IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Criminal Appeal Case 13/20

In the matter between:

MBONGENIMAZWIMNGOMETULU **1'[1] Appellant**

NOMSA NOBUHLE SIMELANE **2[nd] Appellant**

And

REX **Respondent**

Neutral citation: *Mbongeni Mazwi Mngometulu and Another vs Rex (13/20) [SZSCJ 38 [2021} (18[th] November, 2021)*

Coram: **M.C.B MAPHALALA CJ**
S.B. MAPHALALA JA
N.J. HLOPHE JA

Heard: **16/08/2021**

Delivered: **18/11/2021**

Summary: *Criminal law -- appeal against sentence only by JS' Appellant - appeal against both conviction and sentence by 2nd Appellant - doctrine of common purpose considered - the Appeal Court finds that 2nd Appellant was the instigator of the crime therefore the doctrine of the common purpose applies - the court a quo was correct on the conviction and sentence in respect of the both Appellants - the appeal is dismissed and the orders of the court a quo are confirmed.*

JUDGMENT

S.B. MAPHALALA JA

Introduction

[I] Serving before this Court is an appeal against the judgment of the High Court (per M. Langwenya J) issued on the 30 April, 2020 as well as on the 11 May, 2020 under High Court Criminal case no. 99. The Appellants noted an appeal on both the conviction and sentence in the matter. The 1st Appellant has only appealed against sentence whilst 2nd Appellant ·against both conviction and sentence. The 2nd Appellant is the wife of the deceased and the 1st Appellant is her secret lover.

[2] Appellants were both convicted by the High Court on the 11 May 2020 for the murder of one Mfanukona Charles Mthupha. Both Appellants were consequently sentenced to imprisonment for a period of twenty three (23) years, for the 1st Appellant, the sentence was backdated to cover (3) months spent in custody. For the 2nd Appellant, the sentence was backdated to cover thirteen (13) months spent in prison pre- conviction.

(3) On conviction both Appellants were found by the court *a quo* to have committed the offence of murder. That the said Appellants, each or all of them, acting jointly in furtherance of a common purpose, did unlawfully kill Mfanukhona Charles Mthupha.

(4) It's common cause and undisputed that the deceased died after being hacked by the 1st Appellant. The evidence led in the court *a quo* is that the said 1st Appellant entered in the bedroom of the deceased with the intention to retrieve 2nd Appellant's suitcase. There ensued a fight between the 1st Appellant and the latter. The deceased was eventually hacked to death with a bush knife.

(5) It is important at this stage for one to understand the history of the matter,to state that the deceased was cohabitating with the 2nd Appellant and they had a number of children in this relationship. The 1st Appellant was a secret boyfriend to the 2nd Appellant

The grounds of appeal on behalf of 1st Appellant

(6) As stated above the 1st Appellant has only filed an appeal against the sentence only as reflected at page 139 of the Record of proceedings. The pt Appellant contends that the sentence is too harsh and severe to cope with. That the sentence of twenty three (23) years induces a sense of shock in the circumstances of the case. That the occurrence of the offence was not premeditated but occurred as a result of what obtained on the ground at that particular time.

On behalf of the 2nd Appellant

(7) The grounds of appeal in respect of the 2nd Appellant appears at page 141 and 142 of the Records of proceedings in the following terms:

I. The Honourable Court *a quo* erred in law and in fact by returning a guilty verdict for murder in as far as Appellant is concerned. There is absolutely no evidence for such a finding when one considers the totality of the evidence adduced during trial.

2. The Honourable Court *a quo* erred in law and in fact by finding that there was prima-facie evidence against the Appellant and that the evidence was sufficient in the circumstances to prove that the Appellant was guilty of Murder.

3. The Honourable Court *a quo* erred in law and in fact by finding that the evidence adduced by the Crown met the requirements of common purpose such that it found that Appellant and the 1'[1] accused acted in furtherance of a common purpose to kill the deceased.

4. The Honourable court *a quo* erred in law and in fact by making findings on its own without reliance on the evidence. The court *a quo* made findings and conclusions which are wrong and not supported by the evidence such as finding that the Appellant did nothing to help the
deceased when he as attacked, that Appellant entered the scene of crime with a bush knife to aid the 1st accused and other wrong findings.

5. The Honourable court *a quo* erred in law and in fact by finding that the Appellant had the necessary *meus rea* about the outcome at the time the offence was committed, and/or that Appellant foresaw the possibility of the criminal result ensuing and nevertheless actively associated herself recklessly as to whether the result was to ensue.

6. The Honourable Court f' *quo* red in law and in fact by sentencing Appellant to twenty-thr_ee years· imprisonment. The said sentence is

unreasonably on the high side and raises a sense of shock on the Appellant.

7. **The sentence imposed by the Honourable Court *a quo* is such that the Court did not consider the tripartite (triad) and / or degree of participation, if any, on the part of the Appellant.**

The chronicle of the evidence

[8] When the indictment was put to both Appellants in the court *a quo,* they pleaded not guilty. The Crown led the evidence of six (6) witnesses to prove its case. The 1st Appellant led his evidence to support his case and did not call any witness. The I st Appellant also had made a confession before a Magistrate in terms of the law. On the other hand the 2nd Appellant elected to remain silent and closed her case without calling witnesses.

[9] The background of the case is outlined in great detail by the Learned Judge in the *court a quo* where the evidence of the various witnesses were canvassed and the cross examination of such witnesses. A confession by the 1st Appellant was also made part of the evidence.

[10] The short version of the facts which are largely common cause between the parties is that the 2nd Appellant was cohabitating with the deceased and they had a number of children between them. The 2nd Appellant and the deceased did not have a peaceful relationship where assault was a common feature. According to the evidence of PW2 and PW7 the 2nd Appellant always hankered a desire to end deceased person's life. The 2nd Appellant during that time had a relationship with the 1st Appellant on the side. In the eve of the fateful day the 2nd Appellant on her cell phone texted the I st Appellant who was then a fully fledged secrete lover to

come to the matrimonial home of the deceased and the 2nd Appellant to collect a suitcase as the latter was planning to elope due to the abuse in the hands of the deceased. On the fateful night upon invitation by the 2nd Appellant, the I st Appellant came to the farmer's the home. The 2nd Appellant had left a window to the bedroom of the couple unclosed to create a decoy and to make it look like an intruder came through that window.

(11] The Ist Appellant came at the time planned by the two when the deceased was fast asleep. The Ist Appellant then had access to the house through the door. Thereafter a vicious struggle ensued between the Ist Appellant and the deceased leading to the latter being butchered and killed in his own home.

[12] I shall proceed to deal first with the appeal by the 2nd Appellant who has challenged both the conviction and the sentence. Then after that examination deal with the appeal against sentence in respect of both Appellants.

[13] I must a\so mention at the onset that when the arguments of the parties commenced on 16th August, 2021 Counsel for the Appellants concentrated solely on the principle of common purpose, that the Crown has failed dismally in the present case to satisfy the cardinal rules as stated in the South African case of **R vs Blom 1039 AD 188 at 202 -203.**

Conviction in respect of the 2nd Appellant

[14] The 2nd Appellant has filed her Notice of Appeal against both conviction and sentence as outlined at paragraph [7] of page 3 of this judgment and the main contention for the 2nd Appellant is that before this Court the evidence at trial and as it appears in the Record of Appeal does not show and *I* or prove that the 2nd Appellant committed the offence of murder. That the court *a quo* made a finding

that the case against the 2nd Appellant rested on circumstantial evidence. The court *a quo 's* finding at page 25 of the judgment is that there was no direct evidence that linked the Appellant to the death of the deceased. Counsel for the 2nd Appellant reproduced what was stated by the Learned Judge in the court *a quo* to the following:

> *"it is common cause that there is no direct evidence per se that links the second accused to the death of the deceased, the court heard, texted the first accused to tell him he could come into the house as the deceased was now asleep, the second accused leji the door open for the first accused to gain easy access to the bedroom in which the deceased was sleeping, she did nothing to help the deceased when he was attacked, she entered the scene of crime with a bush knife to aid the first accused, she ...."*

[I 5) It is contended for the 2nd Appellant that the two cardinal rules as envisaged in the case ofR **vs Blom 1939 AD 188 at 202 - 203** were not met in the present case. The cardinal rules state the following:

a) That the inference sought to be drawn must be consistent with all the proved facts and;

b) That the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn.

[J 6] Counsel for the 2nd Appellant proceeded at great length to advance his analysis of the facts at paragraphs 6.2.2, 6.2.3 and at 2.1 in support of these arguments. Counsel also cited the leading case in South Africa that **R vs Mgedezi and Others 1989 (1) SA 687** to the following *dictum:*

> *"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

in 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 pe,forming some act of association with the conduct of the others. Fijlhly, he must have had the necessary mensrea, 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 them being killed and performed his own act of association with recklessness as to whether or not death was to ensue ... <u>The state had to prove all these requisites beyond reasonable doubt.</u> "

[I 7] Counsel for the 2nd Appellant contends, following what was stated above, that the requirements therein laid out were not met and that the appeal was allowed and the Appellants were found not guilty of murder and were discharged.

[18] That on the same premise the 2nd Appellant should be found not guilty of murder and discharged. That this is based on the fact that there is no direct evidence that she participated in the killing of the deceased. That even the circumstantial evidence sought to be relied upon does not show that 2nd Appellant had the necessary intention to kill, and that she made common purpose with the 1'1 Appellant.

[19] Counsel for the Appellant further advanced arguments in paragraphs 7.5, 8 and 9 of his Heads of Arguments citing the case **of Josiah Tuesday Dlamiui and 4 Others vs The King- Court of Appeal Case No. 17/1995.**

[20] Finally, it is contended that, in the event that this Court dismisses the appeal on conviction, that on the question of sentence, Counsel for tbe 2nd Appellant has cited a number of cases by this Court. That this Court ought to interfere in the sentence given by the court *a quo.*

The Crown's arguments

[21] The main contention of the Crown is that both Appellants were correctly convicted based on the principle of common purpose. That it is clear from numerous authorities that liability under this principle arises through.prior agreement or active association in the unlawful enterprise coupled with the requisite *mens rea*. That in *casu* the court *a quo* correctly found that the common purpose was premised on active association. That it is trite that in consequent crimes under this doctrine the conduct of one perpetratOf is imputed on the other co-perpetrator(s). That there need not be proof that a party to the common purpose directly caused or inflicted the fatal blow leading to the death of the deceased. Counsel for the Crown also cited the case of **S vs Mgedezi (supra)** in support of these contentions.

[22] The Crown contends that the evidence presented in the court *a quo* clearly showed that the Appellants acted in furtherance of a common purpose in the commission of the offence. Whilst the conviction of the I st Appellant is based on the causation element coupled with intention, the conviction of the 2nd Appellant is based on *dolus eventualis* and circumstantial evidence.

[23] That the Ist Appellant's conviction was primarily based on the evidence of witnesses and a confession admitted in evidence through the consent of his legal representative.· That this exhibit dearly captures the events leading to the commission of the offence. That the court *a quo* also satisfied itself that the conviction was properly obtained before she placed reliance on it. That the confession is further supported by the autopsy report (Exhibit C) that the cause of death was due to hacking (cuts) with a sharp object.

[24] Furthermore it is contended for the Crown that the Appellants' presence at the scene **qf** l)rjrµe is not in issue,:, neither is it in issue that the I st Appellant inflicted some

injuries on the person of the deceased. That as regards the 2nd Appellant she barely denies her involvement in the commission of the offence. In the absence of direct evidence the court *a quo* correctly relied on circumstantial evidence adduced by the Crown. Furthermore, the court *a quo* correctly applied the cardinal rules of logic as stated in the case of **Blom (supra),**

(25] As regards the 2nd Appellant the court *a quo* found the following circumstances to be indicative of shared purpose with the 1st Appellant:

i) It **is the 2nd Appellant who facilitated ease of entry by the pt Appellant by leaving the door unlocked.**

ii) It **is the 2nd Appellant who texted the 1st Appellant to come over.**

iii) It is the 2nd Appellant who had entered the room where the attack was taking place though the court *a quo* correctly found that it was not her intention to help the deceased.

iv) The 2nd Appellant offered no help to the deceased whilst he was under attack. In actual fact she ensured that he was not assisted by preventing PW2 from running to seek help to the extent of physically restraining her.

v) The 2nd Appellant only made a half-hearted attempt at calling for help some 5 -10 minutes after the attack had occurred.

vi) It is 2nd Appellant who had misled the first people to arrive at the scene that the attack !md been carried out by two baraclara clad men. The 2"d Appellant had also smiled when PW7 asked her what had happened.

vii) The 2nd Appellant had always harboured a desire to end deceased person's life according to the evidence of PW2 and PW7.

[26] Further contentions are canvassed in paragraph 4.5 of Counsel's Heads of Argument citing decided cases **in** respect of this case and also on the question of sentence. See **Mancoba Lebogang Mokoena vs Rex, Criminal Appeal Case No.10/13 (30/11] page 11, Elvis Mandlenkosi Dlamini vs Rex, (30/11) [2013] SZSC 29.**

(27] Finally, it is contended for the Crown that there is nothing in the Appellants' respective appeals that warrant any interference by this court, both on the question of conviction and sentence. That therefore the appeals ought to be dismissed.

The court's analysis

In respect of 2nd Appellant's conviction

(28] Having considered the Record of Appeal filed before this Court and the arguments of the Attorneys for the Crown and the defence, the 2nd Appellant was correctly convicted by the court *a quo.*

(29] It is contended on behalf of the 2nd Appellant that the Crown in the court *a quo* relied on circumstantial evidence as there was no direct evidence which linked 2nd Appellant in the commission of the crime of murder of her husband. In this regard Counsel for the 2nd Appellant cited what was stated by the Learned Judge in the court *a quo* at page 25 of the said judgment, to the effect that it was common cause that there was no direct evidence *per se* that linked the 2nd Appellant. The Court heard that 2nd Appellant texted I st accused to come into her home as the deceased was now asleep. The 2nd Appellant left the door opened for the I st Appellant to

gain easy access to the bedroom in which the deceased was sleeping. She did

nothing to help the deceased when he was attacked. She entered the scene of crime with a bush knife to benefit the 1st Appellant. Counsel for the Appellant relied in the South African case ofR **vs Blom (supra).**

[30) The Crown on the other hand contends that the Appellants' presence (both Appellants) at the scene is not an issue, neither is it an issue that pt Appellant inflicted some injuries on the person of the deceased. That as regards the 2nd Appellant, she barely denies her involvement in the commission of the offence. In the absence of direct evidence the court c01Tectly relied on the circumstantial evidence adduced in line with the position stated in **R v Blom (supra).** The Crown further cited the Court of Appeal Case of **Philip Wagawaga Ngcamphalala and Others vs The King Criminal Appeal No. 17/2002** in respect of the facts as outlined by the Crown at paragraph [22) of page 11 of this judgment.

[31) It is my considered view that the facts outlined above in paragraph [25) are an indication of a shared purpose with the 1st Appellant.

[32) Furthermore, it would also appear to me that in applying the principles stated in the aforementioned case the court *a quo* found it as a fact that:

i) Both Appellants were present at the scene where deceased was hacked.

ii) Both Appellants were aware of the assault and attack perpetrated on the deceased.

iii) The 2nd Appellant made common cause with the I[st] Appellant by giving him the bush knife to continue with the assault.

iv) The 2nd Appellant also prevented PW2 from calling for help thereby giving 1st Appellant sufficient time to carry out their unlawful enterprise.

v) The Appellants foresaw the possibility of their conduct leading to the death of the deceased but continued with their unlawful act reckless whether death ensued, hence the finding of *dolus indirectus* by the court *a quo.*

vi) 2nd Appellant left the door to the bedroom open to allow entry of the I *st* Appellant.

(33] On these facts I find that there was no misdirection in convicting both Appellants on the doctrine of common purpose.

Appeal on sentence by both Appellants

(34] I now come to the question of sentence in respect of both Appellants.

(35] Starting with the consideration of sentence in respect of I *st* Appellant as I have stated above the I *st* Appellant contends that the sentence of twenty three (23) years induces a sense of shock in the circumstances of the case. That the occun-ence of the offence was not re-determined but it occun-ed as a result of what obtained on the ground at that particular time.

(36] Counsel for the Appellant contends that the deceased died as a result of a fight between him and Ist Appellant. The deceased and Appellant fought each other probably, in pursuit to gain acbess to the suitcase. 1st Appellant ended up pulling out the bush knife and a baton which was used to assault and hack the deceased.

[37] That the deceased died at the hands of the **1st** Appellant but the **1st** Appellant prayed for a reduced sentence citing a plethora of decided cases by this Court over the years including the Supreme Court cases of **Jabulani Mzila Dlamini vs Rex - Supreme Court Case No. 16/2021, Nkosinaye Samuel Sacolo vs Rex, Supreme Court Case No. 37/2011, the Supreme Court Case of Ndaba Khumalo vs Rex, Supreme Court Case No. 22/2012.**

[38] Counsel contends that the range of sentences for murder cases start from fifteen (15) years to twenty years depending on the facts and circumstances of each particular case citing in Supreme Court case of **Samkeliso Madati Tsela vs Rex Case No. 13/2012.**

[39] In respect of the 2nd Appellant it is contended by Counsel that if this Court finds that 2nd Appellant participated in the commission of the offence and made common purpose with the 1st Appellant the Court should consider the degree of participation, if any of the 2nd Appellant. In the present case it would appear to me that 2nd Appellant was the cause of all these problems by sending a text message to the 1st Appellant to come to her rescue. This single act predicated to the events which took place resulting in the death of the deceased.

(40] It is trite law that the imposition of a sentence lies within the discretion of a trial court, a higher court will lightly interfere with this judicial discretion in the absence of a material misdirection or irregularity resulting in miscarriage of justice. A superior court will also interfere where the sentence is strikingly in appropriate. The Crown contends that there is no misdirection to warrant any interfere with this sentence. In this regard the Crown has cited the case of **Mancoba Lebogang Mokoena vs Criminal Appeal Case No. 10/13 [30/11] at page 11, Elvis Mandlenkosi Dlamini vs Rex (30/11) (2013] SZSC 29.**

[41] The Supreme Court will generally not interfere with this discretion in the absence of a material misdirection resulting in the miscarriage of justice. It appears to me that in the present case there is no misdirection or otherwise what warrant this Court to interfere with the discretion of the court *a quo*. The trial court considered Appellants' personal circumstances as they fully appear in the judgment of the court *a quo* on sentence. The court *a quo* having considered the triad found the Appellants individual personal circumstances were outweighed by the interest of society. The Court arrived at such a finding having considered the gruesome nature of the attack on a defenceless man in his homestead. The attack was by all accounts unprovoked. The deceased was brutally butchered numerous times with a weapon of choice being a bush knife as reflected in the Post Mortem Report filed in the court *a quo*. The court *a quo* also observed in its judgment that the Appellants showed no remorse throughout the trial.

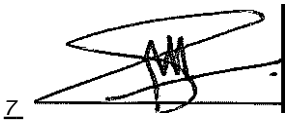
[42] Having considered the triarl the trial court cannot be said to have approached the sentences of the Appellants in a spirit of anger regard being had to the peculiar circumstances of the case.

[43] It is abundantly clear to me that it is not correct that there was no direct evidence as contended by Counsel for the 2nd Appellant. It is clear in the evidence that the 2nd Appellant prevented PW2 from calling for help thus given I st Appellant time to kill deceased. 2nd Appellant not only left door to the bedroom open but she provided a bush knife to the I st Appellant to continue hacking the deceased.

[44] In the present appeal, I am not persuaded that there was any merit in any of the arguments raised. No misdirection by the learned Judge *a quo* was apparent, and the sentence was by no means excessive. It is accordingly ordered as follows:

I. The appeal against conviction by the 2nd Appellant is dismissed;

2. The appeal for the reduction of the sentence by both Appellants is dismissed.

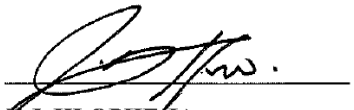


S.B. MAPHALALA JA

I AGREE

M.C.B. MAPHALALA CJ

I ALSO AGREE



N.J. HLOPHE JA

	MrO. Nzima (Nzima and Associates)
For the Appellants:	Mr Khumbulani Mngomezulu Prosecuting Counsel
For the Crown:	(Director of Public Prosecution)