblies Act 17 of 1956), the statutory unlawful possession of firearms, the statutory unlawful possession of a fully automatic firearm, the statutory unlawful possession of ammunition, three counts of attempted murder, six counts of murder and three counts of theft of motor vehicles which were used in the commission of an attempted heist of an armoured vehicle carrying liquid platinum.

[2] At the end of the trial, the appellant was found guilty of robbery with aggravating circumstances, one count of attempted murder, and six counts of murder. He was sentenced to an effective term of 23 years' imprisonment. The appellant is appealing against his convictions and sentences with the leave of the court below.

[3] The trial court delivered a comprehensive and detailed judgment dealing with all the evidence which was led at the trial. It will serve no purpose to repeat that exercise. This is more so because to a large extent the background facts are common cause. I will only refer to those parts of the evidence which the appellant disputed and those which illustrate the role which he played from the beginning of the conspiracy until the day when the heist was foiled by the police, on 8 November 2011.

[4] The following facts are common cause: the appellant was a member of a syndicate which had planned to rob Brink Security of liquid platinum whilst it was in transit; to facilitate their planned heist they had various meetings between August and November 2011 with one Constable Mudau (Mudau), who had been employed by Brink Security as a driver and who, unbeknown to the syndicate, was an undercover agent under the supervision of Colonel Mayana (Mayana); this undercover operation was authorised by the Director of Public Prosecutions in terms of s 252A of the CPA; all the meetings between Mudau and members of the syndicate were video-taped and recorded; the appellant attended all the meetings between Mudau and members of the syndicate where the plan of the robbery was discussed, refined and finally adopted save for the brief period in October 2011 when he was detained in prison.

[5] It is furthermore common cause that: the appellant was not only an integral part of the group planning the heist with Mudau but featured prominently as the brain trust behind it; he was not supposed to participate actively in the actual heist as his role was to be on the freeway to do the reconnaissance of the Brink's vehicle from the airport and report its progress to the members of the syndicate who were going to execute the heist; on 8 November 2011, the other members of the syndicate dressed as road-workers took up their respective positions as planned at the railway crossing at Stephenson Road, Deal Party ready to execute the heist; the planned heist was foiled by the members of the National Intervention Unit (NIU) who had been deployed at the crime scene with the specific purpose to foil the heist; some members of the syndicate made off with drums which they thought contained liquid platinum; others were fatally wounded in the wild shoot-out which ensued with two civilians shot and killed in the cross-fire.

[7] Although the appellant admitted to being a member of the syndicate and a party to the conspiracy to rob the Brink's vehicle of liquid platinum, he raised as his main defence that he had effectively withdrawn and thus dissociated himself from the joint criminal enterprise on 1 November 2011. His stated reason for withdrawing is that it was mentioned for the first time at this meeting that a bomb was going to be used during the heist. He conveyed his intention to withdraw from the planned heist to only one member of the syndicate. Notably, he attended a meeting between Mudau and the syndicate on 7 November 2011, where the plan to execute the planned heist was finalised. Importantly, it is at this meeting that it was decided to execute the heist the next day, 8 November 2011.

[8] In amplifying his defence of dissociation, the appellant denied that he was ever at or near the crime scene on 8 November 2011. Essentially, he raised an alibi to the effect that at the time he had taken his friend to a place where he wanted to buy motor vehicle parts and further that later in the day he went to see his child at Ferguson Road in New Brighton where he spoke to a traffic officer called Mbulelo Ngwenze (Ngwenze). He testified that as evidence of his withdrawal he had reported the planned heist to a police officer, Derick Roderick Grootboom (Grootboom) on 7 November 2011. The appellant called both Grootboom and Ngwenze as his witnesses.

[9] Grootboom testified that at around midday on 7 November 2011, he received a call from a private number from a person who did not identify himself. However, because he knew the appellant, he could make out from the caller's voice that it was him. Although he could not remember exactly what the appellant said, he testified that it was to the general effect that 'there would be an incident going down in Deal Party tomorrow' and 'I will discuss details again with you'. In cross-examination, he testified that the appellant never furnished him with any further details. Of importance, he testified that on the morning of 8 November 2011, he went to Stephenson Road, Deal Party where the heist was to take place with some police officers. Whilst there, the appellant called him and indicated that he was on the freeway and that the Brink's truck had just passed him. When the appellant's counsel suggested to him that he might have misunderstood the appellant as what the appellant said to him was that the Brink vehicle, and not the appellant was on the freeway, Grootboom responded emphatically that 'from the conversation I could derive that both were on the freeway because he indicated that the vehicle is passing him now'.

[10] Ngwenze testified that he knew the appellant very well. He testified, in short, that he heard over the radio, whilst doing patrol duties that morning that there was a shoot-out between police and robbers. He then went to the scene at approximately 10 o'clock and the heist was over. Later that day after he had left the crime scene, he saw the appellant in his vehicle holding his baby on Ferguson Road in New Brighton. He then stopped and told the appellant about what he had seen at the robbery scene. He estimated that it could have been around 12h30 when he spoke to the appellant.

[11] The trial judge dismissed the appellant's defence of dissociation. He found that the appellant's version that he had told accused 5 after the meeting of 1 November 2011 that he was withdrawing from the conspiracy because a bomb was going to be used was contradicted by the transcript of the recorded meetings which shows clearly that the use of a bomb had already been raised at an earlier meeting on 13 September 2011, where the appellant was present. Importantly, the trial judge found the appellant's subsequent behaviour after the meeting of 1 November 2011, to be inconsistent with his claim that he had effectively withdrawn from the conspiracy to commit the heist. Hence the conviction.

[12] Stripped to its bare essentials, the argument before us was confined to the crisp question whether the trial court erred in finding that the appellant's action, viewed holistically, did not amount to dissociation from the planned heist.

[13] Counsel for the appellant agued in the main that the trial court confused conspiracy by members of the syndicate to commit the heist, with the eventual commission of the heist based on common purpose. However, she conceded,

correctly in my view, that because members of the syndicate including the appellant, had agreed on the commission of the offence, the statutory crime of conspiracy to commit robbery had been proved.

[14] Regarding common purpose in committing the heist with his co-conspirators, she submitted that the appellant should not have been convicted as it was common cause that the appellant was not at the crime scene during the commission of offence.

[15] On the other hand, the respondent's counsel submitted that the conviction of the appellant by the trial court is fully supported by the proven evidence. He submitted that it is clear from the evidence of Mudau, the undercover agent, which is fully corroborated by the transcripts of the meetings held between Mudau and various members of the syndicate, including the appellant that since his involvement in the planning of the heist in early August 2011, the appellant was not only an integral part of the plan to rob Brink's Security of liquid platinum, but he was in fact pivotal to the entire scheme. He argued further that the appellant's subsequent conduct, after the meeting of 1 November 2011, of attending another meeting of the syndicate on 7 November 2011 where the plan to execute the heist was finalised, is subversive of his defence of dissociation. In conclusion he contended that the appellant's presence on the freeway where the Brink's Security vehicle was going to travel from the airport as per the agreement with the syndicate is further proof of his continued association with the syndicate's planned heist.

[16] Regarding the telephone call made by the appellant to Grootboom on the day before the heist, the respondent's counsel submitted that the trial court was

correct in finding that it was not sufficient to support the defence of dissociation as the appellant said too little about the planned heist to be of any assistance to the police. In other words, it was so vague and bereft of the necessary details to enable the police to know what was happening where, when, how and by whom.

[17] Regarding the appellant's assertion that he was not on the freeway on 8 November 2011, the respondent's counsel submitted that this was effectively refuted by the evidence of Grootboom, his own witness, who testified, contrary to the appellant's version, that the appellant called him on his cellular phone on the morning of 8 November 2011 to tell him that he was on the highway and that the truck with platinum had just passed him.

[18] I have already indicated above that the appellant's counsel conceded that conspiracy to commit an offence had been proved when the syndicate agreed early in August 2011 to commit the heist and that the appellant could have been properly convicted on conspiracy. It suffices to state that the appellant's conduct falls squarely within the legal parameters of conspiracy as authoritatively enunciated in *S v Alexander & others* 1965 (2) SA 818 (A) at 821; *S v Cooper & others* 1976 (2) SA 875 (T) at 879B-F. See Snyman: Criminal Law, 4th Edition at p292.

[19] I now turn to deal with whether the appellant's conduct can sustain his defence that he had effectively withdrawn or dissociated himself from the conspiracy and continuing common purpose with the syndicate to commit the heist on 7 November 2011.

[20] It is trite that this question is a factual one to be answered with reference to the evidence led and the role played by the appellant. This requires the court to evaluate the entire mosaic of the evidence presented, to determine if the proven evidence is such that it can sustain a conclusion that the appellant did in fact withdraw from the planned heist. See *S v Thebus & another* 2003 (6) SA 505 (CC) para 44.

[21] This Court enunciated the test for dissociation in *S v Nduli & others* 1993 (2) SACR 501 (A) at p504d-e as follows:

'Dissociation consists of some or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defence to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates (see *S v Nomakhlala & another* 1990 (1) SACR (A) 300 (A) at 303g-304d; *S v Nzo & another* 1990 (3) SA 1 (A) at 11H-I; *S v Singo* 1993 (2) SA 765 (A) at 771E-773E). The more advanced an accused person's participation in the commission of the crime, the more pertinent and pronounced his conduct will have to be to convince a court, after the event, that he genuinely meant to dissociate himself from it at the time. It remains, I tend to think, a matter of fact and degree as to the type of conduct required to demonstrate such an intention'.

[22] This Court expounded the salutary approach further in *S v Musingadi & others* 2005 (1) SACR 395 (SCA) at para 35 as follows:

'What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation. Compare Snyman *Strafreg* 4th ed at 267-9. It appears that much will depend on the circumstances: On the manner and degree of an accused's participation; on how far the commission of the crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise.'

The court went further and stated at para 39 that:

'The greater the accused's participation, and the further the commission of the crime has progressed, then much more will be required of an accused to constitute an effective disassociation. He may even be required to take steps to prevent the commission of the crime or its completion. It is in this sense a matter of degree and in a borderline case calls for a sensible and just value judgment.'

[23] In my view, the following pieces of evidence are in summary destructive of the appellant's defence of withdrawal and dissociation from the common purpose to execute the heist: his untruth that he heard about the use of a bomb for the first time on 1 November 2011, whilst the transcript shows this was discussed at a meeting on 13 September 2011 already where he was present; his continued attendance of the meetings of the syndicate in particular the one on 7 November 2011 where the plan for the heist was further refined and adopted; his failure to tell the syndicate that he was withdrawing from the conspiracy; his denial, which has been proved to be wrong by Grootboom, that he was on the freeway on 8 November 2011, the day of the heist; and his unexplained failure to disclose sufficient information pertaining to the planned heist which would have allowed Grootboom to foil it.

[24] In the circumstances, I am of the view that the trial court was correct in finding that the appellant's conduct did not amount to effective dissociation from the planned heist. It follows that there are no grounds on which this Court can interfere with the appellant's convictions by the trial judge.

[25] The appeal against the sentences was largely dependent on the success of the appeal against the convictions. No submissions were advanced at the hearing on any other aspects. No misdirections were identified and nor were

submissions made that any of the sentences, or their cumulative effect, was startlingly inappropriate. I can find no basis to interfere with the sentences.

[26] In the result, the appeal is dismissed.

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L O Bosielo
Judge of Appeal

APPEARANCES:

For Appellant:	L Crouse (with her K Saziwa) Instructed by: Legal Aid SA, Port Elizabeth Legal Aid SA, Bloemfontein
For Respondent:	M L Le Roux Instructed by: Director Public Prosecutions, Port Elizabeth Director Public Prosecutions, Bloemfontein