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**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTH GAUTENG LOCAL DIVISION)**

CASE NO: A228/2018

COURT A QUO CASE NO:

REPORTABLE: NO

OF INTEREST TO OTHER JUDGES: NO

REVISED.

12/08/2022

In the matter between:

DOORASAMY PRAGASAN

FIRST APPLICANT

MOODLEY SHANE

SECOND APPLICANT

MOODLEY ASHWIN

THIRD APPLICANT

and

THE STATE

RESPONDENT

JUDGEMENT

MATSEMELA AJ (DLAMINI J CONCURRING):

INTRODUCTION

[1] The Appellants were tried in the Regional Court sitting in Randburg on the following charges:

(a) Charge 1 Assault with intent to do grievous bodily harm.

(b) Charge 2 Assault common.

BACKGROUND

[2] The incident occurred in the evening of the 5 December 2009 at Greenside. The allegation were that appellants assaulted A [...] C [...] by hitting him with fists.

[3] It was also alleged that on the same day, date and place as in count 1 the appellants assaulted K [...] 1 K [...] 2 by hitting him with open hands and fist. Both victims were 15 years old at the time of the incident.

[4] The appellants were legally represented and pleaded not guilty to all the charges. On 12 April 2018 the *court a quo* convicted the appellants after hearing evidence of 12 witnesses in the trial.

[5] The *court a quo* took both counts as one for the purposes of sentence and sentenced all three appellants to three years correctional supervision in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977 and various conditions were attached.¹

[6] On 9 May 2017, leave to appeal against their conviction was granted by the trial court. This appeal is against their conviction in respect of both counts.

LEGAL ISSUES

[7] At issue in this appeal is whether the State has proved beyond a reasonable doubt that the appellants committed the offences for which they have been charged and convicted with.

¹ record page 871 – line 1 – 7

[8] There is a further legal argument that the State did not allege nor relied on common purpose in the charge sheet and therefore denied/deprived the appellants right to a fair trial.

[9] Various contradictions in the evidence of the State witnesses were further pointed out and submitted as premises upon which the appeal is based.

LEGAL FRAMEWORK

CONTRADICTIONS

[10] Counsel for the appellants argued that there are various contradictions in the evidence of the State witnesses and therefore the State failed to prove its case beyond reasonable doubt. The contradictions are that some of the witnesses statements did not contain the names of the suspects and yet they came to court and identify them as if they knew them well.

[11] The witnesses made it clear that they did not know the suspects before the day of the incident and it is Christina's mother who knew accused 1 which then led to the arrest of the other suspects. During their testimony in court they identified them as accused number 1 and 2 and as the people among the group which assaulted the victims. The appellants never disputed that they were on the scene. They only disputed that they assaulted the victims.

[12] The fact that there are discrepancies is not indicative of lies or that such evidence should not be accepted. The totality of the evidence and circumstances under which such statements were made should be taken into account. In *S v Mkohle*² it was held that:

Contradictions per se do not lead to the rejection of witnesses evidence. These contradictions may be an indication of an error. Not every error made by the witness affects his credibility. The presiding officer has to make an evaluation, taking into account such matters as the nature of the

² 1990 (1) SACR 95 (A)

contradictions, their number and importance, and their bearing on the parts of the witnesses evidence.

[13] In *S v Oosthuizen*³ Willamson J says that contradictions also reflect independence of witnesses and lack of conspiracy against the accused.

[14] There are well established principles governing the hearing of appeals against findings of facts. The courts have ruled in various cases as in *S v Hadebe 1997 (2) SACR 641 (SCA)* at 645 Marais JA said.

“In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will be disregarded if the recorded evidence shows them to be clearly wrong.”

[15] In The Constitutional Court case of *Makate v Vodacom Ltd*⁴ and as reiterated that appeal courts are generally reluctant to interfere with factual findings made by trial courts more particularly if the factual findings depended upon the credibility of the witnesses who testified at the trial.

[16] Going through the record it is clear that the *court a quo* approached the evidence of how each of the appellant is implicated in the commission of the offences individually. Each applicant was held liable by their individual action and the admissions. Each applicant admitted to have been on the scene and therefore the question of identification should be dispensed with.

[17] The credibility of each witness was the main concern of the *court a quo*. The court analysed and weighed the version of the State witnesses against the version of the applicants and concluded that the two were “worlds apart”. The *court a quo* concluded that one of the two versions was false, fabricated and meant to mislead the court.

[18] The court found that the evidence of the State witnesses A [...], C [...], K [...], Kgatiso and Rahul Branco were not only satisfactory in all material respects but

³ 1982 (3) SA 571 (T)

⁴ 2016 ZACC13,2016 (4) SA 121 (CC) 6 BCLR (769)

was also corroborated. Their evidence was well corroborated by the evidence of the other witnesses who were on the scene. Their version was further corroborated by the appellant's version of their presence on the scene and the reason why they were on the scene in the first place.

[19] The court correctly found that the state case against the appellants was credible, reliable and overwhelming and further that the appellant's version on the totality of the evidence was not reasonably possibly true.

[20] The court rejected the appellant's version as false based on their own evidence and that of the defence witness Sheldon. Credibility of his evidence was called to question. The appellant's version was found to be improbable particularly for their denial wherein the victims were injured..

[21] It is my view that the trial court carefully analysed the evidence and correctly rejected the version of the appellants as not reasonably possibly true.

[22] The witnesses gave corroborating evidence implicating the appellants to the extent of who participated in the assault of both victims, who injured the victim and the reasons why the victims were assaulted in the first place.

[23] I am of the view that the *court a quo* was correct in rejecting the appellant's version of events and accepting that of the state witnesses.

COMMON PURPOSE

[24] In the opening paragraph of the judgement the court remarked that

*"although the accused can be convicted individually for their respective roles in assaulting the complainants, the court is of the view that it would not be necessary to separate their roles as such since evidence show that they acted in furtherance of common purpose"*⁵

⁵ Record page 867 paragraph 76

[25] Counsel for the appellants argues that the *court a quo* erred in concluding and convicting the appellants on the basis and principles of common purpose. Under s 35(3) of the Constitution every accused person has a right to a fair trial, which includes the right '(a) to be informed of the charge with sufficient detail to answer it'.⁶ This requirement is not merely formal and procedural but substantive and material to a fair trial.⁷ When the State intends to rely on common purpose it must communicate its intention clearly, unambiguously and adequately.⁸ However if the evidence proves common purpose the State can apply to amend the charge sheet even after all the evidence has been led.⁹ The trial court has wide powers to amend the charges at any stage before judgment, regard being had to prejudice to the accused.¹⁰

[26] The purpose of fair trial rights and the harm it seeks to avert is the risk of a trial by ambush. The mere lack of an averment of common purpose in the charge sheet would not automatically render a trial unfair. Such an approach would amount to preferring form over substance, possibly at the expense of justice. However, there are conflicting decisions about whether the alleged common purpose in the charge sheet is fatal to the prosecution's case. The full court in Gauteng helpfully summarised these decisions in *Ntuli & another v S*.¹¹ Post-apartheid, judicial opinion inclines towards pragmatism and consequentialism. The cases suggest that the issue turns on whether an accused has a fair trial or is prejudiced.¹² Prejudice, actual or potential, will always exist if the defence would have been different if the allegation had been made in the charge sheet, amended if necessary.¹³

[27] It is my view that the trial court in its judgement gave a careful consideration of the common purpose. The court further detailed the meaning of "active

⁶ S 84 of the Criminal Procedure Act 51 of 1977 (CPA); *S v Makatu* 2006 (2) SACR 582; [2007] 1 All SA 470 (SCA); (245/05) [2006] ZASCA 72 (30 May 2006); J Burchell *Principles of Criminal Law* 5 ed (2016) at 475..

⁷ *S v Msimango* 2018 (1) SACR 276 (SCA) para 16; *S v National High Command & others* 1964 (1) SA 1 (T) at 2A; *S v Mpetha & others* (1) 1981 (3) SA 803 (C) at 809F-H.

⁸ *Du Toit Commentary on the Criminal Procedure Act* RS 60, 2018 ch14-p15; *S v Msimango* above para 16.

⁹ *S v Thakeli & another* 2018 (1) SACR 621 (SCA) para 7.

¹⁰ S 86 of the CPA.

¹¹ [2018] 1 All SA 780 (GJ) paras 41-52.

¹² *S v Maqubela & another* 2014 (1) SACR 378 (WCC).

¹³ *Moloi & others v Minister for Justice and Constitutional Development & others* 2010 (2) SACR 78 para 19; 2010 (5) BCLR 497 (CC).

association” and the requirements for liability under common purpose as formulated in *S v Mgedezi and Others*¹⁴ and the proper illustration of such requirement.

[28] The presiding officer can also not be faulted in considering the identification of other people who were on the scene but did not participate in the assault as a result the acquittal of Alpha Jasmin and Krinesan Govender.

[29] The appellants were well represented during the trial proceedings.

[30] The trial court in its judgement gave a careful consideration of the common purpose. The court further detailed the meaning of "active association" and the requirements for liability under common purpose as formulated in *S v Mgedezi and Others* supra and the proper illustration of such requirement.¹⁵

[32] It is my view that the application of the common purpose by the *court a qou* in its judgement cannot be interpreted to mean that the conviction on the findings of the court are not supported by facts or that the convictions are of crimes that the appellants were charged off. The conviction of the appellants was based on proven facts following evidence of the conduct of the appellants falling within the ambit of crime charged.

[34] In *Ntuli and Another vs The State* 2018 ALL 780 (GJ) the court addressed the doctrine of common purpose being applicable despite failure of the state to indicate in the charge sheet that it will be relying on common purposes. The finding of the court was that such would not render the proceedings fatal, as the application of the doctrine of common purposes was” justified by the facts”.

[35] It is my view that the *court a qou* correctly applied and relied on the doctrine of common purposes as the evidence proved that the appellants were seen kicking A [....]. In so doing they acted jointly and those who were part of the group but did not participate were clearly identified and subsequently acquitted.

¹⁴ 1989 (1) SA 687 (A)

¹⁵ Record Page 868 Paragraph 78

ORDER

The appeal is hereby dismissed.

MOLEFE MATSEMELA
Acting Judge of the High Court
Gauteng Local Division, Johannesburg

I concur

JABU DLAMINI
Judge of the High Court
Gauteng Local Division, Johannesburg

Date of hearing: 09 MAY 2022
Date of judgment: 12 August 2022

APPEARANCES:

For the Appellant	SW Van Der Merwe
Instructed by	SW Van Der Merwe Attorneys
For the Respondent	Adv JF Masina
Instructed by	Director of Public Prosecutions