THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 3 May 2023

Status: Immediate

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Govender v The State (221/2022) [2023] ZASCA 60 (3 May 2023)

Today the SCA dismissed the appeal against the conviction and sentence by the full court Gauteng Division of the High Court, Johannesburg.

On the 12th August 2018 the appellant and his co-accused (Accused 1) were part of a group attending a function at a restaurant and club in Kyalami, Johannesburg. Accused 1 shot and killed two people at the club. The appellant was charged and convicted on two counts of murder based on common purpose. The appellant challenged his conviction on the grounds that it was based on circumstantial evidence. He denied that he was present at the scene. He contended that common purpose was not established and the state did not prove his guilt beyond a reasonable doubt. The main issue on appeal was whether the appellant acted in common purpose with Accused 1 in the murder of the two deceased and was correctly convicted of the crimes.

The conviction was mainly based on the evidence of Mr. Maswanganye (an Uber driver called by the appellant to the club to pick the appellant's wife and take her home Randburg), Mrs Nair, (an employee at the club, married to one of the deceased, Mr Nair), and Mr Dickson (a bouncer employed by the club). After midnight on arrival at the club, Mr. Maswanganye (the driver), found the appellant and his wife waiting outside. The area was well lit. He parked his vehicle close to the building, next to the stairway leading up to the club. The appellant's wife asked him to wait for two other passengers. He noticed that as the appellant moved about, he had a firearm underneath his jacket below waist.. One of the two passengers, Bilal, came out of the club with a bloody nose, followed by a man wearing a red bandana. Outraged by what happened to Bilal, the appellant wanted to go back to the club and the man in the red bandana attempted to restrain him. The appellant removed his firearm, described as a "silver firearm" from the holster and held it in his hand. A scuffle ensued between the appellant and the man with a bandana who tried to persuade the appellant to go home.

The scuffle migrated to the stairway leading to the club. Accused 1 appeared and joined the scuffle. The driver saw Accused 1 take the firearm from the appellant. The appellant gave no resistance to the

taking of his firearm. Shortly afterwards, the driver heard sounds gunshots being fired. A man, later identified as Mr. Nair, came running from the club, shouting that he had been shot. Accused 1 had followed Mr. Nair, with the firearm in his hand. He opened the back passenger door of the Uber vehicle looking for Mr. Nair. Mr. Maswanganye wanted to leave immediately but the appellant's wife restrained him for leaving. She wanted to be assured of the appellant's whereabouts. Soon thereafter, the driver saw Accused 1 leaving in an unmarked white BMW. Seeing the departure of the BMW, the appellant's wife instructed the driver to leave. The appellant did not travel with his wife in the Uber vehicle. The driver confirmed during cross examination that he last saw the appellant during the scuffle on the stairs leading to the club where Accused 1 took the firearm from him.

It was a common cause during the trial that the appellant was a licensed owner of two firearms, one of which was a silver Taurus. He did not report the firearm missing. The firearm was never found after the incident.

According to Mrs Nair who was inside the club, an argument ensued between Accused 1, Mr. Nair and Mr. Pillay. A crowd had gathered around them. Club bouncers were called to remove those involved. Peace restored inside, but was short lived because Accused 1 returned using a different entrance. Accused 1 then fired a bullet up at the ceiling and another at Mr. Pillay whom he shot at point blank range. Mrs Nair tried to warn Mr. Nair that Accused 1 had a firearm. Mr Nair took cover behind a pillar but Accused 1 saw and followed him down stairs. Soon thereafter, Mrs. Nair heard the sound of a gunshot and later found that Mr. Nair had been shot in the shoulder area. Despite attempts by paramedics to resuscitate him, he died at the scene from a penetrating gunshot wound of the thorax.

One of the bouncers, Mr. Dickson, confirmed that a fight broke out in the club. Accused 1 and the appellant were part of the same group of patrons. He described the clothes the appellant and Accused 1 wore. In trying to calm down the fight, he took Accused 1 outside the club. Accused 1 returned to the club and fired gunshots inside the club. The patrons, who took cover when the shots were fired, only ran out of the club after Accused 1 and the appellant left. His evidence was that Accused 1 and the appellant left the club together. This evidence was not challenged.

Accused 1 testified in his own defence. He disputed involvement in the scuffle, denied taking a firearm from the appellant and denied shooting the deceased inside the club. The appellant on the other hand, chose not to give evidence in his defence. The version the appellant put to the driver was that someone dispossessed him of his firearm during the scuffle and he ran upstairs to retrieve it.

The SCA considered common purpose based on the requirements in *S v Mgedezi and Others* [1989 (1) SA 705 (A) at 705 I] to establish whether the appellant actively associated himself with the actions of Accused 1 and had the requisite intent to find a conviction. It observed that there was no proof of a prior conspiracy, but however that, an act of active association is wider than a prior agreement. It can be inferred from the conduct of the participants. In this case, the appellant removed his firearm from the holster with the intention to go to the club to avenge the assault on Bilal. He resisted efforts to restrain him and engaged in a scuffle. The appearance of Accused 1 did not deter him from proceeding toward the club to settle the score. It was only halfway the stairway that the forearm was taken from him. His counsel rightly conceded that the appellant relinquished his firearm to Accused 1. The SCA found that

the appellant did not disassociate himself because Accused 1 was going to use the firearm to do that which the appellant intended to do. He knew and foresaw the possibility that Accused 1 would use the firearm which could result in the death of a person and reconciled himself with the consequence. The natural reaction of a person accompanying another with a deadly weapon is to completely distance himself from the events about to unfold. Instead the appellant accompanied Accused 1.

The SCA held that both direct and circumstantial evidence pointed to the presence of the appellant at the scene when the shots were fired. Where else could he have gone with Accused 1? The evidence of the driver, Mr. Maswanganye and Mr Nair corroborated each other that after the shots were fired, Accused 1 sped off in an unmarked white BMW. The only reasonable inference from the proved facts was that the appellant fled the scene with Accused 1. Who else could have driven the white BMW but the appellant? He did not travel home with his wife in the Uber vehicle.

The SCA also considered the appellant's failure to report the loss of his firearm to the police, rightly taken into account by the full court as another factor pointing to his guilt. It found that an inference was ineluctable that both the appellant and Accused 1 knew that the firearm had been instrumental in the killing of the deceased and were intent on suppressing that evidence. The evidence made it clear that the allegation that the appellant went upstairs to retrieve the firearm could be rejected.

The SCA held that the totality of the evidence on which the appellant's conviction was based comprised of direct and circumstantial evidence. Applying the principle in *S v Mthethwa 1972930 SA at 769AD,* it found there was a damning case against the appellant which called for an answer. The appellant chose not to give evidence in own his defence. He could have met the State's case with ease, particularly in the light of the allegation that he was disposed of his firearm. His counsel had put to the driver that a witness would be called to say the appellant left the venue for his safety and did not see the shooting. The appellant never called the witness. The full court was entitled to conclude that the evidence against the appellant was sufficient to sustain a conviction. There were no substantial and compelling circumstances which justified a deviation from the prescribed minimum sentence. Therefore, the appeal was dismissed.

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