IN THE SUPREME COURT OF SWAZILAND

JUDGMENT

Criminal Appeal Case No. 08/2015

In the matter between:

SANDILE MATSA MAVUSO 1st Appellant

FANA JOEL MASILELA 2nd Appellant

And

REX Respondent

Neutral Citation: Sandile Matsa Mavuso & Another v Rex *(08/2015)* [2016] *SZSC 52 (30 June 2016)*

Coram: **MCB MAPHALALA CJ, DR B.J. ODOKI JA and M. LANGWENYA AJA**

Heard: **18 MAY 2016**

Delivered: **30 JUNE 2016**

Summary: *Criminal Law – Murder – Robbery – Assault Common – Common Purpose- Appeal against conviction and sentence.*

JUDGMENT

M. LANGWENYA AJA

[1] The two appellants were charged in the High Court on three counts as follows: On count 1 the appellants were charged with the murder of Vusi Mbhamali at Mgababa, Msunduza location on 10 November 2012. In regard to this count it was alleged that the appellants, acting in common purpose, unlawfully and intentionally killed Vusi Mbhamali. On count 2 appellants were charged with robbery at Mgababa, Msunduza location on the same date, the complainant is Sifiso Mbhamali. The property which is the subject of the robbery charge is four (4) quarts of beer valued at E48.00 (forty-eight Emalangeni). On count 3 appellants were charged with assault common of

Sifiso Mbhamali being alleged that they threatened to chop him with a bush-knife at Mgababa, Msunduza location on the same date the victim alleged is Sifiso Mbhamali. The first appellant did not appeal against the conviction on count 3. It should be noted as well that as regards to counts 2 and 3 common purpose was not alleged in the indictment.

[2] The appellants were respectively accused Nos 2 and 1 at the trial. There was also a 3rd accused-Machawe Msibi who did not feature in the High Court.

[3] The appellants pleaded not guilty to all the charges which they faced. Both appellants were convicted of murder and robbery. The second appellant was acquitted of the charge of assault common, while the first appellant was found guilty of the charge of assault common.

[4] The appellants were found guilty of murder with extenuating factors and were sentenced to twenty (20) years imprisonment without the option of a fine; for the count of robbery they were both sentenced to six (6) months imprisonment without an option of a fine. The first appellant was sentenced

to one (1) month imprisonment with an option to pay a fine of Five Hundred Emalangeni. (E500.00).The sentences were ordered to run concurrently in respect of counts 2 and 3.

[5] In respect of the second appellant the sentences are backdated to 11 November, 2012. In respect of first appellant, eleven (11) months of the sentence is deducted to account for time spent in custody before his release on bail. First appellant's sentence is backdated to 28 March, 2014.

[6] Mr Jele who appeared on behalf of the first appellant contended that the Court *a quo* had misdirected itself in arriving at the conclusion that the doctrine of common purpose applied on the facts of this case: first, in holding that the first appellant was at the scene when the fatal stab wound was inflicted on the deceased; and, secondly, that the first appellant did not associate himself with the assault of the deceased; third, that the first appellant did not foresee the possibility of the deceased being killed. On the charge of robbery it was contended that there was no evidence connecting the first appellant with the commission of the crime of robbery.

[7] Mr Mabila who appeared on behalf of the second appellant filed written heads of argument supplemented by oral submissions based on the following grounds of appeal: that the learned trial Judge erred in relying heavily on the evidence of PW1 and PW4 who testified that the second appellant was the initial aggressor who later inflicted a fatal stab wound on the deceased; that the Court *a quo* relied heavily on the evidence of PW4 who testified that the second appellant stabbed the deceased with a knife when neither the forensic trace analysis report nor the alleged pointing out by the second appellant were inconclusive in proving second appellant's guilt; that PW4 could not have seen the stabbing of the deceased since he stood at an obscure place at the time deceased was stabbed; and, lastly, that the Crown failed to prove the commission of the crime of murder against the second appellant; that the pointing out attributed to the second appellant was in fact undertaken by the first appellant; and, lastly, that the Crown failed to prove the commission of the crime of murder beyond reasonable doubt.

[8] The background facts were as follows. The deceased and the complainant in the robbery and assault charges (PW1) Sifiso Mbhamali were brothers. On 10 November 2012, the deceased and Sifiso bought four quarts of beer at Msunduza and drank one bottle of beer. Sifiso was carrying the beer and

they were going home when the first appellant accosted Sifiso and forcefully took one of the beer bottles, opened it and drank the beer. When Sifiso protested and registered his disapproval at first appellant's conduct, he was slapped on the face by the first appellant. Sifiso fought with the first appellant, and, the deceased joined in the fight. The second appellant and Machawe Msibi joined in the fight ostensibly to help the first appellant. Vusi Matsebula and Machawe Hlophe tried to stop the fight without success. The deceased fled from the scene and was pursued by the second appellant. Sifiso remained behind and attempted to collect the bottles of his beer which had fallen on the ground during the fist fight. The first appellant left the scene of the fracas and returned carrying a bush knife. The first appellant was wielding the bush knife when he directed Sifiso to give him the beer bottles. Sifiso relented and fled in the direction of the deceased. The first appellant was in hot pursuit of Sifiso but was out-paced. Along the way, Sifiso met Machawe Hlophe, the second appellant and Vusi Matsebula. Vusi Matsebula was carrying a Rambo knife. Vusi Matsebula (PW5) corroborates this aspect of PW1's evidence. Immediately thereafter, Sifiso saw the deceased. The deceased was bleeding from the chest, weak and unable to talk. Sifiso took the deceased to the hospital where he was certified dead shortly thereafter.

[9] The Crown relied on the evidence of PW 4 Andreas Jele, who is a community police at Msunduza. On the fateful day, PW4 was at the shop at Msunduza when he saw the second Appellant grab a plastic bag from one of the Mbhamali boys, taking a beer and drinking it. He witnessed the fight of the appellants and the PW1 and the deceased while he stood at the shop. PW 4's evidence corroborates, in material respects the evidence of PW1 on what transpired during the fight. PW4 followed the fight as the deceased fled the scene and was pursued by the second appellant. According to this witness the deceased fell in a *donga* and was stabbed by the second appellant with a Rambo knife. PW 4 said he knows both appellants. He said he knew the second appellant as a Magagula and not a Masilela. PW5 testified that if a person was standing at the shop it was not possible to see the place where the second appellant and the deceased ended their fight that it in the donga/sloppy place. It was the evidence of the PW4 under cross examination that he followed the second appellant's fight with the deceased to the place where he witnessed the second appellant stab the deceased with a knife. PW5 says he saw Machawe Hlophe retrieve a knife from the second appellant whilst the deceased and the second appellant lay on the ground.

[10] The Crown also relied on the evidence of PW 5, Machawe Hlophe who initially tried to stop the fight between appellants and the deceased and Sifiso without success. It was his evidence that the second appellant fought with the deceased along a sloppy area and the fight was witnessed by a crowd. PW 5 saw the deceased and Joel lying on the ground and Machawe Hlophe stood next to them. This witness saw Machawe Hlophe taking a knife from the second appellant. The deceased got up and left the scene. According to PW5, deceased looked frightened. The second appellant was bleeding from the mouth and PW5 helped him. PW5 stated that the first appellant was not present at the scene when the second appellant gave the knife to Machawe Hlophe. The first appellant only came when this witness was helping the second appellant with his injury to the mouth. According to PW5 Machawe Hlophe gave PW 5 the Rambo knife and other items belonging to the second appellant to keep. PW 5 kept the second appellant's items in his motor vehicle. The Rambo knife was subsequently taken by the police.

[11] There is no dispute about the cause of deceased's death, namely a stab wound of the chest. Dr Reddy who performed the post mortem found that the deceased had sustained a stab wound of 2 $^{1}/_{2}$ x 1 cm, with sharp margins in

the middle portion of the front side of the chest. The stab wound is 30cms from and above the umbilicus

[12] There is evidence that all the people who were involved in the fist fight on 10 November 2012 had been drinking the night prior to the incident leading to the death of the deceased.

[13] For the defence, each of the appellants gave evidence. The first appellant admits his involvement in the fight of the 10 November 2012. His evidence is that he entered into the fray in order to help the second appellant. He confirms carrying a bush knife and says he was drunk and did not know why he went home to collect the bush knife. The first appellant admits kicking PW1 during the fight in a bid to help the second appellant. The first appellant denies robbing PW1 of his beer. The first appellant denies that he was in any way involved in the killing of the deceased.

[14] The Second appellant's version is that he fought with PW1. The second appellant said he had been drinking with his friends at the bar when he went

outside and subsequently fought with PW1 after he had unintentionally bumped him. Whilst fighting with PW1 he says he was hit with fists by the deceased who fought on the side of his brother PW1. Acting in self-defence he retaliated. In the course of the fight he broke his tooth. The second appellant says he fought with the deceased and they both fell and rolled on the ground. He was found by PW5 lying on the ground. The second appellant says he then fled the scene leaving the deceased who was now on his feet. It is his evidence that Machawe Hlophe was next to him at the time. The first appellant and Vusi Matsebula came to his rescue and took him to the first appellant's home for first aid treatment.

[15] The trial court rejected the versions of the appellants in preference for that of the Crown.

[16] I now turn to the appeal of the first appellant. The first appellant appeals against conviction and sentence on the count of murder; he appeals against conviction on the count of robbery. Counsel for the first appellant argued that the Court *a quo* misdirected itself by convicting the first appellant on

the crime of murder and robbery on the basis of the doctrine of common purpose.

[17] The facts of the case are relatively straight-forward and do not present any difficulties. As always, the difficulty lies with the application of the facts to the legal principles. The broad issue in this appeal concerns the proper approach to the application of the common purpose doctrine on the proven facts. The leading cases on the subject of common purpose are the judgments of Botha JA in **S v Safatsa and Others 1988 (AD)** and **S v Mgedezi and Others 1989 (1) SA 687 (AD)**.

[18] There is no evidence that there was prior planning by any of the appellants to commit the crime of murder nor was it alleged by the Crown that there was common purpose in the commission of the crime of robbery. A prior agreement to commit a crime may invoke the imputation of conduct committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other elements of the crime such as unlawfulness and *culpa*, criminal liability may in these circumstances be established. In the absence of proof

of a prior agreement, the test and requirements of criminal liability under the common purpose doctrine is very different and more restrictive. It is therefore important that before convicting under the common purpose doctrine on the strength of a prior agreement, the Court must be satisfied beyond reasonable doubt that such a prior agreement was proved, and that the accused was a party thereto.

[19] In the present case no evidential basis exists for a factual finding that there was a prior agreement between the appellants to commit the crimes charged. The fight which eventually led to the death of the deceased was spontaneous and was initiated by the second appellant.

[20] The next question is whether, on the evidence before the Court *a quo*, it was entitled to convict the first appellant on the other facts found proven. It is to this question I now turn.

[21] PW1, PW 4 and PW5 testified that they know the first appellant. They testified that they witnessed a fight between PW1, the deceased and the

second appellant and that the first appellant joined in the fight. It was their evidence that the first appellant subsequently left the scene of the fight and returned to the scene carrying a bush knife. It was the evidence of PW4 and PW5 that the first appellant chased PW1 while wielding a bush knife. PW1 testified that the first appellant demanded the bottles of beer while he wielded the bush knife. PW1, fearing for his life, left the beer bottles and fled.

[22] The learned trial Judge evaluated the evidence of all Crown witnesses and the defence witnesses in his judgment.

[23] The learned trial Judge accepted the evidence of the Crown witnesses who placed the first appellant on the scene, and rejected as false the evidence of the first appellant who said he did not participate in the commission of the crimes alleged herein. The learned trial Judge found that the first appellant formed part of the group that attacked, fought and stabbed the deceased. This appeal must therefore be decided on this factual basis.

[24] The question is whether those findings justify a conviction of the first appellant on the counts of murder and robbery.

[25] The pre requisites for a successful invocation of the doctrine of common purpose are set out in the cases of **S v Safatsa & Others 1988 (1) SA 868 (AD); S v Mgedezi & Others 1989 (1) SA 687 (AD); Mongi Dlamini v Rex Case No. 8/2010 (Supreme Court)** and by **Moseneke J. in the case of S v Thebus and Another 2003 (2) SACR 319 (CC)** in the following terms:-

> *"In our law, or ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequences is a pre requisite for criminal li ability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequences, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social "need to control crime committed in the joint enterprises." The*

phenomenon of serious crimes committed by collective individuals acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or a particular person in the group contributed causally to the criminal result. Such a causal pre-requisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprise intractable and ineffectual."

[26] To return to liability under the common purpose rule in circumstances where there is no prior agreement, the starting point is the definition of common purpose. **Jonathan Burchell, Principles of Criminal Law at 574** defines it 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 the specific criminal conduct committed by one of their number which falls within their common design."

[27] The definition embodies two elements or stages. The first stage refers to the conditions which must be fulfilled before the principle of imputation of conduct can operate; and the second stage refers to the scope and extent of imputing the conduct of one party to the others. The second stage, to repeat only comes into operation when the conditions of the first stage are fulfilled and it involves active association with the conduct that actually caused the death of the deceased.

[28] The conditions in the first stage which trigger the principle of imputation, are either a prior agreement or an active association in the joint venture. Any one of these conditions must exist. On the facts of this case, a prior agreement was not proved. The fight that resulted in the death of the deceased began perchance when the second appellant grabbed and consumed beer belonging to PW1 and the deceased. The question is therefore whether or not the first appellant actively associated himself with the attack of the stabbing of the deceased. The requirement of active association means that mere presence at the scene of the crime, even if the crime is tacitly approved, is not sufficient for liability. In cases of murder there must be active association with the conduct that actually caused the death of the deceased (Refer to **S v Khumalo 1991 (4) SA 310**). Active association with

the common purpose replaces the element of causation and it can be regarded, as the "conduct element" of liability in terms of the doctrine of common purpose.

[29] Applying the present facts to the requirement of active association, I find that the first appellant cannot be said to have actively associated himself with the murder of the deceased. When the deceased and the second appellant engaged in a fist fight, the first appellant realised that the second appellant was engaged in a fight. He approached the warring parties and kicked the deceased in a bid to restrain him. When the deceased and the second appellant fought in the donga/sloppy place, the first appellant was nowhere near the new battle ground as he was chasing after PW1. His subsequent arrival at the scene after the deceased had been stabbed does not justify a finding of active association. There is nothing on record to show he knew that second appellant had a knife and would use it against the deceased.

[30] There is also the requirement that the first appellant intended to make common cause with those who were actually perpetrating the assault and

subsequent stabbing of the deceased. In my view, the Crown did not prove beyond reasonable doubt that the first appellant intended to make common cause with the second appellant who stabbed the deceased. The first appellant may have acted in concert with the second appellant in the unlawful taking of the beer from PW1 but it cannot be said, in my view that he intended to make common cause with the second appellant when he stabbed the deceased for the reason set out above.

[31] Further, the first appellant could not have manifested his sharing of a common purpose with the perpetrator of the murder of the deceased if he was not present at the scene of the stabbing.

[32] Lastly, the Crown did not prove beyond reasonable doubt that the first appellant had the requisite mens rea in respect of the killing of the deceased as there was no evidence led showing that he either intended him to be killed or that he foresaw the possibility that the deceased might be killed and that he performed his own act of association with recklessness as to whether or not death ensued. With respect, the trial Court misdirected itself.

[33] The participation of each accused in the death of the deceased must be separately analysed. If it cannot be said that the first appellant actively participated or associated himself with the conduct which caused the death of the deceased, then the actions of those who caused the death cannot be imputed to him and he must be acquitted.

[34] The doctrine of common purpose calls for a restrictive meaning of 'active association' and this is evidenced by the four requirements for liability under common purpose as formulated in **Mgedezi** case. The requirements are the following:

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.

[35] I pause to remark that the fifth requirement of *mens rea* is a definitional element of any crime which must in any event be proved, and is not a requirement of *active association*. Only the first four requirements referred to above are necessary to prove an *active association* in the crime under the doctrine of common purpose. The enquiry into *dolus* is a separate and further enquiry.

[36] The approach to adjudicate the actions of the accused individually and not paint his conduct with a collective brush is described by the Constitutional Court in the case of **Thebus** at 345 as follows:

A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of

guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case.

[37] Applying the rules in the cases of **Safatsa/Mgedezi**, I am of the view that the requirements for criminal liability under the common purpose rule are not met with regard to the first appellant on the facts of this case.

[38] It follows that, in my respectful view, the appeal of the first appellant against conviction on the count of murder succeeds and his conviction and sentence is set aside and is substituted by the following order: The first appellant is found not guilty and he is discharged on the count of murder.

[39] Concerning the charge of robbery on count two, both appellants were found guilty of the charge of robbery. The indictment does not allege that the crime of robbery was committed in furtherance of a common purpose. Robbery consists in the theft of property by intentionally using violence or threats of violence to induce submission to its taking (See: **S v Maneli 2009 (1) SACR 509 (SCA) para 6;**) It is thus a crime involving two unlawful

acts-taking property and performing a violent act upon a person. The first appellant took PW 1's property after threatening him with a bush knife. His liability for the robbery of PW1 could only have arisen from a common purpose which the Crown neither alleged nor sought to prove. The evidence did not establish any prior agreement to commit the crime. But it did prove that the appellants actively associated themselves with the commission of the crime against PW1 with the requisite fault element. So the finding that the first appellant was liable for the robbery of PW1 was correct, albeit that the indictment may have been deficient in failing to specify a common purpose to commit crime.

[40] Consequently, the appeal of the first appellant against his conviction on the count of robbery fails and his conviction and sentence is confirmed.

[41] I now turn to consider the appeal of the second appellant.

The evidence of PW1 and that of PW4 read better than the evidence of the second appellant on the issue of who the aggressor was. The second appellant was inebriated when he grabbed beer from PW1 and drank it. He hit PW1 when he disapproved of his conduct. The result was a fierce and

mortal combat which ended in tragedy. According to PW4 when the fight started he was standing at the shop but as it progressed to the donga, he went along with other people who were witnessing it. It is inaccurate therefore to say PW4 could not have seen the fight when it was at an obscure place as he remained standing at the shop. The evidence of PW4, the eye witness to the murder was also more credible than the denial proffered by the second appellant concerning the stabbing of the deceased. The evidence of PW4 is that the deceased fell in a donga whilst the second appellant was in hot pursuit. The second appellant caught up with the deceased and stabbed him. The deceased got up and fled. It is a misreading of the evidence of PW4 to say the deceased was stabbed by the second appellant whilst he was in full flight. This much is corroborated by the evidence of the second appellant who states "we fought (meaning second appellant and the deceased) and fell on the ground and rolled with each other. The deceased rose…" There is also the small matter of Machawe Hlophe that the second appellant says was standing next to second appellant and the deceased whilst they lay on the ground. The second appellant deftly avoided saying why Machawe Hlophe was next to him and if he acted in any way. PW5 states that he saw Machawe Hlophe take a knife from the second appellant's hand as he lay on the ground fighting with deceased. The irresistible inference is that

Machawe Hlophe took the knife from the second appellant after the deceased was stabbed. It was never disputed on behalf of the second appellant that he gave Machawe Hlophe a knife under the circumstances outlined herein. Absent all other evidence, pointing out and forensic results, the trial Court properly convicted the second appellant of murder. PW4's evidence of stabbing is corroborated by the post mortem report.

[42] Consequently, the appeal of the second appellant against his conviction on the count of murder fails.

[43] The second appellant was found guilty of the charge of robbery. As alluded to earlier, robbery is a crime involving two unlawful acts-taking property and performing a violent act upon a person. The second appellant took beer from PW1 and slapped him when he protested. For this reason, the second appellant had the requisite fault element to commit the crime charged.

[44] Consequently, the appeal of the second appellant against conviction on the count of robbery fails.

[45] I turn then to the question of sentence. In sentencing the second appellant to twenty (20) years imprisonment for murder, the learned trial Judge stated "In my view the interest of society far outweigh the mitigating factors. This is so because the incidents of unwarranted killings of innocent people with lethal weapons, especially among the youth in our society is becoming a nightmare." The appellant is a young man who was 25 years when he was convicted.

[46] Even agreeing with all the learned trial Judge said, however, I am of the view that the sentence passed for murder under the present circumstances is too severe and that the difference between it and what this Court feels it would have passed is sufficiently substantial to interfere with the learned trial Judge's discretion as to sentence and on appeal to impose a lesser one.

[47] The seriousness of second appellant's crime, his moral blameworthiness and his lack of remorse or regret justify a lengthy sentence of imprisonment. Society would require of this Court that it marks its severe disapproval of this type of criminal behaviour by heavy sentences of incarceration. Its sentences must also serve as a deterrent not only to the second appellant to

abstain from similar behaviour in the future, but to others who may have like-minded schemes in contemplation. At the same time, the reformative aspect of punishment should not be overlooked. The appellant was aged 25 years at the time of his sentencing. He is a first offender. He must be given a chance to rehabilitate himself into society at an age when he can still do so. It is for these reasons that I think the sentence of 20 years is too severe. In my view a sentence of 18 years imprisonment in the count of murder would meet all the criteria I have set out. I would backdate the sentence to 11 November 2012 this being the date of his arrest.

[48] The sentence of six (6) months imprisonment without an option of a fine is confirmed for the count of robbery and backdated to 11 November 2012 this being the date of second appellant's arrest.

[49] In the result the following order is made:-

1. The appeal by the first appellant against conviction on count 1 succeeds and the conviction and sentence is set aside.

2. The appeal by first appellant against conviction on count 2 is dismissed and the conviction and sentence is confirmed.

3. The appeal by the second appellant against conviction on count 1 is dismissed and the conviction is confirmed. The sentence of twenty (20) years imprisonment on the second appellant is set aside and there is substituted for him the following: Second appellant is sentenced to eighteen (18) years imprisonment backdated to 11 November 2012, the date of his arrest.

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M. LANGWENYA AJA

I agree _____

M.C.B. MAPHALALA CJ

I agree _____

DR B.J. ODOKI JA

For the First Appellant **:** Mr N.D. Jele

For the Second Appellant **:** Mr M. Mabila instructed by S. Jele

For the Respondent **:** Mr L. Gama