THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 247/18

In the matter between:

PONTSO DENNIS NDOU **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Ndou v The State* (247/18) [2019] ZASCA 85 (31 May 2019)

Coram: Leach, Saldulker, Zondi and Mocumie JJA and Eksteen AJA

Heard: 20 May 2019

Delivered: 31 May 2019

Summary: Criminal Procedure – the Appeal Court lacks jurisdiction, in the absence of a cross-appeal by the State, to reverse the acquittal of the accused – evidence in relation to common purpose to commit robbery not sufficient to make perpetrators joint possessors of a firearm under the Firearms Control Act 60 of 2000 – sentence in respect of offences related in terms of time and place ordered to run concurrently.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Kgomo J and Mbongwa AJ) sitting as court of appeal.

1 The appeal against the appellant's conviction and sentence on count 3 is upheld and the conviction and sentence imposed pursuant thereto is set aside.

2 The order of the Full Court is set aside and replaced with the following:

(a) The conviction and sentence on count 1 (robbery) are confirmed.

(b) The appeal against the appellant's sentence on count 2 is upheld and the sentence imposed is set aside and is replaced with one of 5 years' imprisonment, three years of which is ordered to run concurrently with a sentence of 15 years' imprisonment on count 1.

(c) The appellant is thus sentenced to an effective term of 17 years' imprisonment.

(d) The sentence is ante-dated to 17 January 2007 being the date that the sentence was imposed in the trial court.

JUDGMENT

Zondi JA (Leach, Saldulker and Mocumie JJA and Eksteen AJA concurring)

[1] The appellant together with his two co-accused appeared in the Wynberg Regional Court, Alexandra, each facing three charges; namely robbery with aggravating circumstances (count 1), attempted murder (count 2) and unlawful possession of a firearm in contravention of s 3 of the Firearms Control Act 60 of 2000 (Firearms Control Act) (count 3). The charges relate to the events which occurred in Rivonia, Sandton, on 13 December 2004 when Mrs Claire Dawn McGraf was robbed of two bags, a handbag containing R3000 in cash, a cellphone, bank cards and a money bag containing R10 840 in cash and two cheques. Mr Barnes saw the suspects get into a BMW vehicle, a get-away vehicle driven by the appellant. When he tried to apprehend the suspects a shot was fired from inside the vehicle and injured him on his

left arm. The appellant drove off, but he and the two suspects were shortly thereafter cornered by the police and arrested. The police conducted a search on their persons and on the vehicle they were traveling in. A firearm and the complainant's belongings were found in the vehicle. The appellant was legally represented and pleaded not guilty to all of the charges.

[2] The appellant was convicted on counts 1 and 2. He was sentenced to 15 years' imprisonment on count 1 and 10 years' imprisonment on count 2. He was acquitted on count 3 (a charge of unlawful possession of a firearm). The appellant with leave granted on petition by the Judge President of the Gauteng Division of the High Court appealed to the Full Court against his conviction and sentence on count 2 only. The State did not cross-appeal against the acquittal of the appellant in respect of count 3. Instead the State forewarned the appellant in its heads of argument that at the hearing of the appeal it would argue for the reversal of the acquittal on count 3. The Full Court also notified the appellant of the State's intention and its intention to revisit the acquittal on the day of the hearing of the appeal.

[3] The Full Court (Kgomo J and Mbongwa AJ) dismissed the appeal against the sentence on count 1 (no leave was granted on count 1), but upheld the appeal against conviction on count 2. It set aside the conviction imposed by the regional court and replaced it with one of assault with intent to do grievous bodily harm. Despite its setting aside the conviction on count 2, the Full Court did not interfere with the sentence of 10 years' imprisonment imposed by the regional court. The Full Court set aside the acquittal order granted by the regional court in respect of count 3. It replaced the acquittal order with the following:

'The appellant is convicted thereon and he is sentenced to two years' imprisonment.'

In consequence the appellant was effectively sentenced to 27 years' imprisonment.

[4] The appeal, with the special leave of this Court, is against the conviction and sentence of 10 years' imprisonment on count 2 and the order setting aside the appellant's acquittal on count 3 and substitution therefor a conviction and a sentence of two years' imprisonment.

[5] Three main issues arise for determination in this appeal. The first relates to propriety of the procedure followed by the Full Court in reversing the acquittal order made by the trial court on count 3. The second one relates to the merits and the question as to whether the evidence adduced by the State was sufficient to sustain a conviction on count 3. The last question is whether the sentence imposed by the trial court was appropriate.

[6] The appellant's convictions and the resultant sentences arise from the following incident. On 13 December 2004 at about 11h40, Mrs McGraf left her place of work, Sandton Caltex Garage, in her motor vehicle to do banking at Standard Bank located at Rivonia Mall, Sandton. The mall is about a kilometre away from her workplace. Mrs McGraf carried a money bag containing an amount of R10 840 in cash, two cheques, bank cards and a handbag containing her personal belongings and R3000 in cash. In total she had R13 840 in her possession.

[7] She parked her vehicle in the basement parking area of Standard Bank, from where she intended to walk to the bank. She took out her handbag and a money bag from the vehicle. When she was about to leave the vehicle two unknown suspects confronted her – one from each side. In an apparent attempt to instil fear in her, one of the suspects displayed a firearm which was tucked inside the waist of his jeans. He thereupon demanded money. A second suspect hit her on the face with an open hand. While Mrs McGraf was in a state of confusion one of the suspects grabbed hold of the handbag and the money bag from her hands and disappeared from sight. She screamed for help. In the meantime, the appellant waited for the two suspects in a get-away car outside the building on Rivonia Road.

[8] Mr Henry John Barnes was in the vicinity of the crime scene when he observed two suspects running out of the building and getting into the get-away car shortly after hearing a loud scream. Mr Barnes, in an attempt to apprehend the suspects, pulled out his firearm and approached the vehicle from the driver's side with a firearm in his right hand. The car window on the driver's side was down. Mr Barnes, through the open window, placed a firearm against the side of the driver's head. He then grabbed hold

of the car keys intending to remove them from the ignition. With that a shot was fired from inside the vehicle and hit Mr Barnes on his upper left arm. He retreated and shouted for help. The suspects fled the scene and drove in the direction of the N1 high way. Mr Gert Van Rooyen followed the get-away vehicle in his Nissan vehicle and kept it under observation from the time it left the crime scene until the police stopped it on the Edenvale off-ramp and arrested the suspects.

[9] The police searched the vehicle and recovered a firearm with rounds of ammunition under the front passenger's seat and two black handbags. The occupants of the vehicle were also searched and R10 840 cash was found on the front seat passenger. A Nokia cellphone was found on the driver and an Ericsson cellphone on the back seat passenger. These and other exhibits were booked into the SAP13 register at Sandton Police Station. Some of these exhibits were later identified by Mrs McGraf at the police station as her belongings which were taken from her during the robbery and they were released to her.

[10] It is common cause that one of the suspects pleaded guilty, and in consequence his trial was separated from that of the appellant's. The appellant's erstwhile co-accused 2 was arrested some few days later at his place of work, Sandton Caltex Garage, where Mrs McGraf was also employed. It transpired that he is the one who facilitated the robbery of Mrs McGraf by providing information to the other suspects about her movements on the day in question. The appellant did not testify in his defence.

[11] As already pointed out, the regional court convicted the appellant on a count of armed robbery and that of attempted murder but acquitted him on the charge of unlawful possession of a firearm. The trial court convicted the appellant on the charge of attempted murder on the basis that he had an intention in the form of *dolus eventualis*. It expressed itself in these terms:

'So accused 1 and accused 3 knew when they went to go and pull this robbery that a person or persons can be shot and be killed. But despite that knowledge they went through with this operation.'

[12] The trial court discharged the appellant on count 3 due to the lack of evidence. It held:

'And regarding count 3 . . . There is no evidence that the three accused had a common purpose to possess this firearm or had control over this firearm.'

[13] On appeal, the Full Court set aside the conviction on a charge of attempted murder. It found that 'had there been an intention to kill Mr Barnes it is clear that his body being inside the vehicle, he could have been shot anywhere in the body but the firearm was directed at this arm and he was shot in the arm.'

[14] As regards count 3, the Full Court found that the trial court had misdirected itself in acquitting the appellant. According to the Full Court, the appellant should have been convicted on this charge on the ground that the firearm that was used to execute the robbery was also used to stop Mr Barnes from preventing the appellant and his co-accused from fleeing the scene.

[15] As regards the severity of the sentences that were imposed, the Full Court found no merit in the appellant's contention that the trial court should have ordered a portion of a sentence on the relevant counts to run concurrently. It held that there was no reason for it to interfere with the sentences as the trial court was in a better position to assess the case. In the result, the Full Court made the following order:

'1. *Conviction and sentence on Court 1 (robbery) are confirmed (15 years imprisonment).*

2. Count 2 (attempted murder) conviction is set aside and replaced with, assault to do grievous bodily harm. The sentence of the Court a quo is to remain unchanged.

3. The finding of not guilty on Count 3, illegal possession of a firearm is set aside and replaced with a conviction. The sentence imposed in two years imprisonment. This sentence is to run concurrently with sentences in Counts 1 and 2.

4. Sentences in respect of Counts 1 and 2 are to run consecutively.

5. Effective sentence [27] years imprisonment.

6. Sentence is backdated to 17 January 2007.'

[16] At the hearing of the appeal counsel for the State was constrained to concede that the evidence in relation to count 3 was insufficient to sustain a conviction on that

count and that she could not, in the circumstances, argue in support of the Full Court's reversal of the appellant's acquittal. She however, persisted with her submission that the Full Court had jurisdiction to consider the acquittal order despite the absence of cross-appeal by the State. This cannot be accepted. It is now trite that the State has no right to appeal against the acquittal based solely on questions of fact.

[17] This Court in *Director of Public Prosecutions, Gauteng v Pistorius* 2016 (2) SA 317 (SCA), para 22 held that '"the traditional policy and practice of our law' is that an acquittal by a competent court in a criminal case is final and conclusive and may not be questioned in any subsequent proceeding.' The court went on to hold at para 23:

'Consequently, as opposed to an accused who has the benefit of appealing against a conviction based on alleged incorrect factual findings, the State may not appeal against an acquittal based solely on findings of fact. And as Chaskalson CJ pointed out in *Basson*:

"Prior to 1948 [the State] could also not appeal against a finding of law made in a trial before a Judge which resulted in the acquittal of an accused person. In 1948 the Criminal Procedure Act then in force was amended to make provision for the reservation of questions of law at the instance of the State in terms substantially similar to s 319 of the present Act."'

See also *Magmoed v Janse van Rensburg* 1993 (1) SA 777 (A) at 816H-817B.

[18] The State thus had no right of appeal and the high court was not entitled either at its own instance or that of the State to set aside the acquittal and substitute a conviction in its stead.

[19] In any event, the conviction on count 3 cannot stand as the evidence on which it was based, was insufficient. This much was conceded by the State. The conviction was based on the reasoning that as all the robbers acted with common purpose they were guilty of joint possession of the one firearm. It is trite too, that this does not follow. (*S v Mbuli* 2003 (1) SACR 97 (SCA) para 71). The conviction on count 3 cannot stand and must be set aside.

[20] The sentences imposed were attacked on two grounds. First, it was submitted that 10 years' imprisonment on count 2 was so excessive as to induce a sense of

shock. Counsel for the appellant argued that following the setting aside of the conviction of attempted murder and its substitution by one of assault with intent to do grievous bodily harm which is a lesser offence, a sentence of 10 years' imprisonment should have been consequentially reduced. Secondly, it was submitted that both the trial court and the Full Court misdirected themselves by failing to reduce the cumulative effect of the sentences imposed on counts 1 and 2 by ordering the sentence or a portion of a sentence on count 2 to run concurrently with a sentence of 15 years' imprisonment on count 1 or taking the offences together for the purposes of sentence.

[21] In general, sentencing is within the discretion of the sentencing court. An Appellate Court's power to interfere with sentences imposed by trial court are circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, or the trial court misdirected itself to such an extent that its decision on sentence is vitiated; or the sentence is so disproportionate or shocking that no reasonable court could have imposed (*Bogaards v S* 2013 (1) SACR 1 (CC) para 41). It is so that where multiple offences have to be punished, the sentencing court has to seek an appropriate sentence for all offences taken together and must not lose sight of the fact that the appropriate penalty must not be unduly severe. Section 280(2) of the CPA affords the sentencing court with a discretion to make an order that sentence run concurrently.

[22] In my view, the trial court committed a material misdirection in sentencing the appellant on count 2 on the assumption that the provisions of the Criminal Law Amendment Act 105 of 1997 prescribed a sentence of 10 years' imprisonment. It erred in doing so. At best for the State the offence was one envisaged in Schedule IV to the Act which carries a prescribed minimum sentence of 5 years' imprisonment.

[23] It is so that an assault using a firearm is a prevalent and a very serious offence; more so in this matter as it was committed during the robbery. It is in the general public interest that sentences imposed in matters such as this one, should act as a deterrent to others. The evidence regarding the nature and extent of the injury to Mr Barnes was not presented in the trial court and this court is left in the dark as to whether he had fully recovered from the damage caused to his left arm.

[24] As regards the personal circumstances of the appellant, he was a first offender and there is no evidence that he is the one who shot the complainant. He was convicted by association and on the basis that he had an intention in the form of *dolus eventualis*. The Full Court on appeal changed the conviction from one of attempted murder to assault with intent to do grievous bodily harm. That finding should have resulted in the reduction of a sentence. The Full Court refused to interfere with the sentence contending that the trial court was in a better position to assess the sentence which, unfortunately, was not the case as it is apparent that the trial court had sentenced the appellant on an incorrect assumption that the prescribed minimum sentence was 10 years' imprisonment.

[25] In my view, the appeal against sentence on count 2 should succeed and the sentence of 5 years' imprisonment should replace the sentence of 10 years' imprisonment imposed by the trial court and confirmed by the Full Court. Both sides eventually agreed that this would be an appropriate sentence.

[26] An effective sentence of 20 years' imprisonment is a very severe punishment that should be reserved for particularly heinous crimes (*Muller & another v The State* [2011] ZASCA 151; 2012 (2) SACR 545 (SCA) paras 9-10). The offences of armed robbery and that of assault with intent to do grievous bodily harm are related in terms of time and space and in order to reduce the cumulative effect of the penalty, three years of the five years sentence on count 2 should be ordered to run concurrently with the sentence of 15 years imposed on count 1. Effectively the appellant would be sentenced to 17 years' imprisonment. I should mention that during the course of the appeal both sides also agreed that this would be the appropriate outcome.

[27] In the result the following order is made:

1 The appeal against the appellant's conviction and sentence on count 3 is upheld and the conviction and sentence imposed pursuant thereto is set aside.

2 The order of the Full Court is set aside and replaced with the following:

(a) The conviction and sentence on count 1 (robbery) are confirmed.

(b) The appeal against the appellant's sentence on count 2 is upheld and the sentence imposed is set aside and is replaced with one of 5 years' imprisonment, three years of which is ordered to run concurrently with a sentence of 15 years' imprisonment on count 1.

(c) The appellant is thus sentenced to an effective term of 17 years' imprisonment.

(d) The sentence is ante-dated to 17 January 2007 being the date that the sentence was imposed in the trial court.

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D H Zondi
Judge of Appeal

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