IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: CC158/2018

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED: YES/NO

SIGNATURE

10/06/2021
DATE

In the matter between:

ALOGEN OLIFANT **4th Applicant**

NEALANE PETERSON **5th Applicant**

v

THE STATE **Respondent**

JUDGEMENT

MOSOPA, J

1. In this matter, five accused were arraigned before me on multiple counts, including murder, read with the provisions of section 51(1) of Act 105 of 1997, attempted murder and unlawful possession of firearm(s) and ammunition. On

30 November 2020, I convicted all the accused on all charges proffered against them and eventually sentenced them on 7 December 2020.

2. Application for leave to appeal against both conviction and sentence was then brought by the current applicants. I must mention here that the application for leave to appeal was supposed to be heard in respect of the remaining three applicants too, but after their application for condonation of late filing of the application for leave to appeal was refused, I proceeded to hear the application of the current applicants. After hearing argument on 3 June 2021, I reserved judgment.

3. Section 316(1)(a) of the Criminal Procedure Act 51 of 1977 ("CPA") provides;

> *"(1)(a) Subject to section 84 of the Child Justice Act, 2008, any accused convicted on any offense by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order."*

4. Section 17(1)(a)-(c) of the Superior Courts Act 10 of 2013 provides;

> *"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*
>
> *(a)(i) the appeal would have a reasonable prospect of success, or*
>
> *(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;*
>
> *(b) the decision sought on appeal does not fall within the ambit of section 16(2)(a), or*
>
> *(c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."*

5. From the above, it is clear that leave to appeal may only be granted when certain "jurisdictional facts" exist, namely;

   5.1. the appeal would have reasonable prospects of success, or
   5.2. it should be heard for some other compelling reason, such as conflicting judgments on a particular point of law raised.

6. The test of "reasonable prospects of success" was dealt with in the matter of ***S v Smith 2012 (1) SACR 567 (SCA)*** at para 7, which reads as follows;

> *"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 appellant 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, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."*

7. It is against this backdrop that the test of a reasonable prospect of success can be found to have the effect that the court will refuse an application for leave in this cases where absolutely no chance of a successful appeal exists; or where a court is certain beyond reasonable doubt that the appeal will fail (see ***R v Ngubane and Others 1945 AD 185*** at 186-7). On the other hand, it is trite that it is not necessary for the trial court to satisfy itself that the appeal court would come to a different conclusion, but what is necessary is that there should be a reasonable prospect that the appeal may succeed (***S v Ackerman en 'n ander 1973 (1) SA 765 (A)*** at 767G-H).

8. The nature of the argument made by Mr Peterson on behalf of the fourth and fifth applicants can be summarized as follows;

8.1. That I misdirected myself in the evaluation of the facts and evidence presented in respect of the surrounding facts of the scene, namely;

8.1.1. the identification of the vehicle, and

8.1.2. the identification of the individuals (perpetrators)

8.2. That I misdirected myself in the application of the law in respect of;

8.2.1. alibi, and

8.2.2. the doctrine of common purpose.

9. Mr Peterson contended that I erred in holding that the visibility at the time of this incident was clear enough for one to make an observation. The attack was levelled against the admitted evidence of Ms Anna van Schalkwyk and Constable Kolobe, who attended the scene as a photographer. I mentioned inconsistencies in the state witnesses' evidence in my judgment and made a ruling in respect thereof. I also admitted evidence that there was sufficient light for one to make an observation. In admitting this evidence, I not only considered the state witnesses but also witnesses on behalf of the accused, namely Mr Lucas and Mr Levanian Olifant, the younger brother of the fourth applicant.

10. The existence of the garage light at Mr Mohamed's place is not disputed and its illumination of the place is visible on the crime scene photo album, indicating that it was switched on at the time of the commission of the offense. Mr Levanian testified about the appolo lights at Slawerboom which the complainants referred to in evidence as the other source of light, and which was in working condition and illuminated the scene. Mr Kolobe, who attended the scene as a photographer, also had occasion to testify about the visibility at the scene. According to him, the light was sufficient for him to make an observation about 200 meters from the scene. He does not deny that he had to use a flashlight, as it was night. Mr Lucas, also a witness on behalf of the defense, observed the visibility at the scene where the shooting incident took place. Before he could even arrive at the exact scene of the shooting, he saw the bodies lying on the ground and he could see blood. This shows that

visibility at the scene was sufficient for one to make an observation. He later went on to change his evidence that the scene was dark and he had to make use of bright lights in order to see.

11. Mrs van Schalkwyk was not called to testify about the visibility at the scene where the shooting incident took place, but mainly to refute the second applicant's alibi. It is in response to the court's questioning that she testified about the visibility at the scene. She mentioned light coming from the shopping complex in corroboration of some state witnesses' evidence in this respect, the appolo light situated next to her residence and the street lights on Caledonia Curve, which is street where the shooting incident took place. All the witnesses who testified about the visibility at the scene, with the exception of Mr Lucas who changed his version, their evidence can be relied upon and I am not of the view that I misdirected myself in relying on this evidence.

12. The fifth applicant and his mother, Mrs Peterson, both testified that the original petrol cap of the vehicle used by the fifth applicant, was black and was damaged. It was then replaced with a white petrol cap. The eyewitnesses gave a different colour to the petrol cap, with some saying that it was white and others saying it was a grey petrol cap. They were all consistent in respect of the colour of the vehicle being black and that it was a VW Polo vehicle. This fact was also admitted by the fifth accused as well as Mrs Peterson. They all agreed that the vehicle had a silver trim on the boot. The eyewitnesses were all consistent in saying that it was the only vehicle like that in the area and that the driver of the vehicle always played loud music. This was also confirmed by the fourth and fifth applicants.

13. Mr Kemp was once a passenger in the vehicle described above. Mr Zayn Mohamed provided the court with the registration number of the vehicle which attacked them. However, this registration number was not correct as he had confused certain letters. Criticism was levelled against his evidence as to why this registration number was not mentioned in his statement to the police. However, the identification of the vehicle is not the only evidence linking the applicants to the commission of the offence, as all the applicants were placed

inside the vehicle, with the fifth applicant as the driver. I have already dealt with the issue of visibility and that allowed the complainants to identify the applicants inside the vehicle. All the witnesses who identified the fourth applicant, indicated that they never saw him shooting and further stated that he was seated on the back passenger seat. However, this does not exclude the liability of the fourth applicant, as the state relied on the doctrine of common purpose to secure a conviction against all the applicants. All the state witnesses placed the fifth applicant at the scene and confirmed that he was the driver of the vehicle which was used in the commission of the offense, namely the black VW Polo Vivo vehicle, which belongs to him.

14. In contention, Mr Peterson, on behalf of the applicants, further contended that I applied the doctrine of common purpose incorrectly and most importantly, that I misdirected myself, in that I did not make a finding in respect of a planning enterprise, yet I convicted the applicants on common purpose. This contention is completely misplaced as I dealt with this point in my judgment and held as follows:

> *"... The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offense. In the second category, no such agreement exists or is proved..."*

15. Further, that,

> *"The State could not prove the existence of a prior agreement amongst the accused before the crime was committed in order to hold the accused liable for murder. However, what the State managed to prove is the fact that all the accused on the 6 April 2018 were together in the vehicle which belongs to accused 5, who was also the driver of that vehicle. The accused knew that some of the members of their group were in possession of the firearms and such firearms would be used to kill the deceased and injure the complainants and they actively associated themselves with such intention. They have manifested their*

sharing of a common purpose with the actual perpetrators by associating them with their conduct. They had the requisite mens rea to kill the deceased and they had foreseen the possibility of the deceased being killed and they reconciled themselves with that intention. (S v Mgedezi)."

16. The same was said by the Constitutional Court in the matter of ***S v Tshabalala and Another 2020 (2) SACR 38 (CC)***, which is one of the decisions Mr Peterson relies on, where Mathopo AJ observed,

> *"[48] The liability requirement of a joint criminal enterprise falls into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offense. In the second category, no such prior agreement exists or is proved. In the latter instance, the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.*
>
> *[49] It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of the parties to the agreement which falls within their common design, to all other contracting parties. Subject to proof of the other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in these circumstances be established."*

17. When I convicted the applicants based on the doctrine of common purpose, I relied on the second leg of the doctrine, as I found that the State could not prove the existence of a prior agreement, but the surrounding circumstances of the case infers that such an agreement exists. For all the applicants to be in the same vehicle at the time of the shooting incident proves that. Evidence is established that the applicants do not stay in the same vicinity, but rather

some distance from each other. There was a stage earlier on, before the shooting incident, when accused 1 and 3 passed the complainants and were seen pointing their fingers at the complainants. At that stage, the rest of the applicants were not present. Shots were fired immediately after the vehicle driven by the fifth applicant approached the complainants and such shots were not fired from where the complainants were seated.

18. It was furthermore contended by Mr Peterson that I misdirected myself in finding that the alibis of the applicants are false, beyond doubt. I fully gave my reasons for this finding in my judgment which I do not intend to repeat at this stage and I stand by that finding.

19. A further attack of my rejection of the defense of alibi of the applicants is that I drew an inference of guilt from the applicants' pre-trial silence (their failure to disclose the defense of alibi at the time of their arrest). In my judgment, when convicting the applicants, I stated the following;

> *"It is trite that there is no onus on the accused to establish their alibi. It might be reasonably true that they must be acquitted and it does not have to be considered in isolation from other evidence. The correct approach is to consider it in the light of the totality of the evidence presented before court. "(Further quoted the dictum expressed in the matters of R v Hlongwane [1959] 3 All SA 308 (A), R v Biya [1952] 4 All SA 304 (A); Tshiki v The State (358/2019) [2020] ZASCA 92 (18 August 2020).*

20. Further, that,

> *"The rights to remain silent before and during trial and be presumed innocent are important, interrelated rights aimed at ultimately protecting the fundamental freedom and dignity of an accused person… It is well established that it is impermissible for a court to draw any inference of guilt from the silence of an accused person. Such inference would undermine the rights to remain silent and to be presumed innocent.*

The failure not to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating evidence as a whole…"

21. Further in my judgment, that,

> *"I cannot draw any negative inference due to the late introduction of their defenses of alibi (applicants), as it does not appear that they were initially appraised of that at the time of their arrest."*

It was my finding that the applicants' defenses of alibi should be weighed against the totality of evidence. Further finding that the only basis on which a court can reject the defense of alibi is when it is proven that it is false beyond doubt because once it is raised, as a general rule, it must be accepted (***S v Musiker 2013 (1) SACR 517 (SCA)*** at paras 15-16).

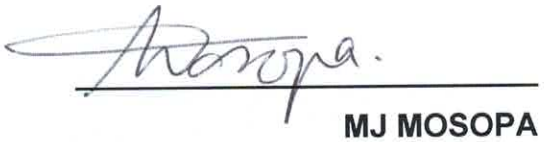
22. Based on the above, I do not see any court coming to the different conclusion reached by the trial court.

23. On sentence, even though Mr Peterson correctly, in my view, stated that there is not much to present as the main emphasis was on conviction, only legal argument was presented. The majority of offenses I convicted the applicants of are defined and prescribed in the minimum sentence regime. For a court sentencing a convicted person of such, it must be established that there exists compelling and substantial circumstances for such court to deviate from the imposition of such prescribed minimum sentences. In my judgment on sentence, I found that no such circumstances existed and I stand by my finding.

24. I am of the view that no other court could come to a different conclusion from the sentence I imposed.

25. Consequently, I make the following order;

1. The application for leave to appeal against both conviction and sentences is refused.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicants:	Adv D Peterson
Instructed by:	Luando Vorster Attorneys
For the respondent:	Adv M Marriott
Instructed by:	The DPP
Date of hearing:	3 June 2021
Date of judgment:	10 June 2021