IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 57/2021
Date heard:01 February 2022
Date delivered: 07 February 2022
NOT REPORTABLE

In the matter between

THE STATE

and

THEMBA NTSHABA	**ACCUSED 1**
NONCEBA KWAKWA	**ACCUSED 2**
NOSAKUTHETHWA FANISO	**ACCUSED 3**

JUDGMENT

GOVINDJEE, J

Background and evidence

[1] Zukile Kewu (the deceased) was a teetotaller working for a farmer (Bezuidenhout) who abhorred alcohol. On 31 October 2020 he joined some of his colleagues, including all three accused, as they socialised and drank at the

residence of Kwakwa. When he returned to his home, at least some of those in attendance decided that he was likely to inform Bezuidenhout that employees were drinking on the farm. Their response was to decide to kill him. With a pair of shorts over his face, tripped and pinned to the ground, Ntshaba slit his neck with a knife in the presence of the other accused. The resultant 10 cm deep cut or stab through the anterior neck and airway was fatal.

[2] The accused are charged with planned and / or premeditated murder, it being alleged that they acted in execution or furtherance of a common purpose in unlawfully and intentionally killing the deceased. Ntshaba and Kwakwa pleaded guilty and, while their pleas were not accepted by the State, made a series of admissions in terms of s 220 of the Criminal Procedure Act, 1977. Their subsequent testimony confirmed their roles in the murder. Ntshaba had been under the influence of liquor but not so heavily intoxicated that he could not remember the events of that evening. He was aware of the consequences of his actions when he cut the deceased's throat and killed him without justification. Kwakwa had acted with common purpose by assisting to trip the deceased and holding his legs together, tight against the ground, while he was killed by Ntshaba.

[3] The reason for Ntshaba's and Kwakwa's conduct was their concern that the deceased would inform Bezuidenhout that they had been drinking liquor. Both explained that Faniso had been part of the plan from its inception at Kwakwa's home. Ntshaba had suggested that the deceased should be killed and Kwakwa had ascertained from Ntshaba and Faniso whether they were certain that they could see this through, which they had both confirmed. It was Faniso that had later placed the pair of shorts over the deceased's head, before holding his upper body while he was on the ground and during the time he was stabbed. Her participation, according to both of them, had been voluntary.

[4] Faniso made a statement to Captain J Klaas on 21 July 2021, seemingly admitting to a role in the deceased's death.[1] Klaas testified that the statement was made freely and voluntarily, with Faniso seemingly at ease. He allowed her to tell

[1] On the admissibility of such statements, see s 219A of the Criminal Procedure Act, 1977 (Act 51 of 1977).

her story in isiXhosa, a language with which they were both fluent, and then attempted to write down everything said before reading this back to Faniso prior to finalisation. That statement confirmed that Faniso had been drinking with Ntshaba, Kwakwa and a lady named Teyase at Bezuidenhout's farm. She had not been drunk. The deceased had been present and was not drinking alcohol. When he returned to his house, Kwakwa suggested that he should be killed. This was because the deceased was friendly with a lady named Gcobisa, who was competing with Kwakwa for the affections of Bezuidenhout. Kwakwa promised to pay the others an unspecified sum of money. Teyase was too drunk to participate in the murder and was asked to keep Faniso's baby. The accused proceeded to the home of the deceased. Faniso was carrying a pair of Kwakwa's shorts and used this to cover the deceased's face while he was talking on his phone. Ntshaba and Kwakwa brought him down. Ntshaba placed his foot on the deceased's neck and Kwakwa held his hand so that he could not move. Faniso was holding the door so that the deceased could not exit. Ntshaba then took out a knife and cut the deceased's throat. The accused returned to Kwakwa's house and continued drinking. When it was suggested that the deceased's home should be burned in order to hide the evidence, Faniso disagreed, indicating that they might be seen. Bezuidenhout then entered, searching for the deceased.

[5] The statement also reflects that Faniso denied knowledge of the deceased's death the following morning when questioned by Bezuidenhout. Kwakwa advised her to flee to Lesotho to avoid arrest. Faniso's statement included the words 'After I killed Whitey exact date unkown…'. She was later assisted by Kwakwa's children and others to avoid arrest and was given money to return to Lesotho. She returned to South Africa to find work during January 2021 and was then arrested.

[6] Klaas was an excellent witness. He was based at Elliot and had neither been involved in the investigation of the crime, nor informed of any related background facts. Faniso had never made any mention of being threatened to participate in the murder at the time she made her statement. Had she done so, this would have been recorded. She understood what had been recorded and had agreed to the contents of the statement before signing each page.

[7] Mr Solani, counsel for Faniso, did not challenge the admissibility of the statement into evidence, accepting that it had been made freely and voluntarly. Instead, it was argued that the statement was incomplete and incorrect in material respects. Faniso's version of events was then put to Klaas, who denied not recording her statement properly. Klaas was emphatic in respect of the suggestion that Faniso had been forced into participation. The word 'force' was important to him and would have been carefully recorded. He had listened carefully at the time the statement was recorded and it was only during cross-examination that a suggestion of 'force' had emerged. Faniso had also been given the opportunity to advise Klaas if the statement he had recorded was incorrect.

[8] Her testimony was markedly different. Kwakwa had wanted to kill the deceased because he would inform Gcobisa about what had been discussed. Faniso had expressed her fear that they would be arrested if they did so. Kwakwa reassured her that other killers who were arrested would return from prison. She was criticised by the others as being too 'forward' and instructed that everybody present would go together to commit the murder. Faniso believed that she might also be killed. She had seen Kwakwa take out a knife from a drawer and a pair of shorts from a wardrobe. She and Ntshaba were aggressive and kicked Teyase, who was intoxicated and seated on the steps, indicating that they would return for her. The only words spoken to Faniso at this point prior to departure was that nobody would remain, spoken in an aggressive manner. Faniso felt forced and accompanied the other accused because she was afraid of dying. She was told to lead the way. On Faniso's version, she had been instructed to push open the deceased's door. Kwakwa had taken a seat near the stove and then given the pair of shorts she had carried to Faniso, instructing her to cover the deceased with this. While doing so, the deceased had asked what was happening. She had remained quiet. He later screamed that Faniso should call Bezuidenhout. She replied that she could not, as she would also be killed along with Teyase. She was instructed to stand at the doorway, to prevent dogs from entering, and had never held the deceased while he was being murdered.

[9] Faniso later told Bezuidenhout that she did not know what had happened. This was based on Kwakwa's instruction that nothing should be said about the

incident. She later lied to him by indicating that Ntshaba and the deceased were at the tar road. This was based on Ntshaba's instruction. Faniso had been afraid to tell the truth about the murder, even when she had the opportunity to do so to Bezuidenhout and the police. The other accused had subsequently laughed about the deceased's death. She and Teyase had been given R500 each to maintain their silence. The other accused had influenced her to leave Ugie and make her way to Lesotho.

[10] Faniso testified that it was due to stupidity that she had not informed the police about what had transpired, considering that she believed she had done nothing wrong. After her arrest, she had made a statement to Klaas and agreed to its contents. He had erroneously not recorded that she had been forced to accompany the other accused to the house of the deceased.

Applicable law

[11] If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. The crucial requirement is that the persons must all have had the intention to murder and to assist one another in committing the murder. Once that is proved, the conduct of the person who actually administered the fatal blow is imputed to other parties to the common purpose who actively associated themselves with its execution. A prior conspiracy is not necessary for this outcome and the common purpose may also arise spontaneously. The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful result will be brought about.[2]

[12] It is the individual accused's 'active association' with the common purpose that forms the basis for the doctrine. That notion is wider than that of express or implied agreement. It is accepted that if there is proof of a previous agreement between the participants, the inference that each participant associated herself with

[2] CR Snyman *Criminal Law* (5th Ed) (LexisNexis) (2008) 266.

the others is relatively easily made. In the absence of a previous agreement, other requirements must exist.[3] The mere fact that a person happens to be present at the scene of a crime and was a passive spectator of the events cannot serve as a basis for holding her liable for the crime that has been committed.[4] A person might also negative liability by having the clear and unambiguous intention to withdraw from the common purpose and by voluntarily performing some positive act of withdrawal before the commencement of the execution. No ground of justification can exist in the absence of objective factors, and a person's conduct remains unlawful if she subjectively thinks that there is a ground of justification whereas in fact there is none.[5]

[13] One of the grounds of justification is necessity from compulsion.[6] A person acts in necessity, and her act would be lawful, if she acted in protection of her or somebody else's life or bodily integrity when this was endangered by a threat of harm which had commenced or was imminent and which cannot be averted in another way. It has been held that 'compelled' in this context refers to exposure to 'a motive at once terrible and exceedingly powerful'.[7] A person pleading necessity must be faced with a situation of emergency. The emergency must already have begun or be imminent. It must not have terminated, nor be expected only in the future.[8] There must be strict compliance with various requirements before the defence can be successful.[9] A person must, for example, be aware of the threats

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[3] *S v Mgedezi* 1989 (1) SA 687 (A) at 705I-706C: 1) X must have been present at the scene where the violence was being committed; 2) X must have been aware of the assault on Y by somebody else; 3) X must have intended to make common cause with the person or persons committing the assault; 4) X must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others; and 5) X must have intended to kill Y.

[4] *S v Petersen* 1989 (3) SA 420 (A) at 425A-B.

[5] Snyman *supra* 102. A putative ground of justification is one that does not legally exist but which X wrongly believes to exist. It 'exists' in X's imagination only and X mistakenly believes that her conduct is covered by a ground of justification.

[6] Necessity can also serve to negative culpability. This would be the case if Z orders X to kill Y and threatens to kill X if she fails to obey the command and X, fearing for her life, kills Y. The emergency situation results from the conduct of Z. Culpability is excluded because, although X intentionally and with awareness of unlawfulness did wrong, the law could not fairly have expected the average person in the same situation to have avoided the wrongdoing. Whether an acquittal can occur on a charge of murder on the ground of compulsion depends on the particular circumstances of each case, requiring the entire factual complex to be carefully examined and adjudicated upon with the greatest of care: *Snyman supra* at 245; *S v Goliath* 1972 (3) SA 1 (A).

[7] *S v Damascus* 1965 (4) SA 598 (SR) at 603.

[8] *Damascus supra* at 601.

[9] Snyman *supra* at 116.

and believe that they will be executed.[10] A person who is able to avoid the threat or danger by fleeing must do so and, if possible, seek police protection.[11]

Has the state proved murder with common purpose?

[14] Murder is the unlawful and intentional causing of the death of another human being. Ntshaba and Kwakwa have admitted their guilt, testified to that effect and offered no defence. I have specifically considered the possible effect of voluntary intoxication on their conduct. I am satisfied, based on consideration of his admitted conduct, that their mental abilities and conception of the material circumstances surrounding the act were not affected to the extent that their intoxication can operate in their favour at this stage of the enquiry. The state has proved beyond reasonable doubt that, despite his consumption of liquor, Ntshaba is guilty as charged of unlawfully and intentionally causing the deceased's death by cutting his throat with a knife. The state has also proved beyond reasonable doubt that Kwakwa acted in common purpose with Ntshaba and is guilty of murder.

[15] As indicated, Faniso's statement contradicted the versions of Ntshaba and Kwakwa and was at variance with her own statement to Klaas. The court must treat the self-contradiction with circumspection, also bearing in mind that the statement to Klaas was not obtained by way of cross-examination.[12] In this instance there were no language differences between Faniso and Klaas to contribute to an incorrect recording of what was intended. The court must also consider that not every error or contradiction necessarily affects credibility.[13] The contradictory versions must still be evaluated in the context of all the evidence. This includes determining the proved reasons for the contradictions, the actual effect of the contradictions on credibility or reliability, as well as the quality of any explanations, together with the relationship between the contradictions and the rest of the evidence.[14] The question to be answered is whether Faniso's evidence is

[10] In *Damascus supra*, at 600, Macdonald J held that 'it is the reasonable fear created by the threat and not the threat itself which must be looked at.'
[11] *Damascus supra* at 603-604.
[12] *S v Mafaladiso en andere* 2003 (1) SACR 583 (SCA) at 593e-594h.
[13] *S v Mkohle* 1990 (1) SACR 95 (A) at 98f-g.
[14] *Ibid*.

trustworthy and whether, despite any shortcomings, defects or contradictions in that testimony, the truth has been told.[15]

[16] Ntshaba and Kwakwa were both good witnesses, testifying honestly about their involvement. They had no apparent reason to implicate Faniso, who noted that Kwakwa had been a mother-figure to her. Their evidence was clear that the agreement to kill the deceased had been tripartite, including Faniso, and without any compulsion for her to participate. Much of her signed statement accords with that reality, the main difference being the suggestion that Kwakwa had hatched the plan based on her intention to kill Gcobisa. Significantly, there is no suggestion of any force, fear or necessity in her interactions with the other accused.

[17] That version emerged only during Faniso's testimony and was shaken under cross-examination. Faniso could not explain why she had not utilised any number of subsequent opportunities to explain, either to Bezuidenhout, the police or a family member, that she had operated out of fear or compulsion. She could only acknowledge that it was stupidity not to have done so given her proclaimed innocence. Faniso repeatedly testified that her life, and that of her child, was in danger, but could only raises the other accused's tone of voice and demeanour at the time, and that Teyase had been kicked, to support this. Her version that Kwakwa only told her to cover the deceased's face with the pair of shorts when they were already inside his home is highly improbable. When these shortcomings are considered together with the strength of Klaas' testimony, I have no hesitation in concluding that he accurately recorded what she had told him at the time, including the various admissions she made.

[18] Her reasons for departing from that statement at the trial are apparent. Faniso attempted to sketch a picture of somebody fearing for her life and that of her child, but this is simply not borne out by the other evidence, particularly her own recollection of the extent of the threat directed towards her, and her subsequent conduct. It is improbable in the extreme that she would not have said something of the truth either to Bezuidenhout, the police or a family member, once she was

[15] *S v Sauls and others* 1981 (3) SA 172 (A).

safely away from Ntshaba, had she really been acting out of necessity. To frame her signed statement without reference to this compulsion is simply unthinkable if that was really what had happened. The statement recorded by Klaas would have made that clear, or at least made some allusion to the allegation, if she had said anything along those lines. Faniso conceded that many of the statements recorded in her statement were indeed an accurate reflection of what she had said. Klaas, being uninvolved with the investigation and unaware of the circumstances surrounding the matter, would have had absolutely no basis to omit anything said by Faniso.

[19] While Faniso tried to maintain her stance during her testimony, she improvised on occasion and did not display the demeanour of somebody speaking truthfully at all times. Some of her remarks during cross-examination were particularly telling. For example, she confirmed that Kwakwa had 'suggested' that they should proceed to the deceased's house, rather than indicate any threat prior to their departure. She resorted to explaining that it was the manner in which the suggestion had been put that inspired her fear, together with the suggestion that Teyase would be 'dealt with' later. She also testified that she had expressed her fear of being caught by the police, rather than her fear of personal injury or harm to her child, to her co-accused. The response received, that criminals frequently return from jail, seemed to satisfy her concern. She later accepted that she could have left the scene before the crime had been committed, but failed to do so. Rather than being under pressure, she had also had no difficulty in participating in the deliberations with the other accused. On her own version, it was Faniso who had told the others that the deceased's home should not be burnt.

[20] That the statement contains no mention of actions caused by force or necessity is deafening confirmation of the reality that emerges from consideration of this evidence in its totality. Faniso did not act under force or out of necessity to protect herself or her child. She was part of the tripartite agreement to kill the deceased. She left her child with Teyase voluntarily and accompanied her fellow accused to the deceased's home without being made to do so. In fact, and bearing in mind the improbability of being given the pair of shorts inside the home of the deceased, I accept that she left Kwakwa's house with this item, intending to use it

in the manner she did. She subsequently made no attempt to distance herself from the undertaking and actively participated by placing the pair of shorts over the deceased's face. While I accept that this may have been at Kwakwa's suggestion at the time, I am unable to accept that Faniso did so under compulsion based on any real, reasonable or substantial fear. I further accept that she was part and parcel of tripping and holding the deceased while he was killed.

[21] There was simply no emergency situation created by either Ntshaba or Kwakwa that necessitated or compelled this conduct, and I accept their testimonies in that respect, having applied the necessary caution in evaluating the evidence of accused persons testifying against a co-accused.[16] Faniso's conduct in failing to even mention something of this version to Bezuidenhout, when she was alone with him, the police or a family member points to the same result. Neither Faniso nor her child was in mortal danger due to compulsion, so as to justify her participation in the crime. Her version that this was the reason for her conduct is not reasonably possibly true. While Faniso's plea explanation suggested that she had been threatened with a knife by Kwakwa, her evidence made no mention of this at all. Bezuidenhout's evidence confirms that Faniso had not looked threatened when he saw her a short time thereafter and when she lied about Ntshaba's whereabouts and indicated that he was with the deceased at the tar road. Even if there had been some threat, which I reject, Faniso could have run away from the situation at some stage before the act was completed. Similarly, the suggestion that because the deceased called out her name because she was not involved in killing him is far-fetched. Even if that had been the case, the deceased would not have known of her innocence at the time, particularly since she had actively participated by placing the pair of shorts over his head. Her version to that effect is not reasonably possibly true. In all the circumstances, and having carefully considered the evidence in its totality, I conclude that the state has succeeded in proving beyond reasonable doubt that Faniso is also guilty of the crime of murder, acting intentionally and unlawfully in furtherance of a common purpose. Given the overwhelming evidence of this, it was unnecessary for the state to call Teyase as a witness and I am disinclined to draw an adverse inference from their failure to do so. She could, in

[16] *S v Dladla* 1980 (1) SA 526 (A) at 529.

any event, have been called by the defence if her testimony was crucial to their case.

[22] It might be added that Bezuidenhout's testimony that he had heard Ntshaba request Faniso to call him cannot be accepted. He was some distance away and testified that he would not have heard shouting from inside the home of the deceased. The probabilities favour that it was the deceased that had called out, begging for his life and calling the accused by name, and that Bezuidenhout had only heard distant shouting. Ntshaba confirmed that it was the deceased that had cried out, calling all of their names and asking why they were doing this. While it may be accepted, based on his testimony and that of Kwakwa, that Kwakwa had grabbed him and tore his T-shirt after he had pushed her, their relationship had ended some time ago. I remain satisfied that the decision to kill the deceased had nothing to do with jealousy on the part of Kwakwa, but rather the accused's concern that he would tell Bezuidenhout that they had been drinking.

Was the murder 'planned or premeditated'?

[23] The prosecution has the burden to prove beyond reasonable doubt that a murder was planned or premeditated.[17] Despite its clear link with the sentencing regime, judgments have confirmed that this is an issue that must be dealt with during judgment on the merits.[18] There is a difference between weighing-up proposed criminal conduct and committing murder on the spur of the moment or in unexpected circumstances.[19] This requires an examination of the state of mind of each of the accused and consideration of the period of time between them forming the intent to commit the murder and carrying out this intention. To put it differently, it may be asked whether the decision to murder and the steps taken to commit this murder were, in terms of time, place and circumstance so closely connected that the steps taken – far from indicating advance or prior planning – were mainly the immediate result of, and part and parcel of, the earlier decision to murder.[20]

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[17] *S v Mokgalaka* 2017 (2) SACR 159 (GJ) para 27.
[18] *S v Taunyane* 2018 (1) SACR 163 (GJ) para 9.
[19] *S v Raath* 2009 (2) SACR 46 (C) para 16.
[20] See Du Toit et al *Commentary on the Criminal Procedure Act* (RS 65) (2020) ch 28-p18D-8. For detailed consideration of the concept of 'premeditated' see *S v PM* 2014 (2) SACR 481 (GP) para 36.

[24] While I accept that the accused discussed an idea to visit the house of the deceased and kill him, matters seem to have proceeded on an accelerated basis thereafter.[21] Although there is no direct evidence as to how much time actually passed between the decision to kill the deceased and the actual deed, the period does not appear to have been lengthy. I accept that Kwakwa questioned whether the others were committed to the idea, that Ntshaba then picked up the knife, the child was handed to Teyase and the accused walked to the deceased's house. The evidence suggests that the houses were close by. His head was then covered, he was tripped, held and killed. This all after the heavy consumption of alcohol and seemingly without rational consideration. The only calculated attempt to increase the likelihood of success was the pair of shorts that accompanied the accused and was used to cover the face of the victim.[22] To the extent that there was an actual plan, this was rudimentary.[23] There was no overt attempt to evade detection or apprehension or planned strategy as to how the deceased would be overpowered and killed.

[25] I accept that Ntshaba conceived of the idea to kill the deceased and armed himself for this purpose.[24] I am satisfied, on a conspectus of the evidence, that the real reason for this was an alcohol-inspired irrational attempt to avoid workplace strife by killing the deceased. The murder that followed was callous and brutal, the deceased's life needlessly extinguished in a manner akin to an animal slaughter. Nevertheless, I am unconvinced that the events may be said to be planned or premeditated and of the view that they were more likely impulsive and spur-of-the-moment acts.[25] In coming to this conclusion on the facts, I am mindful of the unanimous judgment of the Supreme Court of Appeal in *S v Kekana* that premeditation does not necessarily require an accused to have planned a killing

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[21] See *Raath supra* para 16. While consideration of the period of time between the accused forming the intent to commit the murder and carrying out this intention is of cardinal importance, it does not provide a particular point or time that equates to a murder being 'planned or premeditated'.
[22] Cf *S v Kekana* [2014] ZASCA 158 para 14.
[23] *Raath supra* para 18.
[24] On the relevance of the time spent between the collection of a weapon and the actual murder, see *S v Mokgalaka* 2017 (2) SACR 159 (GJ) para 33.
[25] See, for example *S v Jordaan and others* 2018 (1) SACR 522 (WCC). It is clear that the test is not whether there was an intention to kill, which is a factor to be considered in determining whether the killing was an act of weighed: *S v Taunyane* 2018 (1) SACR 163 (GJ) para 30.

over a long period of time.[26] In my view, it cannot be held that there was proof beyond reasonable doubt of a pre-planned rationally thought-out scheme, designed to increase the likelihood of success or to evade apprehension.[27]

Order

[26] Accused no. 1, 2 and 3 are all found guilty of the crime of murder.

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A. GOVINDJEE
JUDGE OF THE HIGH COURT

[26] 2019 (1) SACR 1 (SCA) para 37.
[27] See *Taunyane supra* paras 30, 32.

Appearances:

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