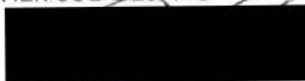




**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
DATE: 11 3 /2024	
	
BRAND AJ	

Case number: A220/2023

In the matter between:

COSTA FUNDAMO

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

BRAND AJ (with DAVIS J and VAN DER SCHYFF J CONCURRING)

Introduction

[1] This is an appeal against the conviction of Costa Fundamo ('the appellant') on one count of murder and one of robbery with aggravating circumstances, in a judgment

handed down in this Court per Bam J on 11 November 2022.

Background

[2] On the morning of 25 January 2017, two men, the appellant and Eric Patrick Nhaca (later the appellant's co-accused – 'the co-accused') reported at the Lyttleton Police Station in Pretoria that they had earlier that day come upon their employer, Emmanuel Tefo Myambo ('the deceased') seemingly murdered in his bed.

[3] When members of the police accompanied them to the deceased's house, they duly found him dead on his bed, bloodied and with several wounds to his head. Although there were no signs of forced entry, the presence of a bolt-cutter and crowbar on the floor of the deceased's bedroom; the fact that two plasma television sets were found removed from their wall mountings and left on the floor; and the absence of the deceased's laptop computer, later that day reported by his family, suggested to the police that a robbery had also occurred, in addition to the murder.

[4] The appellant and his later co-accused were on that day questioned by the police and their shared room on the deceased's premises was searched. They both denied any involvement in the murder and supposed robbery, and nothing was then found to connect them to the crimes. Nonetheless, just over two months later, on 27 March 2017, they were arrested and charged with both these offences. Their trial in the High Court in Pretoria, and conviction of both murder and robbery with aggravating circumstances on 11 November 2022, followed. For the murder they were each sentenced to life imprisonment and for the robbery to 15 years.

[5] The appellant was granted leave to appeal against his conviction on both counts. It is thus his appeal against conviction that is now before us. The appellant's co-accused has not similarly applied for leave to appeal and there is no appeal against his conviction pending.

The judgment of the court *a quo*

[6] At trial, both the appellant and the co-accused pleaded not guilty. In broad terms, the appellant denied any knowledge of how the murder and supposed robbery unfolded and any involvement in it, testifying that he slept through the night on the date of the murder and only discovered the deceased with the co-accused around 9:00 on the morning of 25 January. The co-accused in turn also denied involvement in the murder but professed some knowledge of how it occurred. He testified that he was awoken in the early hours of the morning of 25 January 2024 by a car alarm that had been activated. He got up to investigate and saw two men – one armed with a knife and the other with a firearm - running from the garage in which the bakkie of which the alarm had been activated was parked. When he tried to follow these two men, they turned around and grabbed and held him. At that time, he saw three more persons emerge from the deceased's house: the deceased's estranged wife, Anita Myambo ('the estranged wife') and two men. They walked toward a black motorcar parked in the yard and got in. The two men holding the co-accused then said to him that if he told anyone what he had seen, they would kill him. They released him and also got into the black motorcar, which sped off. The co-accused further testified that he then, after closing the gate to the property returned to the room he shared with the appellant (who was fast asleep), got back into bed without waking the appellant and went back to sleep. In the morning, he and the appellant then discovered the deceased dead in his bed.

[7] The court *a quo* convicted the appellant and the co-accused despite their disavowals of involvement in the murder and robbery, wholly on the basis of a statement that the co-accused had made two months after the murder, to a family friend of the deceased, Leotina de Almeida ('De Almeida'). This statement is central to the judgment of the court *a quo* and indeed to this appeal. Accordingly, I describe in some detail below how it came about and what it was about.

[8] The deceased's brother, Thabang Myambo ('the brother') testified that some two months after the murder, on 26 March 2017, an employee of his informed him that the appellant knew more of the murder than he had up to then let on and wanted to

tell the deceased's family what he knew. The brother met with the appellant and thereafter, at the appellant's suggestion, with the co-accused. They both told more or less the same story to the brother, broadly along the lines of the co-accused's version later presented at trial: that they had been awoken in the dead of night by an activated car alarm; had gone out to investigate and had seen the deceased's estranged wife with three men exiting the deceased's house, getting into a black motorcar parked in the yard and speeding off. The only difficulty was that the appellant and the co-accused each said that they alone saw this happening, while the other was asleep in their shared room. This discrepancy roused the brother's suspicion. To clear this up, he asked De Almeida, a court interpreter fluent in both Portuguese and Mozambican Shangaan, the appellant's and co-accused's home languages, to speak with them. De Almeida met with the appellant and co-accused but soon asked to speak with the co-accused alone. She then called the brother and other family members present closer and said that the co-accused had agreed to give a statement.

[9] The co-accused proceeded to say that early on the morning of the murder the estranged wife called him on the telephone and asked him to open the gate to the deceased's yard. When he did so a black motorcar entered, with four male occupants. Three occupants alighted and entered the deceased's house with him. One of the men had a firearm, another a knife. Inside, they encountered the estranged wife and the appellant. The estranged wife asked the co-accused and the appellant whether they wanted money. When they responded yes, she said they should kill the deceased. They were both shocked, and refused, but the estranged wife and the three men continued trying to persuade them to kill the deceased. At some point the estranged wife gave the co-accused an object that looked like a hammer, with a blunt steel head and wooden handle. Both the co-accused and the appellant were now very nervous. The three men started to threaten them, eventually saying that should they refuse to kill the deceased, they would themselves be killed. The co-accused then entered the deceased's bedroom where the deceased was lying on the bed asleep. He struck the deceased on the side of his head multiple times with the hammer-like object the estranged wife had given him. When he stopped, the estranged wife took a pair of scissors and stabbed or cut at the deceased's ear. While this happened, the appellant stood behind the co-accused and the estranged wife with the three men, watching.

After the co-accused had killed the deceased, the three men proceeded to break the flat screen televisions from their mountings on the wall and place them on the floor. One also went outside to try and start the deceased's bakkie, to load some things on the back so that it would look like an attempted robbery. However, the bakkie's alarm went off, so he abandoned that attempt. Thereupon, the three men and the estranged wife left. Once they had left, the appellant and co-accused were very scared and shaken and could not go back to sleep. They spent their time formulating a story to tell the deceased's brother when they would call him at 9:00 that morning.

[10] Both the brother and Ms de Almeida testified that, although it was the co-accused who spoke, the appellant stood by and nodded. He also added two details to the co-accused's version: that the estranged wife was wearing old clothes and was barefoot; and that, after the deceased had been killed, he felt scared that he would open his eyes and see them, so that he took a pair of spectacles lying next to the deceased's bed and placed them on his eyes.

[11] The co-accused during testimony admitted to making this statement to De Almeida. However, he denied that it was true. He said that he had been coerced and threatened into making it, principally by the deceased's brother, who told him that if he didn't make the statement, he would go to jail.

[12] Nonetheless, the court *a quo* held that the co-accused's statement to De Almeida was a confession to the murder. On this basis, it convicted him of the murder.

[13] More pertinent to this appeal, the court *a quo* also relied on the co-accused's statement to De Almeida to convict the appellant of the deceased's murder. It held that, although it was according to the statement the co-accused and not the appellant who had killed the deceased, the appellant was nonetheless guilty of the murder, as he had made common purpose with the co-accused.

[14] Thus arise the two central issues in this appeal, which are whether the court *a*

quo was correct:

[14.1] to rely on the co-accused's statement to convict the appellant; and

[14.2] to hold that the appellant had acted in common purpose with the co-accused to murder the deceased.

[15] I turn to these two issues below.

The court *a quo*'s reliance on the co-accused's statement to De Almeida to convict the appellant

[16] Was the court *a quo* entitled to rely on the co-accused's statement to De Almeida to determine the guilt of and convict the appellant? The court *a quo* proceeded from the assumption that the statement that the co-accused had made to De Almeida was a confession to the deceased's murder. It held that the co-accused had in this statement 'implicated himself in the murder of the deceased' and had 'actually confessed to the murder in saying that he had inflicted the injury or an injury to the head of the deceased'.¹

[17] If indeed the co-accused's statement to De Almeida was a confession, then the court *a quo* clearly erred in relying on that confession to convict the appellant. Section 219 of the Criminal Procedure Act 51 of 1977 determines that '[n]o confession made by any person shall be admissible as evidence against another person'. This provision has been interpreted to require a court to refrain from considering at all a confession by one accused when determining the guilt of another;² whether directly or indirectly;³ as part of a chain of inferences drawn against the non-confessor; or to corroborate

¹ Judgment *a quo* p 4, Record Vol 5 p 341.

² *S v Molimi* 2008 (3) SA 608 (CC) at para [30].

³ *R v Baartman* 1960 (3) SA 535 (A) at 542B-E; *S v Serobe* 1968 (4) SA 420 (A) at 425A-H.

other evidence.⁴

[18] At best for the court *a quo*, one can assume that it did not rely on the co-accused's 'confession' to convict the appellant, but instead regarded the appellant's conduct while the co-accused was making his statement to De Almeida (nodding in seeming agreement and adding in small part to his version) as constituting either a confession or admission of his own.

[19] But the facts do not bear this out. Neither the deceased's brother nor De Almeida, although testifying that the appellant was present while the co-accused made his statement and nodded in seeming agreement while he did so, gave any evidence on what exactly the appellant's nodding indicated agreement with and with what intention he was indicating his agreement, there where he did so. Neither of the two things that the appellant added to the co-accused's statement (that the estranged wife wore old clothes and was barefoot; and that, once the co-accused had killed the deceased, he (the appellant), unsettled by the deceased's open eyes, placed his spectacles on his face) indicate anything other than that the appellant was present when the deceased was killed. This fact, in and of itself, is no indication of the appellant's guilt. Indeed, him relating how he placed the deceased's spectacles on his face to hide his eyes is exculpatory: from the record it is clear that he did so because he was frightened and unsettled by what had occurred.

[20] However, the court *a quo* also erred in assuming that the co-accused's statement to De Almeida was a confession. It has long been accepted that a confession is 'an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law'.⁵ In this sense, a confession has been described as an extra-curial admission of all the elements of the crime the confessor has been charged

⁴ *S v Makeba* 2003 (2) SACR 128 (SCA) at para [14].

⁵ *R v Becker* 1929 AD 167 at 171.

with.⁶ An admission that seems to relate to all the elements of the relevant crime but that nonetheless leaves any possibility of a defence to that crime for the accused is for that slim reason alone not a confession.⁷

[21] From the record there are strong indications that the co-accused intended his statement not as any acknowledgement of guilt, but instead as exculpatory. He is at pains to point out, after all, that over an extended period he was coerced and indeed forced, with threats by armed men to his own life, to kill the deceased. This means first that he did not admit to one of the central elements of the crime of murder, being the requisite *mens rea*. But it also means that (however slim the chances of success with it might have been) he is, despite his statement, left with a possible defence: that he was forced to do it. On both, related counts, his statement was not a confession.

[22] The statement, instead of a confession, amounts simply to an extra-curial admission: a statement adverse to the co-accused's case (in several respects), falling short of a confession of all elements of the crime of murder.⁸ Even though the absolute exclusion of section 219 of the CPA does not apply to admissions as it does to confessions, as a general rule also an admission may not be relied on to the detriment of anyone other than its maker. As it relates to anyone other than its maker, an admission is per definition hearsay evidence. As such, it is inadmissible, unless it qualifies as an exception to the hearsay rule.⁹

[23] For the court *a quo* to have relied upon the statement of the co-accused as an admission to convict the appellant, it would have had to consider and decide whether, in terms of section 3 of the Law of Evidence Amendment Act 45 of 1988, the statement was admissible as evidence. In short, this section authorises courts to admit hearsay

⁶ *S v Molimi* (above) at para [28].

⁷ *S v Grove-Mitchell* 1975 (3) SA 417 (A).

⁸ Schwikkard PJ and Van der Merwe SE *Principles of Evidence* (3rd ed 2012) Cape Town: Juta at 305.

⁹ *Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A).

evidence where it would be in the interest of justice to do so, taking account of several factors. There is no indication in the judgment of the court *a quo* that this question was at all considered and decided: the admissibility of the co-accused's statement to De Almeida as an admission against the appellant was simply assumed. Also as such, the court *a quo* erred in relying on the co-accused's statement to convict the appellant.

[24] Again, at best, the judgment of the court *a quo* concerning this can be read as that the appellant's conduct while the co-accused made his statement indicated assent to such a degree that he can be regarded as having made admissions of his own concerning the murder. But also here, the facts do not bear this out. As already set out above, there was no evidence before the court *a quo* about what exactly in the co-accused's statement the appellant assented to and for what reason; and the Appellant's additions to the statement are either unrelated to the question of his guilt, or related, but exculpatory.

[25] I conclude that the court *a quo*'s reliance on the co-accused's statement to De Almeida – whether regarded as a confession or admission – to convict the appellant was in error. Because the appellant was convicted solely on the basis of the co-accused's statement, this means that he was convicted in the absence of any evidence. The appeal should succeed on this ground alone. Nonetheless, I proceed to consider the second question posed above: whether the court *a quo* was correct to convict the appellant of murder on the basis of common purpose.

Common purpose

[26] As set out above, in his statement to De Almeida, the co-accused admitted to killing the deceased himself and mentioned that the appellant was present when he did this. In addition, the appellant also admitted that he was present when he related how, after the deceased had been killed, he placed his spectacles on his face to hide his eyes. Other than that, there was no evidence before the court *a quo* linking the appellant to the deceased's death. Instead, the evidence clearly shows that the appellant did not kill the deceased and only stood by while he was being killed. Nonetheless, the court *a quo* held that the appellant was guilty of the murder of the

deceased, together with the co-accused. It reached this conclusion as follows: '[A]ccused 2 [the appellant] was present and the only reasonable inference that can be drawn from those facts is that there was a common purpose to kill the deceased'.¹⁰ Was the court *a quo* correct to convict the appellant on the basis of common purpose?

[27] The doctrine of common purpose allows a court to attribute 'criminal liability to a person who undertakes jointly with another person or persons the commission of a crime'.¹¹ In particular, it allows a court to attribute such liability to persons who had not themselves committed the crime but had shared the intention to do so with the person who had.

[28] Criminal liability can be attributed to a person for common purpose if this shared intention is shown either through an agreement to commit the crime in question¹² or, where there is no such agreement, by the non-doers actively associating themselves with and/or participating in 'a common criminal design' with the doer, with the requisite blameworthy state of mind.¹³

[29] The court *a quo* held that the murder was planned and premeditated between the co-accused and the appellant: 'I am satisfied that from the circumstances it *can* be inferred and should be inferred that the murder was pre-planned'.¹⁴ The court *a quo* does not indicate on what evidence this inference is based. There is in fact no evidence that in any way indicates an agreement between the appellant and the co-accused to commit the murder. Indeed, the version of the state witnesses accepted by the court *a quo* graphically illustrates the absence of any such agreement: on this version the

¹⁰ Judgment *a quo* p 8, Record vol 5 p 345.

¹¹ *S v Thebus and Another* 2003 (6) SA 505 (CC) at para [18].

¹² The judgment of the Supreme Court of Appeal in *Molimi* (above) (*S v Molimi and Another* 2006 (2) SACR 8 (SCA)) illustrates a case where agreement on a common criminal enterprise led to criminal liability being attributed also to accused who had not actually committed the murder (at para [34]).

¹³ *S v Thebus* (above) at para [19].

¹⁴ Judgment *a quo* p 8, Record vol 5 p 345.

co-accused was forced to kill the deceased and the appellant to look on, through credible threat to their lives. That seems not merely the absence but the opposite of an agreement.

[30] This means that the appellant can only be held criminally liable for the murder of the deceased on common purpose if he had somehow actively associated himself with and/or participated in the criminal design of murdering the deceased. The requirements that must be met for someone to be held criminally liable on common purpose because of active association or participation in the criminal design were first set out in the pre-constitutional era case of *S v Mgedezi*,¹⁵ as follows:

[i]n 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.¹⁶

[31] For the court *a quo* to have concluded that the appellant had actively associated himself with and/or participated in the criminal design of murdering the deceased, so that for that reason he was liable for it with the co-accused even though he had not committed it, it should have inquired on the facts whether the appellant's conduct had satisfied the *Mgedezi*-criteria. It did not.

¹⁵ 1989 (1) SA 687 (A). Despite being a pre-constitutional decision, *Mgedezi* remains good law. It was applied with approval by the Constitutional Court in *Thebus* (above) and in several of its more recent decisions on common purpose (see most recently, *Jacobs and Others v S* 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC) at para [41] *et seq*).

¹⁶ *Mgedezi* (above) at 705I-706B.

[32] Of the five *Mgedezi*-requirements, the appellant's conduct during the course of the murder complies with only two. These are the first two: the appellant was present at the scene of the murder when it was committed; and he watched the murder being committed from behind its perpetrator, the co-accused, so that he was aware that it was being committed. But that is where it ends:

[32.1] The appellant did not intend to make common cause with the co-accused in murdering the deceased. Just as the co-accused was forced to kill the deceased, the appellant was coerced into and forced to be present and to watch the murder unfold. On the evidence of the state's witnesses, he was frightened and unsettled throughout, there against his will and only because he couldn't leave.

[32.2] The appellant did not manifest his sharing of a common purpose with the perpetrator of the killing (the co-accused) by himself performing some act of association with his conduct. The appellant simply stood by, unable to leave. His only act during the course of the murder was, when the deed had already been done, to place the deceased's spectacles upon his eyes. This was not an act of association with the murder: instead, on the evidence of the state witnesses, which the court *a quo* accepted, it indicated his horror and fright at what had just happened and his desire, quite literally not to be seen to be a part of it. In that sense, it comes closer to being an act of dissociation.

[32.3] The appellant did not have the requisite *mens rea*. That is, he did not intend the deceased to be killed, or display recklessness about whether or not he would be killed. He was present at the murder only because he had happened upon it and was then forced to remain. For an extended time, he, with the co-accused resisted the efforts of the estranged wife and her three accomplices to persuade them to kill the deceased. He did not want to but had to remain there.

[33] Accordingly, on the facts as provided by the state witnesses and accepted by the court *a quo*, just as no common purpose can be inferred on the basis of an agreement to kill the deceased, also no common purpose can be inferred from active association and/or participation in the deceased's killing, as there is none.

[34] At the hearing of this appeal counsel for the state, Ms Roos, submitted that both the appellant's failure to do anything to prevent the murder before it occurred and then his failure after the fact promptly to report the murder to the police and provide them with the true version of events (which she urged us to read as an attempt to hide the murder) constituted active association with the criminal enterprise of the murder, indicating his common purpose with the co-accused.

[35] On the former of these, the response is that, apart from the fact that there was no legal duty on the appellant to act to prevent the murder (particularly where his life was in threat), he did in fact, in concert with the co-accused resist the murder for some time while the estranged wife and her cohorts attempted to persuade him and the co-accused to kill the deceased. He only acquiesced and proceeded to 'let the murder happen' when credible threats were made to his own life.

[36] On the latter, the response is twofold. First, on the evidence of the State witnesses accepted by the court *a quo*, the appellant failed to tell the police what had happened and who was responsible, because he was scared of the estranged wife and what she would do were he to tell. Second, even were he attempting to hide what had happened, that is not an act of active association with or participation in the murder from which common purpose can be inferred. At worst, such conduct could constitute a different offence, such as obstruction of justice. Ms Roos was also unable to refer us to any precedent for the proposition that such after the fact conduct can constitute active association with or participation in the criminal enterprise.

[37] For all these reasons, the court *a quo* erred in concluding that the appellant, although not himself actually killing the deceased, was guilty of his murder on the basis

of having made common purpose with the co-accused who did the deed. Also on this ground, the appeal against conviction for murder should succeed.

The robbery

[38] The court *a quo* convicted the appellant (and co-accused) of robbery, on the following grounds: 'In respect of the third charge, robbery with aggravating circumstances, the state allege[s] that the laptop of the deceased was taken during this attack. I am satisfied that the state adduced evidence in this regard, that was not contested that the deceased's laptop disappeared after his death'.¹⁷

[39] It is unclear what evidence the court *a quo* refers to here. The only evidence before the court concerning the laptop was the testimony of a Constable Baloyi that one of the family members of the deceased had at the scene of the murder told him that the deceased's laptop had 'just disappeared' and that he had then asked for its serial number; and the testimony of the deceased's brother that on the same day, when the police had asked whether he and the other family members knew of anything that was missing, the estranged wife responded that 'she observed that a laptop was missing' and that he had later been told by the investigating officer that the laptop's Wi-Fi signal had been picked up at a block of flats in Centurion, but that it could not be found.

[40] At the outset, concerning the question whether indeed the laptop was missing, both the constable and the brother's testimony is inadmissible hearsay. But even were it to be admitted, it does not in any way support the court *a quo*'s conclusion. All that this testimony if admissible establishes is that a laptop of the deceased's that was usually at his house was after the murder had been discovered not there and could, despite police efforts to find it, not be found. It does not establish that the laptop 'was taken during the attack' or that it 'disappeared after [the deceased's] death', as the court *a quo* held or indeed even that it was 'missing' (instead of perhaps sold or given

¹⁷ Judgment *a quo* p 7, Record Vol 5 p 344.

to someone else by the deceased). The laptop could have been 'missing' for any length of time and for whatever reason.

[41] Most importantly, that little evidence concerning the laptop that was before the court *a quo* establishes no link whatsoever between either the appellant or the co-accused and the fact that the laptop was not there. In sum, there simply was no evidence before the court *a quo* that the deceased was robbed of his laptop and, more importantly, even if he was, that the appellant (and the co-accused) had robbed him – no evidence whatsoever, that is, on the basis of which to convict the appellant (or the co-accused) of robbery with aggravating circumstances. The court *a quo* erred in doing so.

[42] For all these reasons, the appeal should be upheld, and the convictions, both for the murder and the robbery, set aside.

[43] The appeal is upheld. The conviction of the appellant both for murder and robbery with aggravating circumstances, and the consequent sentences imposed on him are set aside.



JFD Brand

Acting Judge of the High Court

Gauteng Division, Pretoria



E Van Der Schyff
Judge of the High Court
Gauteng Division, Pretoria

I agree.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

COUNSEL FOR THE APPELLANT:

Adv L Augustyn

INSTRUCTED BY:

Legal Aid Centre, Pretoria

COUNSEL FOR THE RESPONDENT:

Adv A Roos

INSTRUCTED BY:

Director of Public Prosecutions, Pretoria

DATE OF THE HEARING:

29 January 2024

DATE OF JUDGMENT:

...¹... March 2024