REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: A104/2022

(1) Reportable: NO
(2) Of interest to other judges: NO
(3) Revised.

27 November 2024 ...

MHE Ismail

In the matter between: -

SITHOLE MANDOZA **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Ismail J: (Concurring Mia & Malindi JJ)

(1) The appellant was convicted of murder in contravention of section 51(1) of the CPA read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (hereinafter referred to as the CLAA) and robbery with aggravating circumstances as defined in section 1 of the CPA, read with the provisions of section 51(2) of the CLAA.

(2) The allegations were that the appellant and others killed Sidumo Ebrahim Ngwenya, a faith healer in Lenasia on the 11th of August 2015.

(3) The assailants entered the deceased's residential premises and thereafter they robbed the deceased and his wife. They tied the deceased's arms and legs and the same was done to the deceased's spouse. One of the assailants was armed with a firearm whilst two others had knives.

(4) The appellant and his companions were seen by two people who testified namely Thompho Dama (Dama) and Naeem Sambo (Sambo) entering the deceased's premises.

(5) The appellant and another person were known to the witnesses. Both Thompho and Sambo testified that they knew the appellant as he operated a hair salon in the informal settlement nearby.

(6) Although, there was no direct evidence regarding the identity of the person who fatally stabbed the deceased, the appellant, who was charged alone, was convicted on both counts by the *court a quo*, by virtue of the doctrine of common purpose.

(7) He was sentenced in respect of the murder count to life imprisonment, and to a term of 15 years imprisonment in respect of the charge of the robbery with aggravating circumstances.

(8) The appellant now appeals to this court against the conviction imposed upon him. Leave to appeal against sentence was refused.

(9) The purpose of an appeal court is to determine whether the trial court arrived at a proper and just finding or whether it erred and/or misdirected itself in some or other manner.

Identification

(10) The gravamen of this appeal is premised on the ground that the two witnesses who testified on behalf of the Respondent were not reliable and credible witnesses, in that their identification of the appellant was incorrect. The appellant avers to the extent, that the trial court erred in finding the Appellant guilty of the charges. The State witnesses were adamant that they knew the Appellant prior to the day when the deceased was killed.

(11) Both witnesses testified that after the group entered the premises, the appellant came out of the house and that he loitered outside the house for approximately 20 minutes. He walked out of the premises up to the point where the pillars were implanted on the road to prevent cars travelling from the informal settlement into the residential area where the deceased lived.

(12) The appellant's version was that he was never at the deceased premises during the incident. His version was that he was at his salon attending to a client and that his girlfriend could corroborate his version. Both his girlfriend Puseletso Dineo Motloung and Mbatha Lundo testified as witnesses on his behalf.

(13) The two state witnesses knew the appellant when he passed them together with three others. The visibility was good, and they passed the witnesses being within a proximity to them. They had a second opportunity of observing the appellant, when the latter came out of the house and when he walked up to where the pillars were. One can safely rule out the prospect that they were making a *bona fide* mistake regarding identity of the person they saw. See: *R v Dladla* 1962 (1) SA 307 (A) et 310; *R v Shekelele* 1958 (2) SA 675 (A); *S v Mthethwa* 1972 (3) SA 766 (A) and *S v Nango.*

(14) The trial court also examined the version of the appellant and his witnesses' evidence. It is trite that when the court determined the innocence or guilt of the accused, the court is bound to look at the conspectus of evidence as stated and should avoid looking at the evidence in compartments, namely the state's case and the defence case. Nugent J (as he then was) in *S v van Der Meyden* 1999 (1) SACR stated that the court must look at all the evidence. The learned Judge went on to say:

"What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored."

(15) It axiomatically follows that if the accused's version is reasonably possibly true, the court must find that the State witnesses' evidence was doubtful. Both propositions cannot prevail. Proof beyond reasonable doubt does not mean that the prosecution must prove its case beyond a shadow of a doubt. See *R v Mlambo* [1957] ZASCA 73 and *S v Glegg* [1972] ZASCA 59.
All that the prosecution needs to prove, to discharge the *onus* is that the evidence has a high probability of certainty for a reasonable man to convict.

Alibi

(16) I agree with the *court a quo*'s finding that the appellant's witnesses, Puseletso Dineo Motloung and Lindo Mbatha, were not candid with the court. Their evidence was unconvincing, and they contradicted their own evidence as well as each other.

(17) The version that the appellant was at the salon cutting the hair of Mr Mbatha stands in direct contrast to the evidence of the two state witnesses' evidence. Mr. Mbatha was, to say the least a poor witness who could not remember how much money he paid for the taxi fare to Lenasia from Kliptown, notwithstanding him having taken a taxi on dozens of occasions. He kept changing the time that he arrived at the salon for him to have a haircut. It was evident when one read his evidence, that his evidence, was contrived to give the appellant an alibi.
In *R v Biya* 1952 (4) SA 514 D-E

(18) It was stated that the courts are required to assess an alibi in the same way as they assess the other evidence whether it can be accepted as being reasonably possibly true, or whether it could be rejected as it is obviously false. In *S v Hlongwane* 1959 (3) SA 337 at 390H.

(19) In *S v Shackell* [2001] 4 SA 279 (SCA) (279) the court held:

"a court does not have to be convinced that every detail of an accused's version it true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course, it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true. On my reading of the judgment of the Court a quo its reasoning lacks this final and crucial step. On this final enquiry I consider the answer to be that, notwithstanding certain improbabilities in the appellant's version, the reasonable possibility be true".

(20) The two state witnesses identified the appellant as being part of the group, he was known to them. In the absence of a palpable grudge or malice on their part, their evidence that they saw the accused was in my view rightly accepted by the court. His alibi must be viewed in light of their evidence. Both narratives can't be correct. It is an either-or situation. In my view this irresistible inference to be drawn was that the alibi was false and hence the trial court rejected it as not being reasonably possibly true.

(21) I am of the view that the prosecution's case against the appellant which was based on circumstantial evidence was proved beyond reasonable doubt and that the trial court's findings are sound and unimpeachable. Accordingly, I would recommend that the appeal on conviction be dismissed.

Common purpose

(22) It is so that the evidence of the identity of the persons who fatally stabbed the deceased is unknown, however, it can safely be accepted that it was not the appellant, in view of the state's case being that he was outside the house keeping a lookout and that he was prowling up to the spot where the pillars were embedded keeping a look out.

(23) The appellant was convicted of the murder of the deceased by virtue of the prosecution relying on the doctrine of common purpose.

(24) In *Thebus and another v S* 2003 (6) SA 505 (CC) the constitutional court held that the doctrine was not unconstitutional. At paragraph 18 of the judgement

"The doctrine of common purpose[16] is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton[17] define the doctrine of common purpose in the following terms:

"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their 'common purpose' to commit the crime."

See also paragraphs 21 to 28.

(25) On the facts accepted by the court, it was held that the appellant acted as a lookout or sentry to the deceased's premises whilst the other three assailants were in the premises.

(26) The evidence of the two state witnesses was to the effect that he came out of the home and stood outside the premises looking up and down the road. At some point he walked out of the premises up to the point where the pillars were implanted. This action of his, was to check that his co-perpetrators would be warned of any person(s) who might come to the deceased place.

(27) The law relating to common purpose was recently dealt with in the matter *S v Mgedezi,* 1989 (1) SA 687 (A) where the court set-down the 5 pre-requirements for common purpose:

27.1 The accused must have been present at the scene where the violence was being committed;

27.2 Been aware of the assault;

27.3 Intended to make common cause with those who were actually perpetrating the assault;

27.4 Manifested his/her sharing of the common purpose with the perpetrators of the assault by himself/herself performing some act of association with the conduct of others;

27.5 Had the requisite *mens rea,* e.g. he/she must have intended them to be

killed, or he/she must have foreseen the possibility of their being killed and performed his/her own act of association with recklessness as to whether or not death was to ensue.

(28) During argument before us, Counsel for the appellant submitted that the timeline of the offences clearly excluded that the appellant was part of the joint venture. She based her argument upon the premise that, the people entered the deceased's premises at approximately 16h00, she submitted that the deceased's wife managed to get to the neighbour's house after 18h30. By that time, that is 18h30 the appellant was busy giving Mr Mbatha a haircut.

(29) Counsel for the appellant submitted that the appellant even on the state's version, was not present at the property when the actual crime was committed. He was not near the crime scene thereby disassociating himself with the actions of the others.
The problem with this argument is that it is speculative, and it is not based on the evidence by the appellant when he testified. The appellant's evidence was that he was never with the other robbers. Had he testified that he originally was with the group, however he changed his mind and decided to leave – this argument may have had some merit or validity. His version was that the witnesses were mistaken regarding him and that he was at his salon thereby relying on an alibi.

(30) We, sitting as an appeal court are bound by the facts appearing on record. We cannot venture into the realms of speculation and sophistry.

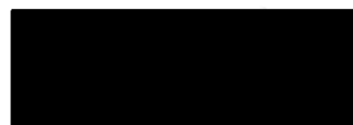
(31) Advocate Ndou, the state advocate relied upon the decision of *S v Phate* 2024 (2) SACR 421 (GJ) et para (14) where the court stated:

> *"It is clear that for a departure from the scene to favour an accused, more is required than merely going away. In this instant, he did not dissociate himself from the dire consequences that he himself predicted would befall those present at the interrogation which led to death. One would expect that if he really withdrew with an intent to dissociate himself, he should have expressed it clearly and forcefully. The question was posed in S v Ndebu and Another*[4] *when the court posed the question of "… what is meant by the word 'dissociate'?" Is it enough to have left the scene immediately after he uttered those words for him to escape criminal liability? I don't think so. I find that*

him leaving the scene for his co-accused to complete the task of killing the deceased renders him culpable and the trial court rightly found him guilty and found that he acted in common purpose with the other accused. Although he was absent when the deceased was killed, I find that, in the words of the court in Chabalala,[5] *the accused was still the "prime mover" of the offence".*

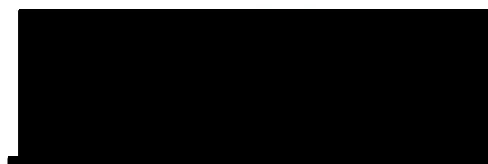
(32) On the careful analysis of the matter, we are of the considered view that the conclusion reached by the trial court was correct and that there were no misdirections on his part.

(33) Accordingly, the appeal falls to be dismissed.



MHE ISMAIL
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I concur



S MIA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

I concur.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 27 November 2024.

Heard: 11 November 2024

Judgment: 27 November 2024.

Appearances:

For the Applicant:

Advocate Britz

Instructed: by Legal-Aid (JHB)

For the Respondent:

Advocate R Ndou

Instructed: by NPA (JHB)