

IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE APPEAL NO.08/2010

In the matter between

MONGI DLAMINI

APPELLANT

AND

THE KING

RESPONDENT

CORAM: M.M.RAMODIBEDI CJ, S.A. MOORE et

I.G. FARLAM JJA

HEARD: 04 MAY 2010

DELIVERED: 27 MAY 2010

Summary: Criminal Law - Murder - Common purpose -
requisites for.

JUDGMENT

I.G. FARLAM JA

[1] The appellant in this case was convicted by M.B.C. Maphalala J, sitting in the High Court at Mbabane, on a charge of murder and, extenuating circumstances having been found, he was sentenced to fifteen years imprisonment.

[2] It was alleged in the indictment that the appellant was guilty of the crime of murder in that upon or about the 31st March 2007 and at or near Nhlanguano in the Shiselweni region he, acting in furtherance of a common purpose with one Mthokozisi Mkhwanazi, unlawfully and intentionally killed Nhlanhla Simelane.

[3] It was common cause at the trial that Nhlanhla Simelane was killed on the date and at that place specified in the indictment by

Mthokozisi Mkhwanazi, who inflicted a fatal stab wound on the back of his right chest, which penetrated his right lung. It was also common cause that Mthokozisi Mkhwanazi committed suicide before he could be arrested. In what follows I shall refer to Nhlanhla Simelane as **“the deceased”** and Mthokozisi Mkhwanazo as **“Mkhwanazi”**.

[4] According to the evidence led at the trial, while the deceased was standing near the bar at the Phoenix Hotel in Nhlangano, his mobile telephone was taken from him by Mkhwanazi, who ran away. The deceased chased Mkhwanazi to a spot near the Swazi National Court where the fatal wound was inflicted. Two of the witnesses for the prosecution, Jabulani Ngwenya (PW1) and Ndumiso Mathousand Mngomezulu (PW2), were in or near Phoenix Hotel when the deceased’s mobile telephone was taken. They followed the deceased and Mkhwanazi to the spot where the fatal injury was inflicted and gave evidence at the trial as to what they saw. The only other evidential material adduced by the Crown regarding what happened in Phoenix Hotel and later when the deceased was stabbed was contained in a statement made by the appellant before a magistrate.

[5] PW1 testified that just before closing time on 31 March 2007 he was standing near the bar of the Phoenix Hotel with the deceased, when the deceased took out his mobile telephone. He, the witness, moved away and went to stand next to a call box. He then saw the deceased chasing Mkhwanazi. The witness followed them. When he looked forward he saw Mkhwanazi turning back towards the deceased and hitting him. The witness said that there was another man behind the deceased whom he saw raising his fist and whom he hit with his fist. (In what follows I shall call this person **“the second person”**.) After that they were surrounded by a crowd of people who were going from one bar to another. They started

putting their hands in the deceased's pockets and the deceased told them to take his money and not to kill him. The second person had opened a knife. PW1 went to him and dispossessed him of his knife. PW1 also referred to another person who was present, whom he described as **"Mathousand"** (this person was PW2). According to PW1, after the deceased had told the crowd to take his money and not kill him, PW2 raised a knobkerrie when the second person pulled out his knife. PW1 stated that the crowd who had surrounded him and the deceased started attacking him, whereupon he ran away into a nearby park, chased by the crowd. He got into his motor car and drove back towards the crowd at the spot where the deceased was stabbed. He found PW2 and the second person standing there. He drove towards them and they ran away. He stated that the only person in the crowd whom he knew was PW2.

[6] When asked what the second person did, he said he saw him raising his fist. Dealing with the knife this person had and which he had taken from him he said that he did not know if he wanted to stab the deceased.

[7] Under cross examination he stated that when he was about to reach the deceased there were two persons in front of him, Mkhwanazi and the second person. When asked where the person came from he said: **"I think he was in front of us, my Lord, because I came running and before reaching him I saw him"**.

[8] It was not clear on the evidence of PW1 whether he saw the second person actually hitting the deceased. At one point during cross examination, when asked whether the second person was the person who he said hit the deceased with his fist he answered in the affirmative. Elsewhere in his evidence, as I have said, when asked what he saw the second person doing, he said he raised his fist.

[9] He conceded under cross examination that he did not see anyone stabbing the deceased. **“When I saw him, my Lord”**, he said **“they had already stabbed him when he was in the crowd”**.

[10] When asked if the person whom he saw hitting the deceased with his fist was the person from whom he later took a knife, he answered. **“I did not see, my Lord, because there were many people”**.

[11] When PW2 was called the court was informed that he was an accomplice. He was duly warned in terms of section 234 of the Criminal Procedure and Evidence Act.

[12] In his evidence PW2 described how he, the Appellant, Mkhwanazi and others were together drinking from about 2 pm on the 31st March 2007 at various places, ending up at the bar of the Phoenix Hotel from about 10 pm. At midnight, when the bar closed, as he was going out, he heard a voice shouting, **“Mthoko bring me my phone”**. He ran outside, following others, who were running in the street. When he reached the Swazi National Court he found a person lying down (this was obviously the deceased), with Mkhwanazi in front of him. The witness stood next to the appellant and asked Mkhwanazi what was happening because he had heard people calling his name. Mkhwanazi told him it was, in his words, **“this stupid person”**, whereupon he kicked the deceased. There were a lot of people present. He then saw PW1 **“strangling”**, to use his word, the appellant’s hand and taking a knife from him.

[13] He then explained to the court that because he was carrying what he called a wooden bat, he attacked PW1, who ran away and came back driving a motor car, whereupon he and his female companion **“jumped”**, as he put it, to the park.

[14] When asked what the appellant was doing with the knife when PW1 took it from him, he said that he was **“relaxing”**. Mkhwanazi at that stage was kicking the deceased, who was lying down, and he was carrying a knife.

[15] When asked what he found the appellant doing next to the deceased he replied, **“nothing”**. He said that at the relevant time there were about twenty people surrounding the deceased. In answer to a question from the judge, he said that there was no plan to kill the deceased.

[16] The statement made by the appellant, which was handed in by consent reads as follows;

“I do recall sometime last month although I cannot recall the date I was at [Phoenix] Hotel about 12:00 pm enjoying some drinks. I was in the company of two ladies one of whom is Nelie whose surname I do not recall, whilst the other is unknown to me.

One Mthokozisi Mkhwanazi who is my friend was also in the bar. Whilst I was outside the bar I saw Mthokozisi, running away being chased by some persons. I then ran and joined Mthokozisi, out-running the persons who were chasing Mthokozisi. One of the persons who were chasing Mthokozisi came to us and demanded his cell phone from Mthokozisi. Mthokozisi told him to get lost and pushed the person who fell on the ground and Mthokozisi then ran away.

Whilst I was still there one Mathousand whose surname I do not know but who is my friend came by and we pick pocketed the person who was lying down but did not find anything on him.

In fact Mthokozisi stabbed the person who was asking for his phone from him and that is why the person fell down. I could not clearly

see where Mthokozisi stabbed that person. He ran away after the act. The police then came to take away the person who had been stabbed. On the following day the police informed me that Mthokozisi had since committed suicide. That is all I wish to say about this matter."

[17] The third prosecution witness, Detective Constable Dumsani Zwane, confirmed that Mkhwanazi committed suicide shortly after the commission of the offence. He also testified regarding the arrest of the appellant. The Crown handed in from the bar, with the consent of the defence, the report of the post mortem examination done on the body of the deceased, together with photographs of him. After the Crown closed its case and an application for the discharge of the appellant in terms of Section 174 (4) of the Criminal Procedure and Evidence Act was refused the defence case was closed without any evidence being led.

[18] The trial court convicted the appellant of murder on the basis that it had been proved, so the court held, that he was guilty of murdering the deceased because he had actively associated himself with the commission of the crime by Mkhwanazi with the result that what Mkhwanazi had done was to be imputed to him as a matter of law and that he was accordingly guilty on the basis of the doctrine of common purpose.

[19] In a full and comprehensive judgment the trial court referred to the well-known passage on the requisites for the application of the doctrine of common purpose in cases such as the present (where there is no evidence of a prior agreement between the accused and the main perpetrator to commit the crime) to be found in the decision of the Appellant Division of the Supreme Court of South Africa in **S v Mgedezi and Others** 1989 (1) SA687 (A) at 705 I - 706 B. The principles set forth in that case have been referred to

with approval by this Court in **Phillip Wagawaga and Others v the King**, Criminal Appeal No. 17/2002 at pp 5-6 of the judgment.

The passage reads:

*“In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, 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 being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. 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, he must have had 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.”*

[20] The reasoning of the learned Judge in the court below is contained in paragraphs [41] and [42] of his judgment, which read as follows:

[41] *“Having regard to the above authorities and evidence led, it is my considered view that the accused is guilty of the crime of murder on the basis of the Doctrine of Common Purpose by active association. He was present at the scene of the crime with Mthokozisi and he was aware that Mthokozisi had unlawfully taken the cellphone belonging to the deceased by force. He knew that the deceased was running after Mthokozisi to get his cellphone.*

Together with Mthokozisi, they assaulted the deceased with fists; they were the only people with Mthokozisi when the latter stabbed the deceased to death. The accused also drew out a knife which is exhibit 1 in furtherance of the Common Purpose. Lastly, the accused together with PW2 pick-pocketed the deceased when he had been stabbed fatally and fallen down.

[42] *For the accused to have a common purpose with Mthokozisi Mkhwanazi to commit the murder, it is not necessary that his intention to kill be present in the form of **dolus directus**. It is sufficient if his intention to kill is present in the form of **dolus eventualis**. I am convinced that the accused foresaw the possibility that the acts of Mthokozisi Mkhwanazi with whom he associated himself may result in the death of the deceased but he reconciled himself to this possibility."*

[21] The court *a quo* also held that PW2 had answered all questions put to him fully to the court's satisfaction and he was accordingly discharged from liability to prosecution for this offence.

[22] MrBhembe, who appeared on behalf of the appellant, contended that the court *a quo* had misdirected itself in two respects in coming to the conclusion that the doctrine of common purpose applied on the facts of this case: first in holding that the appellant was aware that Mkhwanazi had unlawfully taken the mobile telephone belonging to the deceased by force and that the deceased was running after him to recover it; and secondly in holding that the appellant together with Mkhwanazi had assaulted the deceased with fists.

He also submitted that the appellant's admitted action in joining with PW2 in picking the pockets of the deceased while he was lying on the ground was done after the fatal injury had been inflicted by

Mkhwanazi and it could not be said that it was in furtherance of a common purpose to kill the deceased.

[23] A further contention advanced by Mr *Bhembe* was that the Crown had not shown beyond reasonable doubt that the requisite intent to kill, even in the form of ***doluseventualis***, was present.

[24] Ms *Zwane*, who appeared for the Crown, originally submitted that the court *a quo* was correct in convicting the appellant. She argued that all the requisites for the application of the doctrine of common purpose were present. During the course of the argument, after certain aspects of the evidence were put to her, she very fairly conceded that there was no evidence on which a finding could be based that the appellant actively associated himself with the stabbing of the deceased.

[25] In my view Mr *Bhembe* was correct in submitting that the court *a quo* misdirected itself in finding that the appellant assaulted the deceased. The only witness whose evidence can afford any basis for a finding to that effect was PW1 but in view of the contradictions in his testimony I do not think that it is possible to find, as the trial court did, that it was proved beyond reasonable doubt that the appellant hit the deceased.

[26] I also do not think that it was shown beyond reasonable doubt that he knew when he ran after the deceased and Mkhwanazi, that the latter had taken, by force or otherwise, the deceased's mobile telephone.

[27] I am also in agreement with Mr *Bhembe's* submission than the appellant's action in endeavouring to steal whatever was in the deceased's pockets takes the case for the Crown no further. This happened after the fatal injury was inflicted. As Mr *Bhembe* submitted, an accused person cannot be held liable for a fatal injury

inflicted on another on the basis he associated himself with that person's conduct after the infliction of the injury: see **S v Motaung** 1990 (4) SA 485 (A).

[28] In my view the key question to be answered in this case was whether the Crown proved that the appellant associated himself with the criminal purpose of Mkhwanazi *before* he inflicted the fatal injury. His presence on the scene and his running after the deceased and Mkhwanazi do not justify a finding of active association. There is nothing to show he knew Mkhwanazi had a knife or would use it when the deceased caught up with him and demanded his mobile telephone. It is also not clear whether the appellant raised his fist at the deceased or PW1 or when precisely this happened.

[28] It is also not clear with what intent the appellant drew the knife of which he was dispossessed by PW1. According to PW2 (whose evidence, it will be remembered, was accepted by the trial court) he was 'relaxing' with it.

Presumably this means he had it in his hand was not pointing it at anyone.

[30] In all the circumstances I am satisfied that the concession made by Ms Zwane was correct and that the appellant's conviction cannot be sustained. It follows that the appeal must be allowed and the appellant's conviction and sentence set aside.

[31] The following order is made;

1. The appeal is allowed.
2. The conviction and sentence of the appellant are set

aside and replaced with the following order: *'The accused is found not guilty and discharged.'*

I.G.FARLAM

JUSTICE OF APPEAL

I agree _____

M.M. RAMODIBEDI

CHIEF JUSTICE

I agree _____

S.A.MOORE

JUSTICE OF APPEAL

For: Appellant: Mr. S. Bhembe

For: Respondent: Ms. Q. Zwane