IN THE COURT OF APPEAL OF SWAZILAND

HELD AT MBABANE Criminal Appeal No. 17/2002

In the matter between

PHILLIP WAGAWAGA NGCAMPHALALA 1st Appellant

MLAHLWA NGCAMPHALALA 2nd Appellant

HANNIS MAVIMBELA 3rd Appellant

PETROS NGCAMPHALALA 4th Appellant

GEORGE MAMBA 5th Appellant

ELIZABETH HHALAZA 6th Appellant

PHILEMON NDZABANDZABA 7th Appellant

MTININI NDZABANDZABA 8th Appellant

And

REX Respondent

Coram LEON, JP

TEBBUTT, JA

BECK, JA

For 1st, 2nd, 3rd, 4th and 5th Appellants In Person

For 6th and 8th Appellants Mr. Simelane

For Respondent Ms Langwenya

JUDGMENT

TEBBUTT, JA

people, Ndodebovu Mamba (for convenience I shall refer to him hereinafter as Ndodebovu) and his brother, Piet Mamba, were killed. In addition, three huts belonging to Ndodebovu's wife, Doris Hlabezile Sibandze, and other huts belonging to relatives of theirs viz Esther Lomhlangano Mamba and Esther Fakazile Mamba, were set alight and burnt to the ground and the windows of a house belonging to a further relative, Ncamsile Ncane Ndzabandzaba, who was Piet Mamba's wife, were broken and curtains and other items in the house destroyed by a fire started in the house. As a result the eight appellants in this Court were arraigned before Matsebula, J in the

High Court on two counts of murder, three counts of arson and one count of malicious injury to property. Certain assault charges were also brought against some of the appellants, but on these the Court found them not guilty and discharged them. Originally a ninth person, one Philemon Dinini Ndzabandzaba, was also indicted with the eight appellants but he died in custody while awaiting trial, while three other persons who were also accused with the appellants of the charges, were acquitted at the end of the Crown case and not put on their defence. Other persons who were members of the mob, were initially arrested but not subsequently arraigned. One such person was one Mkhali. I shall refer to him later herein.

The reason for the mob's going on the rampage was, according to the evidence at the trial, a belief among the community in the area that members of the Mamba family whose homes and persons were attacked were "stock thieves and wizards." They were considered to be unacceptable by the community and had been told that they should leave the area. It is also clear that the intention of many of those making up the mob was to rid the community of those members of the Mamba family against whom the acts of aggression of the mob were directed. That was made clear from statements made by members of the mob during the attacks by them.

The Crown alleged that in the killing of the two deceased, Ndodebovu and Piet Mamba, and in the cases of arson, the appellants acted in common purpose.

The learned trial judge convicted all eight appellants on both the murder charges, on the three arson charges and on the charge of malicious injury to property. On the two murder charges, extenuating circumstances having found in respect of both of them, each appellant was sentenced to seven years imprisonment on each

count, the sentences to ran concurrently and backdated to 27 December 1997. On the other counts, which were all taken together for purposes of sentence, each appellant was sentenced to five years imprisonment again backdated to 27 December, 1997. The eight appellants no appeal to this Court against both their convictions on the charges mentioned and their sentences. First appellant has not, however, pursued his appeal against his convictions.

In convicting the appellants the learned trial judge chose not to analyse the manner and extent of each individual appellant's involvement in the incidents giving rise to the various charges. He did so in respect of some of them but in respect of others he took what might be described as a blanket or global approach, basing his conclusion as to their guilt on the fact that the death of the two deceased and the burning of the huts was the action of members of the mob, that the appellants were members of the mob and had either participated directly in the events forming the basis of the charges or had associated themselves with the actual perpetrators i.e. had acted in common purpose with them.

The essence of the doctrine of common purpose is that where two or more persons associate in a joint unlawful enterprise each will be responsible for any acts of his fellows which fall within their common design or object (see the judgment in the South African case of S vs Safatsa 1988 (1) SA 868(AD), which has been followed in several cases in this Court e.g. Patrick Wonderboy Ngwenya v Rex Cr. App 25/1999, See also S v Mgedze and others 1989(1) SA 687(A) . The crucial requirement is that the persons must all have the intention to commit the offence - in casu to murder and to assist one another in committing the murder and to set alight and bum down the houses of the targeted victims. There need not be a prior conspiracy. The common purpose may arise spontaneously. Nor does the operation of the doctrine require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about (See S v Shezi 1948(2) SA 119(AD) at 128; S v Trosane 1951(3) SA 405(0) at 407; S v Nhiri 1976(2) SA 789(RAD) at 791).

It is however, necessary for the Crown to establish that each participant had the necessary mens rea (sec S v Malinga 1963(1) SA 692(A) at 694; Safatsa's case

at p 200J). It must be shown that he or she knew or must have known that the crime was likely to be committed by one of his associates and either participated therein or agreed, by words or conduct, to associate himself with the act or acts of his associates. The test is summarised succinctly by Burchell and Hunt: South African Criminal Law and Procedure Vol. 1 (General Principles) 2nd Edition pp 434 - 435 as follows:

"Proof, whether by evidence of words or conduct, of agreement to participate in the criminal design, added to proof of participation, and directly or by necessary implication , of contemplation of (possible) consequences, irrespective of the particular means by which they were attained (coupled with recklessness as to, whether those consequences occur or not), provides the proper test in law of the liability of parties to a common purpose. "

It must be emphasised that mere presence at the commission of a crime does not in itself constitute an implied common purpose with the actual perpetrator or perpetrators. The Court must be satisfied that an accused person had a common intention with members of a group which perpetrated an unlawful attack and was not a mere spectator, even an approving one. (See S v Mgedze and Others supra at 702H). The Court must therefore analyse and consider the evidence against each individual accused alleged to have acted in common purpose with another or others.

The necessity to examine the evidence adduced by the prosecution against each individual was adverted to in Barnabas Magawana and 15 others v State, unreported but referred to in R v Kgolane and others 1960(1) P.H. H110 and approved in State v Macala and Others 1962(3) SA 270(A) at 273 -274. In the Magawana case van Winsen JA said at 274 A - B:-

" Where the state can bring no evidence that the accused took part in the actual assault resulting in the death of the deceased, but seeks to rest its case upon the fact that the accused made common cause with the actual killers, it must prove beyond reasonable doubt that the accused had a common intention to kill and that in execution of that intention they became members of the band of killers. While it is true that, depending upon all the circumstances of the case, the mere presence of accused at the scene of a killing may afford prima

facie evidence of their being members of the band of killers all of whom entertained a common intention to kill, yet, in the particular circumstances of the case, their mere presence there does not afford such proof "

This view of the position in regard to common purpose has been stated with equal clarity in the recent case in the South African Appellate Division of S v Mgedezi and Others supra. The headnote in that case reads as follows:

"In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (in casu, group violence on a number of victims) can be held liable for those events on the basis of the decision in S v Safatsa and Others 1988(1) SA 868(A) only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was committed. Secondly, he must have

been aware of the assault on the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assalt. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

Inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of an acting in concert. From the point of view of the accused, the common purpose must be one that he shares consciously with the other person. A "common " purpose which is merely coincidentally and independently the same in the case of the perpetrator of the deed and the accused is not sufficient to render the latter liable for the act of the former".

In that case, too, the trial Court had taken a global approach and had rejected the defence versions en masse. On appeal the Appeal Court found that the trial Court

had erred in precluding itself from performing its duty to consider the evidence of each accused separately and individually, to weigh up that evidence against the particular evidence of the individual prosecution witness or witnesses who implicated that accused and upon that basis then to assess the question whether the' accused evidence could reasonably possibly be true. By assessing liability in respect of all the accused en bloc the trial Court had seriously misdirected itself.

I have referred earlier to the blanket or global approach taken by the learned trial judge in the present case. He said the following:-

"Considering the, totality of the evidence it is my considered view that this Court is left in no doubt that the accused acting in the furtherance of a common purpose committed the crimes as set out on counts 1, 2, 3, 4, 5 and 6. In reaching this conclusion I am very much aware of the fact that the liability of each accused rests on his or her mens rea in these cases ".

Despite this latter caveat the learned judge did not consider the individual involvement of each of the appellants or consider what Crown evidence implicated that particular appellant.

The learned judge said that the evidence of the Crown witnesses was to a great extent corroborated by a statement made by accused No. 6 to the police. This statement, apart from any question of its admissibility, could, of course, not be used as evidence against any of the other accused and the trial Court erred in doing so. It had, in any event, having initially been ruled admissible, later been ruled by the trial judge, reversing his initial ruling, to be inadmissible as regards the 6th appellant.

The learned judge then went on to say this:

"In the light of the above I find it difficult to credit that none of the accused did anything towards furtherance of the purpose for which the so called abduction forced them to join. This is the mob to accomplish the mission of killing wizards, witches and thieves that were a menace in that community. This court finds that there is evidence of declaration accompanying acts

laying down the foundation of a common purpose. 'The evidence of the Crown witnesses deposed to the executive statements and acts allegedly deposed to and done by some of the accused excepting the presence of other accused and rejecting that they were merely asked to be present and do nothing. In this regard the court will again refer to Phipson at page 98. In the 9th edition the author says the following:-

"It is immaterial whether the existence of the conspiracy or the participation of the defendants be proved first. Although either element is mugatory without the other",

I have already said that the court is aware that such executive statements are not necessarily the evidence of the truth of the assertion that they contain. I refer to REX VS MILLER 1939 AD at 119.

In the present case however the acts and declaration of some of the four conspirators were made and performed in the furtherance of the common purpose, I find myself justified in admitting the evidence of one conspirator against the other. I have dealt with the documentary evidence relating to the statement made by accused No. 6 and being admitted as her statement. Considering the evidence in its totality I find that the Crown has proved its case beyond reasonable doubt. "

I have difficulty in following the reasoning of the trial judge in the passage just cited. What is clear, however, is that the Court, by taking a global view of the evidence and rejecting the defence versions en masse failed, as it should have, to consider the Crown evidence against each appellant separately and individually, to consider the evidence of each appellant as against that evidence and to then assess whether that evidence could reasonably possibly be true.

Had the trial judge done so, he would - or should - have found that there was no evidence whatsoever, by any of the Crown witnesses against the eighth appellant, Mtinini Ndzabandzaba, on the two murder charges or on two of the arson charges. On the third arson charge the evidence of a Crown witness who said she saw him set a

hut alight was contradicted by another witness and it seems that the former confused him with his brother Dinini Philemon Ndzabandzaba, who was the accused who died in custody.

Ms Langwenya, -for the Crown, conceded that the 8th appellant should never have been convicted and that his appeal must succeed.

Ms Langwenya also conceded that she could not support the conviction of the 6th appellant who though present at the scene of the crime, did not participate in the events; constituting the arson or the two murder charges. A statement by her to a police officer, ruled inadmissible by the trial judge, could not support a finding of guilt against her. Her appeal, too, must succeed.

In regard to the two murder charges, there is again no evidence from any of the reliable Crown witnesses implicating any of the appellants in the second charge, which is the killing of Piet Mamba. The only witness who tended to involve any of them was one Mandla Tsabedze (PW5 at the trial). He, however, departed from his statement to the police and was declared a hostile witness by the trial Court. No regard can accordingly be paid to his evidence.

Again Ms Langwenya conceded, as indeed she had to that in the absence of any evidence against any of them on the second murder charge, she could not support the convictions of any

of the appellants on this charge and their appeals in respect of it must succeed.

One is left then to consider the appeals of the 1st, 2nd, 3rd, 4th and 5th appellants on the first murder charge, the three arson charges and the charge of malicious damage to property.

The latter can also be shortly dealt with. No Crown witness was led who identified any of the appellants as being involved in this count. None of them should therefore have been convicted on it and the appeals of all of them on this count succeed.

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Turning to the other charges, the Crown evidence is that the mob, having gathered at a certain meeting place, advanced on the homestead of Ndodebovu . They were armed and in an angry mood. Esther Nomhlangano Mamba (PW1) and her daughter-in-law, Doris Hlabezile Mamba (PW2) who was the wife of the deceased, Ndodebovu Mamba, told the Court how the mob had surrounded them and the homestead and told them they were "going to die with Ndodebovu". PW2 was told to bring out "the bag containing the muti" that the mob said Ndodebovu had used to kill one Joseph Tsabedze. PW.2 said she knew nothing about any such bag but to appease the crowd went into the hut and brought out a bag of her own containing some of her personal possessions. At this juncture, the door of the hut was kicked down and Ndodebovu emerged from the hut carrying a spear. Members of the mob then assaulted him. He protested that the law would come to his rescue but a voice from the mob said "How is the law going to help you because you are going to die". PW1's daughter, Nobuhle Mamba, who gave evidence as PW4, said that 4th appellant kicked down the door and PVV1 and PW2 said that 1st appellant started the assault on Ndodebovu. PW1 and PVV4 said that 2nd, 3rd 4th and 5th appellants also assaulted him. At that stage,2nd appellant poured petrol on Ndodebovu and set it alight. They later tried to extinguish the flames but members of the mob continued hitting him. Others put grass on top of him which also caught fire and the man Mkhali put a burning tyre over his head. 5th appellant helped to pull out the grass that was thrown over Ndodebovu. According to the post-mortem report Ndodebovu died of multiple injuries including third degree burns all over the body, which was charred, and burning of the brain. PW1's house was also set alight, the one who did so being identified as 2nd appellant. It is clear from this evidence that 1st, 2nd, 3rd, 4th and 5th appellants all took part in the attack on Ndodebovu and apart from each one's own participation acted in common purpose in the assault on Ndodebovu from which he died. They were accordingly correctly convicted of murder.

After the attack on Ndodebovu some of the mob moved on to PVV2's property singing and chanting slogans such as "Away with the thieves. Away with the wizards, they must be killed." PW2's huts were set alight but no witnesses could identify who had done so or that any of the appellants were part of the mob who did so. This burning was the substance of count 5, i.e. the charge of malicious damage to

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property, in regard to which I have already found that the conviction cannot be sustained.

On count 6, which related to the burning of the huts of Esther Fakazile Mamba, the Crown evidence was that 1st, 4th and 5th appellants set her huts alight and that 2nd and 3rd appellants were active members of the mob who attacked her huts.

Apart from 1st appellant, the other appellants simply denied being involved in any of the incidents making up the various charges. Their denials cannot stand in the light of the evidence of the Crown witnesses, who corroborated each other on all material aspects, and whose evidence the trial Court, correctly in my view, accepted as truthful in regard to their individual participation in

the various events.

From the aforegoing it is clear that the conviction of 1st appellant on counts 1, 4 and 6 cannot be faulted and, indeed, as mentioned earlier he did not pursue his appeal against any of them. The conviction of 2nd, 3rd, 4th and 5th on counts 1, 4 and 6 are also warranted as they were either active participants in the events relating to them or were associated in a common purpose with those who did perpetrate them. Their appeals against their convictions on those counts must fail.

On count 3, due to the lack of evidence implicating any of the appellants on this count, Ms Langwenya conceded that the convictions could not be sustained. The appeals of all the appellants therefore succeed on count 3.

The appellants whose appeals have failed have asked that their sentences all run concurrently. As the learned trial judge backdated them all to 27 December 1997 it would seem that he intended them to run concurrently, although he did not order that to happen. Ms Langwenya was agreeable to such an order being made.

In the result the following order is made:-

A. The appeals of 6th and 8th appellants viz Elizabeth Hhalaza and Mtinini Ndzabandzaba succeed and their convictions and sentences on all counts are set aside.

B. The appeals of 1st, 2nd, 3rd, 4th and 5th appellants on counts 2 and 3, 5 succeed and their convictions and sentences on these counts are set aside.

C. The appeals of 1st, 2nd, 3rd, 4th and 5th appellants on counts 1, 4 and 6 are dismissed and their convictions and sentences on these counts are confirmed..

D. The sentences of 5 years imprisonment imposed on 1st, 2nd, 3rd, 4th and 5th appellants on counts 4 and 6 (taken together for purposes of sentence) are
to run concurrently with the sentence of 7 years imprisonment imposed on 1st, 2nd, 3rd, 4th and 5th appellants on count 1 and both are backdated to 27th December, 1997.

DELIVERED IN OPEN COURT THIS 7th DAY OF June, 2002

P.H. JEBBUTT, JA

I AGREE

R.N. LEON, JP

I AGREE

C.E.L. BECK, JA