



FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No. : A94/2018

In the matter between:-

KAMOHELO RAMATLOTLO

First Appellant

MOHLOUWA JOHN LETEANE

Second Appellant

MOLAHLEHI PATRICK PHORORO

Third Appellant

and

THE STATE

Respondent

CORAM: VAN ZYL, J *et* MOLITSOANE, J

HEARD: 17 SEPTEMBER 2018

JUDGMENT BY MOLITSOANE, J

DELIVERED: 10 JANUARY 2019

- [1] The appellants were convicted and sentenced in the Regional Court: Welkom on a charge of murder, read with the provisions of s51 of the Criminal Law Amendment Act 105 of 1997(the Act) and Assault with intent to do grievous bodily harm. They were each sentenced to 20(twenty) years imprisonment for murder and 7(seven) years imprisonment for assault with intent to do grievous bodily harm. This appeal against their convictions and sentences is with leave of this court.
- [2] Mokete Makoanyane testified that in the early hours of the morning and at The Zone tavern he met one Thabonyana. He asked for lift from the latter on his way home. Thabonyana operated a taxi business. They left together. Along the way they picked up the deceased and another person. While travelling they noticed a white vehicle and Thabo stopped and went to that vehicle. Thereafter the said vehicle drove away and Thabonyana followed it in his vehicle. When the white vehicle approached a certain bridge it stopped next to the road. Thabonyana also stopped behind it. The first and third appellants alighted from the white vehicle while the deceased and the other passenger also alighted from Thabonyana's vehicle. The deceased and the other passenger went to the first and third appellant. Within a few seconds the deceased got back in the vehicle and said he had been stabbed. The other passenger never came back. The witness did not see who stabbed the deceased. They drove away and along the

way at Mazibuko's house the deceased alighted. They drove to the garage where Thabonyana saw blood in his vehicle. Thabonyana cleaned the blood in his vehicle. From the garage they drove in Thabonyana's vehicle to James Nake street. The vehicle of Moleboheng appeared and went to Tshepiso's house. They also went to the said house of Tshepiso where he met the three appellants. He informed them that Thabonyana's car was full of blood and someone had been stabbed. He got a lift from Moleboheng to his home.

[3] Tshepiso David Mokoena and the three appellants were passengers in a vehicle driven by Moleboheng Tinte. While they were travelling Moleboheng stopped her vehicle. The appellants alighted and went to the vehicle of Thabonyana which had stopped behind them. He saw a person running on the other side of the road. At that stage the appellants came back in the vehicle and Moleboheng drove away. She took him to his home. At his home he went inside to collect money and upon his return to the vehicle he saw the three appellants holding knives.

[4] Thabonyana Moses Makume testified that on the day of the incident he was the driver of his taxi, a Honda Ballade. While so driving a vehicle alerted him to stop by its lights. He noticed that the vehicle belonged to Moleboheng Tinte and he stopped in front of it. He went to the said vehicle to speak to the driver. He saw the three appellants sitting at the back while Tshepiso sat in front. After speaking to Moleboheng he

went back to his vehicle and drove off. He saw Moleboheng following him at high speed and overtook him and brought her vehicle to an abrupt stop. The three appellants alighted. The second appellant came to his side while the first and third appellant went to the back of his vehicle. One of his passengers alighted and ran away while the first and third appellant seem to grab the other passenger who was at the back when he got out of the vehicle. When the appellants left, the passenger told him that they took his cell phone and they stabbed him. He did not see who stabbed him. He wanted to take him to the hospital but he refused. He dropped him at the corner of the house of one Mazibuko at his request. He proceeded to a garage to fill in petrol, He saw blood stains on his vehicle and he cleaned it. He then took Mokete Makoanyane home where after he went home to sleep, later that day he again met the three appellants and confronted them about the stabbing of the deceased.

- [5] xxxxxxxx Mothupi testified that he and the deceased were from work at Blue Ribbon. They boarded a taxi driven by Thabonyana Makume. While they were driving their driver stopped the vehicle and went to another vehicle, a Tazz. He did not take long and he came back and drove further away. When they were approaching a certain bridge the Tazz came at speed and overtook them. It came to a halt in front of them and their driver nearly bumped it. Three people alighted from the Tazz and came to the vehicle they were in. They opened the doors at the back. They took his cell phone and he went out but one of those people stabbed him in the hand.

He managed to run away. He could not identify the people who stabbed him. He also does not know who stabbed the deceased.

[6] On the other hand the versions of the three appellants boil down to a bare denial as all three of them raised the defence of alibi. The only thing they seem to agree upon is that on the day of the incident they were at The Zone tavern drinking until the early hours of the morning when they left for their different destinations.

[7] The appellants rely on a number of grounds of appeal on the merits which may in nutshell may be summarised as follows:

1. "The court a quo erred in the application for declaring the witness Thabonyana Moses Makume a hostile witness and its subsequent acceptance of the statement he made before the police in terms of s3 of the Law of Evidence Amendment Act 45 of 1988;
2. The court erred in excluding the statements which the court admitted provisionally in the final analysis of the case.
3. The court erred in finding that the three applicants acted in common purpose;
4. The Honourable Court erred in finding that the state has proven its case beyond a reasonable doubt."

[8] It is trite law that an appeal court will not lightly interfere with the findings of the trial court unless there is misdirection on the part of the trial court in the application of the law or the facts.

- [9] The appellants assail the conviction on the basis that the court misdirected itself in excluding the police statements of Moleboheng and Moeketsi. It has to be borne in mind that cross examination on these statements was provisionally allowed on condition that the police official who took them came to testify. The witnesses in these statements denied that the said statements were read back to them. The legal representative undertook to lead evidence of the person who took them. That was not done. Much of the contradictions referred to by the defence centred on the testimony in court and previous inconsistent statement made before the police. The previous inconsistent statements were never proven as the person who took them was never called. I further agree that the argument on the said contradictions fell by the road side for failure to prove the previous inconsistent statements. The appellants knew that the statements were provisionally admitted on condition that the police official came to testify. That did not happen and the statements thus remained inadmissible and were properly excluded by the court *a quo*.
- [9] The appellants' also assail the conviction on the basis that the court *a quo* erred in rejecting the testimony of Thabonyana Makume in court and accepting his previous inconsistent statement made before the police in terms of s3 of the Law of evidence Amendment Act 45 of 1998. It is contended that the appellants' constitutional right to a fair trial was infringed in that they were denied the right to challenge the evidence contained in the said statement.

[10] I am unable to fathom this argument. It has to be borne in mind that Thabonyana Makume was only declared a hostile witness after a protracted extensive cross examination by the defence which included an extensive reference to the previous inconsistent statement made before the police. The appellants concede that the procedure followed in proving the authenticity of the statement and confronting him with same was correct. It is trite that a party may not attack the credibility of ones witness unless the court has declared such a witness hostile. The decision to declare a witness hostile lies in the discretion of the trial court and another court will not lightly interfere in such a discretion.¹ In *Sv Mathonsi*² a previous inconsistent statement was accepted in evidence against the accused as hearsay. I cannot find that the court erred in accepting the previous inconsistent statement of Thabonyana as hearsay herein.

[11] Mr Molise in his heads of argument and during submissions before us submitted that the Court *a quo* erred in finding that the Appellants acted in common purpose whereas that was never averred when the charge in count 1 was put by the prosecution to the appellants when they pleaded. It is indeed so that the charge sheet does not contain an allegation that the appellants acted in common purpose in causing the death of the deceased in count 1. It is apposite to mention that the appellants were legally represented by one attorney throughout the proceedings before the Court *a quo*.

¹ R v Saqwashula 1930 AD 437

² 2012(1) SACR 335 (KZP) ; See also *Sv Rathumbu* 2012(2) SACR 219(SCA).

[12] It is trite law that an accused person is entitled to such particulars as he properly requires to enable him to prepare his defence. In *R v Adams and Others*³ the court said the following:

“It is a well-known principle in our law that an accused person is entitled to such particulars as he properly requires for the purpose of preparing his case before he is called upon to plead and enter upon his defence, and he is entitled to such particulars even if it entails a disclosure of Crown evidence.”

[13] In *S v National High Command*⁴ the court held that:

Now it is clear that where common purpose is alleged, the state has to supply particulars of the facts on which it will rely in order to ask the court to draw the inference that each and one of the accused was a participant in the conspiracy, or party to the alleged common purpose.”

[14] In *S v Ndaba*⁵ the state made an application in terms of s86 of the Criminal Procedure Act 51 of 1977 to amend the charge sheet to reflect that it intended to rely on the doctrine of common purpose. In granting the application the court held as follows:

“I am satisfied that the allegation of common purpose has to be made by the state in the indictment, or at least in the summary of substantial facts furnished in terms of s144(3)(a) of the Act.”

[15] The obligation to inform the accused with sufficient particulars that the state intends to rely on common purpose is currently also premised on the right of an accused to a fair trial as envisaged in s35(3)(a) of the Constitution which provides that

³ 1959(1) SA 646 (SCC) at 656F

⁴ 1963(3)SA 462(T) at 464

⁵ 2003(1) SARC 364(W)

every person has a right to a fair trial which includes the right to be informed of the charge with such particulars to answer it.

[16] In *Msimango v The State*⁶ the court *a quo* in convicting the appellant relied on common purpose even though it was never averred in the charge sheet or proved in evidence. On appeal the SCA said the following:

“[15] Undoubtedly, the approach adopted by the Regional Magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s35 (3) (a) of the Constitution of the Republic of South Africa Act 108 of 1996.”

The court in this case went further to say:

“[16].....The requirement embodied in s35(3) is not merely formal but substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient details to put him or her in a position where he or she understands what the actual charge is which he or she is facing. In the language of s35(3)(a) , this is intended to enable such an accused person to answer and defend himself in the ensuing trial. Its main purpose is to banish any trial by ambush.”

The court in *Msimango*(supra) set aside the conviction where the charge sheet was silent on any possible reliance on the doctrine of common purpose.

[17] Reverting to the matter at hand, it is not in dispute that the charge sheet did not refer to the doctrine of common purpose. It is my view that it is not the intention that mere failure to aver in the charge sheet that the state intends to rely on common

⁶ (698/2017)[2017] ZASCA 181 (01 Dec 2017)

purpose should automatically result in the unfairness of the trial. The next logical question should be to enquire into the nature of the prejudice the appellants suffered by the failure to aver in the charge sheet that the state intended to rely on common purpose.

[18] The question of common purpose only surfaced for the first time towards the end of the trial, specifically during the address by both counsel. It was never the case for the state that it intended to rely on common purpose. The state witnesses in this case were subjected to a long, protracted cross examination and at no stage was it intimated either by the state or the defence that common purpose might be an issue.

[19] The appellants denied being on the scene of this incident. The evidence of the reliability of the evidence of the state witnesses must thus be weighed against the alibi and the evidence of the witnesses called by each of the appellants.

[20] Although the appellants denied being on the scene of the incident much of the cross examination centred on how the incident unfolded. The identity of the appellants were not seriously challenged. It is clear from the evidence led that according to Moleboheng, Moeketsi and Tshepiso the appellants were known to them. Moleboheng testified that she had known the appellants for a considerable time. The appellants did not dispute this assertion by Moleboheng.

According to the testimony of Moleboheng she met the three appellants at The Zone tavern. He left with them when the tavern closed in the early hours of the morning. They went to another drinking place. They proceeded to Dagbreek hotel and they found it closed. They then proceeded to the drinking place of one Doctor and this palace they also found closed. They then decided to go home to sleep. It is at this material time when driving home that the appellants requested her to signal the vehicle of Thabonyana to stop. In this regard she is corroborated in material terms by Moeketsi Makoanyane who was a passenger in her vehicle. I can find no reason to reject the testimony of Moleboheng and Moeketsi that the appellants were with them in the Tazz vehicle and that they alighted same to go to the vehicle of Thabonyana.

[20] The evidence of Moleboheng and Moeketsi is corroborated in material terms by Mothupi. Mothupi was a passenger in the vehicle driven by Thabonyana. He testified that he and the deceased were passenger in the vehicle of Thabonyana. That the vehicle they were passengers in stopped behind a white Tazz. That three people alighted from the Tazz and two of those people came towards them. They were attacked as a result of which he was stabbed. He did not know or identify the people who attacked them. He did not know who stabbed the deceased.

[21] In order to be held liable on the basis on the basis of common purpose the court in *S v Mgedezi*⁷ said the following:

⁷ 1989(1)SA687(A) at 705I-706B

“in the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite mens rea, so in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.”

[22] These requirements as laid down in *Mgedezi* have since been developed and redefined in subsequent decisions of the SCA like *Magmoed v Janse Van Rensburg and Others*⁸ where the court held that:

“...common purpose may arise by prior agreement between the participants or it may arise upon an impulse without prior consultation or agreement.”

[23] The Constitutional Court has since held that after *Mgedezi* there remains no doubt that where the prosecution relies on common purpose as a basis for criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in the crime and the unlawful consequence caused by one or more in the group, is not a requirement.⁹

[24] Although the appellants were legally represented throughout the trial, there is no evidence adduced suggesting that their

⁸ 1993(1)SA 777(A) at 810G

⁹ See *Thebus and Another v S* 2003 10 BCLR1100 at par [22]

legal representative anticipated that the state intended on relying on common purpose. I cannot even find that s88 of the Criminal Procedure Act 51 of 1977 would find application herein.¹⁰ In the work, Hiemstrar's Criminal Procedure¹¹, the learned author says the following with reference to s88:

“ It is thus more particularly a charge which does not disclose an offence which is envisaged here(*S v Moloiyane 1965 (2) SA 109 (O) at 111 C: Sv Kuse 1990 (1) SACR 191(EC)at 196h*), because there is sufficient provision for other mistakes in section 86.”

[25] The defence throughout the trial focused on trying to highlight the improbability of the state case. It was also never put to the appellants by the state during cross examination that they acted in concert in the commission of the offence. The state at no stage applied for an amendment of the charge in terms of s86 to reflect that it intended to rely on the doctrine of common purpose. While one accepts that common purpose is not an element of the offence of murder one also has to accept that an accused person has a constitutional right to be apprised with sufficient particulars to enable him to prepare his defence. In this case failure to allege in the charge sheet that the state intended relying on common purpose was prejudicial to the appellants and as such rendered the trial unfair. It is my view that on this point alone the convictions ought to be set aside. it follows that the sentences cannot remain. I would accordingly propose the following orders.

¹⁰ S88 of Act 51 of 1977 provides that: “Where a charge is defective for the want of an averment which is an essential ingredient of the relevant offence, the defect shall, unless brought to the notice of the court before judgment, be cured by evidence at the trial proving the matter which should have been averred.”-

¹¹ Page 14-25

ORDERS

1. The appeals by the three appellants are upheld.
2. The convictions and the sentences of the three appellants are hereby set aside.

P.E. MOLITSOANE, J

I agree and it is so ordered.

C Van Zyl , J

On behalf of appellant: Ms L Molise
Instructed by:
Legal Aid, South Africa
Bloemfontein

On behalf of the respondent: Adv. Bontes
Instructed by:
Director of Public Prosecutions
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