



IN THE SUPREME COURT OF SWAZILAND

HELD AT MBABANE

JUDGMENT

Criminal Appeal Case No. 27/2012

In the matter between

**SIMANGA MASHAYA
THEMBINKHOSI MASHAYA
MSINGATSENI SIMELANE**

**1st Appellant
2nd Appellant
3rd Appellant**

And

REX

Respondent

Neutral citation: Simanga Mashaya & Others *v Rex (27/2012)* [2014] SZSC 67 (3 December 2014)

Coram: RAMODIBEDI CJ, EBRAHIM JA and MOORE JA

Heard: 6 NOVEMBER 2014

Delivered: 3 DECEMBER 2014

Summary: Criminal law – Appellants jointly charged with one count of murder – Common purpose – Corroboration – The first appellant further facing two additional charges of assault with intent to do grievous bodily harm and robbery respectively – Appeal against both conviction and sentence dismissed.

JUDGMENT

RAMODIBEDI CJ

[1] The appellants were jointly charged in the High Court with one count of the murder of one Mmeli Masuku which was alleged to have taken place on 29 December 2006 at or near Gayinethi area in the Shiselweni Region. The Crown specifically alleged in the indictment that the appellants acted jointly and in furtherance of a common purpose. They were each found guilty of murder with extenuating circumstances.

[2] Apart from murder, the first appellant further faced two additional charges of assault with intent to do grievous bodily harm and robbery respectively. He was found guilty as charged on both counts.

[3] The High Court sentenced the appellants to 15 years imprisonment each on the murder count. The first appellant was further sentenced to imprisonment for two years and six months each on counts two and three respectively. However, the sentences were ordered to run concurrently with the sentence on count 1. A period of seven months which both the first and second appellants had spent in custody each before they were granted bail was credited to them in the computation of their respective periods of imprisonment. Similarly, the third appellant was credited with a period of three months which he had spent in custody before he was granted bail.

[4] The appellants have appealed to this Court against both their convictions and sentences.

[5] With regard to conviction, the appellants complain that there was no corroboration of the evidence of the accomplice witness Siboniso Ndlovu (PW 7) and that the trial court failed to exercise due caution in accepting such evidence. They further complain that the Crown failed to establish the presence of common purpose.

[6] Insofar as sentences are concerned, the appellants complain that these are too severe and that they induce a sense of shock, taking into account the facts of the matter as well as their personal circumstances.

[7] The relevant facts pertaining to the matter may be stated briefly. As indicated earlier, the Crown relied principally on the evidence of the accomplice (PW 7). He testified that in the evening of the fateful day in question, he was in a group of the local boys sitting next to Futhi Simelane's homestead. Crucially, this group included all the appellants. One Melusi Simelane approached the group, carrying a firecracker which exploded in PW 7's hands as he tried to seize it from him. This apparently infuriated another group of two boys and two girls who were sitting at the back of a motor vehicle parked nearby. One of the two boys, who turned out to be the deceased, chased after PW 7's group who in turn ran away. He, however, managed to catch the first appellant who cried and shouted for help.

[7] PW 7 testified that the first appellant "retaliated". All the appellants and others helped him by physically assaulting the deceased with fists.

They also kicked him. He was injured and his male companion came and took him to their motor vehicle. It is important to record here that PW 7 did not minimise the role he played. He testified that he, too, assaulted the deceased.

[8] Meanwhile, PW7 further testified that the first appellant who had been stabbed in his hand went home. He shortly came back, armed with a knobstick and a spear. He was looking for the deceased but one Bhekithemba blocked him. At that stage the deceased opened the door of the motor vehicle and fled. The third appellant tried to hit him with a log but missed, hitting the motor vehicle in the process.

[9] It was the evidence of PW7 that as the deceased ran away, all the appellants and others, including the witness himself, pursued him until he fell down at the fields. The three appellants assaulted him once again. The third appellant was using the log referred to in the preceding paragraph. They then carried him away and dumped him along the path. PW7 gave a chilling account that at that stage the deceased “was just soft and couldn’t move”. They left him there and

went to their respective homes. A police van took the deceased to hospital where he sadly passed away.

[10] Under cross-examination PW7 remained unshaken in his evidence that the appellants assaulted the deceased. When he caught up with them he found them busy assaulting him.

[11] It is important to note that the evidence of PW7 did not stand alone. He was corroborated by Bongiwe Dlamini (PW1) who testified that the first appellant assaulted the deceased as he lay on the ground. According to PW1's evidence it was the first appellant who first pointed at the deceased as the person who had stabbed him. She testified that it was in fact the third appellant who opened the door of the motor vehicle. The first appellant then took him out. The deceased ran away into the fields, hotly pursued by a crowd of people who included all the three appellants. The first appellant was armed with what looked like a spear.

[12] PW1 gave damning evidence against the first appellant in particular. She said that when the deceased's pursuers came back from chasing him, she heard the first appellant utter the words, "we have killed the dog. It is there in the fields." This evidently callous statement was in reference to the deceased.

[13] PW1 further corroborated PW7 to the effect that the third appellant hit the motor vehicle with a log, flattening tyres and putting stones in front of it, ostensibly to immobilise it.

[14] Gcinile Simelane (PW2) testified that she was one of the two girls who were with the deceased. She corroborated PW7 and PW1 that the appellants pulled the deceased out of the motor vehicle. She saw the first appellant "hitting" the deceased with fists. The latter ran away towards the fields. She further corroborated PW1 that when the first appellant came back from chasing the deceased he boasted that he had killed the dog. This was in reference to the deceased.

[15] The evidence of Duduzile Simelane (PW3) provided ample proof of common purpose in my view. She testified that she brewed traditional beer. On the fateful evening in question, there was a motor vehicle parked on the yard. The first appellant came and reported that he had been stabbed. He left but shortly came back carrying a knobkerrie. Others were carrying logs or pieces of wood. Crucially, one Mongi Sithole came and said, “deceased cannot outrun us”. Under cross-examination she remained unshaken. She maintained that Mongi Sithole exhorted the others, “we are many, the deceased cannot outrun us.”

[16] It is important to add that PW 3 was related to all the appellants. No suggestion was made why she would lie against them.

[17] It is common cause that the deceased’s cause of death was due to the injuries to his head. These included a depressed fracture in three sides of the skull. There was also extra-dural, sub-dural and intra- cerebral haemorrhage observed.

[18] All the appellants gave evidence in their own defence. They also called witnesses.

[19] In his evidence the first appellant corroborated PW 7 that he was one of the group of boys who were sitting next to Futhi Simelane's homestead. After the firecracker in question exploded, the deceased attacked him, despite the fact that he protested his innocence. In the process, the deceased stabbed him on the hand. He then ran away and did not assault the deceased. He went home. He says that he realised that he had to go to hospital. He then armed himself with a knobstick and a spear "not for fighting but to defend me." He could not explain whom it was that he was defending himself against. Nor could he explain why he needed not one but two admitted weapons of war for that matter, namely, a knobstick and a spear.

[20] Crucially, the first appellant conceded that when the deceased ran away into the fields, he followed the chasing pack. After the deceased had been injured he saw a police van. He then ran away, something that is undoubtedly consistent with a guilty conscience on its own.

[21] The first appellant made the following admissions:-

- (i) that he told the police that he had taken part in the assault on the deceased. He did say, however, that he was tortured;
- (ii) that a sum of E 179.60 was found in his underwear;
- (iii) that he was found in possession of the cellphone belonging to the deceased;
- (iv) that he pleaded guilty to count 2, namely, the assault of one Sibuyile Zakhele Sangweni with intent to do grievous bodily harm.

[22] In his evidence the second appellant confirmed that he was amongst the group of boys who were sitting next to Futhi Simelane's homestead. He denied taking part in the deceased's assault. He confirmed that the first and third appellants were present amongst those who were chasing the deceased. He further confirmed that PW7 was amongst the people who were holding the deceased.

[23] The evidence of the third appellant was more or less similar to that of the second appellant. He, too, denied assaulting the deceased.

[24] Nonhlanganiso Simelane gave evidence as DW4. She made a half-hearted attempt to raise an *alibi* in favour of the third appellant. She said that he was at home at the time of the “noise”. At some point in time she left to meet kids who had gone to buy candles. Thereafter, she went to sleep. She said that when she left to sleep, the third appellant was still in the house. Quite plainly, she was not in a position to account for the third appellant’s movements from that moment onwards. This half-hearted *alibi* was, however, never disclosed to the prosecution.

[25] In his evidence Bhekithemba Simelane (PW5) testified that he saw the deceased lying on the ground, being assaulted by boys. He said that the first appellant was standing behind them and not taking part in the assault. However, he gave damning evidence that at some point in time the first appellant came with a knobkerrie and a spear. He was looking for the man who had stabbed him, namely, the deceased.

[26] Crucially, PW5 confirmed that after the deceased came out of the motor vehicle in question and started running, one Melusi exhorted the other boys to pursue and catch him. The first appellant was present. However, PW5 did not see the second and third appellants.

[27] Finally, Siphon Simelane (PW6) testified that the first and second appellants were his cousins. The third appellant was in turn his brother. He confirmed that at some point the first appellant came from his homestead armed with a knobstick and a spear. However, PW5 dispossessed him of both weapons.

[28] Although not stated in so many words, except with regard to the accomplice witness, it is apparent from the manner in which the court approached the matter that the trial court accepted the Crown evidence and rejected that of the defence. An appellate court is loath to interfere with credibility findings in the absence of a material misdirection resulting in a miscarriage of justice. No such misdirection has been shown to exist in this matter. Indeed, none of the appellants' grounds of appeal is directed at this aspect of the case.

[29] In my judgment, the appellants' ground of appeal that the trial court erred in law and in fact in not exercising caution in accepting the evidence of the accomplice evidence is devoid of merit. In paragraph [14] of its judgment the court clearly adverted its mind to the cautionary rule. In the process, the court correctly referred to the seminal case of **R v Ncanana 1948 (4) SA 399 (A)**. In this jurisdiction see, for example, **Jabulane Mzila Dlamini and Another v Rex, Criminal Appeal Case No. 16/2011**.

[30] Contrary to the appellants' complaint, the trial court clearly looked for corroboration of the accomplice (PW7) evidence. The court was particularly impressed by the fact that the accomplice witness did not seek to minimise his own role in the deceased's assault as pointed out in paragraph [7] above. Furthermore, it will be recalled that PW 7's evidence did not stand alone. He was corroborated in several respects by PW1, PW2, PW3 and PW4 respectively.

[31] Similarly, the appellants' complaint that the Crown failed to establish the presence of common purpose falls to be rejected. The evidence

established teamwork amongst the appellants. Thus, for example, it will be recalled from PW1's evidence that after the third appellant opened the door of the motor vehicle in question, the first appellant took the deceased out. Thereafter, credible evidence established that the appellants pursued him into the fields where he was assaulted. It will be remembered, too, that one Mongi Sithole exhorted the appellants' group to catch the deceased. And so it happened. All of these factors point inexorably, in my view, to a common purpose.

[32] Now, the doctrine of common purpose is well-established in law. In this regard it will no doubt be convenient to repeat the apposite remarks which I had occasion to make more than eleven years ago in the Court of Appeal of Lesotho in the case of **Ramaema v R LAC** [2000 – 2004] 710 at para [84]. I said this:-

“[84] It requires to be stressed that the Crown case was founded on the doctrine of common purpose. I hasten to observe however that this doctrine has been the subject of much debate and criticism in the Republic of South Africa, see for example S v Khoza 1982 (3) SA 868 (A). I do not propose to enter the debate

but I should be prepared, however, to say that the classical meaning of the doctrine of common purpose is that, where two or more persons associate together or agree in a joint unlawful criminal undertaking, each one of them will be responsible for any criminal act committed by the other or others in the furtherance of their common purpose. In such a situation the acts of one are the acts of the other(s). See S v Shaik and Others 1983 (4) SA 57 (A) at 64 – 65.”

[33] Insofar as counts 2 and 3 are concerned it is necessary to draw attention to the fact that the first appellant has not noted any appeal against either convictions or sentences pertaining to them. Accordingly, nothing further need be said about them.

[34] It follows from the foregoing considerations that the appellants’ appeal must fail.

[35] Insofar as sentence is concerned Mr Manana for the appellants did not present any submissions, both in his heads of argument and in oral argument before this Court. This is hardly surprising as the appeal on sentence is completely unmeritorious. It is trite that sentence is pre-eminently a matter that lies within the judicial discretion of the trial

court. An appellate court will generally not interfere in the absence of a material misdirection resulting in a miscarriage of justice.

[36] In the result the appeal is hereby dismissed. Both convictions and sentences recorded by the High Court are confirmed.

M.M. RAMODIBEDI
CHIEF JUSTICE

I agree

A.M. EBRAHIM
JUSTICE OF APPEAL

I agree

S.A. MOORE
JUSTICE OF APPEAL

For Appellants : Mr N. Manana
For Respondent : Mr D. M. Nxumalo

