THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG

CASE NO: AR267/16

In the matter between:

WAWITO MAWALA Appellant

and

THE STATE Respondent

ORDER

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a) The appeal against the convictions is upheld in respect of
    i) count one (murder), and
    ii) count three (unlawfully trespassing in an area where game was likely to be found while carrying a weapon or trap).
b) The convictions and sentences on counts one and three are set aside and the appellant is acquitted on these counts.
c) The appeal against the conviction is dismissed in respect of count two (hunting specially protected game, namely, rhinoceros without having a valid permit being issued).
d) The sentence of nine (9) years imprisonment on count two is unaffected by this appeal.

JUDGMENT

D. Pillay J:

[1] On Saturday 19 November 2011, game rangers at the Ndumo Game Reserve on the KwaZulu-Natal North Coast became aware that a rhinoceros was being chased. They realised that poachers were within the reserve. They watched. In the setting sun, they saw four poachers emerge into a clearing, walking slowly, trying to follow the rhinoceros tracks. Hiding behind a fig tree, the rangers were able to observe the poachers without being noticed. Amongst the poachers they saw the appellant, Wawito Mawala and his accomplice, Mazivelo Erasmos (the deceased) who was carrying a rifle.

[2] As the poachers came closer, one of the rangers shouted to the deceased to lay down his rifle. The deceased turned, pointing the rifle at the rangers. Two rangers fired shots simultaneously striking the deceased in his abdomen and thorax. The other poachers ran off in different directions.

[3] Early the next morning whilst driving about the reserve, game rangers came across the appellant. He raised his arms. There is a dispute as to whether he was signally his surrender or wanting to hitchhike a lift. The rangers took him to their offices where other rangers who had encountered the poachers the previous evening identified him as one of the poachers. The appellant was subsequently arrested and charged.

[4] Applying the principle of *dolus eventualis*, the Regional Court, Ingwavuma, convicted the appellant of murder on count one, on count two of hunting specially protected game, namely, rhinoceros without having a valid permit being issued to him in contravention of various conservation laws, and, on count three of unlawfully trespassing in an area where game is likely to be found while carrying a weapon or trap in contravention of an ordinance.

[5] The regional magistrate sentenced the appellant to fifteen years' imprisonment on count one, nine years' imprisonment on count two and one year's imprisonment on count three, with four years' imprisonment on count two running concurrently with the sentence in count one, giving an effective sentence of twenty-one years' imprisonment.

[6] Leave to appeal was granted initially in respect of count one only. On 30 January 2017 counts two and three were added on the basis that they were related to count one. Counsel for the defence correctly conceded the dismissal of the appeal on count two.

[7] Whilst in custody the appellant made a statement to a police captain. At the trial he disputed the admissibility of the statement on the basis that he neither spoke isiZulu nor understood the captain who recorded it in English. At his initial appearances in the district court the officials spoke to him in English and isiZulu to inform of his rights and to ascertain his preferred language. Although he preferred to speak Shangaan, the appellant understood isiZulu sufficiently to function. Witnesses for the State confirmed that they also communicated well with him in isiZulu. For these reasons the regional magistrate admitted the statement into evidence as a confession.

[8] In my view, simply because the appellant's confession was noted on a form that did not request nor record the particulars of his preferred language, cannot imply that the police did not ascertain his preferred language before recording his statement or that he did not know and understand the import of his confession. Any doubt about his understanding of the language used to record his confession was settled with reference to the contents of his confession.

[9] Generally, a trial court should hold a trial-within-a-trial to determine the admissibility of an extra-curial statement.[1] However, in this instance, the appellant disavowed knowledge of the contents of the statement. This defence invited the prosecution to produce the statement to the court. The production of the statement disposed of the issue as to whether the appellant had made it voluntarily.[2] Once it became apparent that the information in the statement could have emanated only from the appellant, the likelihood of him not understanding the language used to record it and of the police or the rangers implicating him falsely, was remote.

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[1] *S v De Vries* [1989] 3 All SA 779 (AD) at 784-785; D T Zeffertt and A P Paizes *The South African Law of Evidence* ed (year) at 157; C W H Schmidt and H Rademeyer *Law of Evidence* (July 2018) para 13.1.2.

[2] *S v Potwana & others* 1994 (1) SACR 159 (A) at 168e-170c; *S v Latha & another* 1994 (1) SACR 447 (A) applied in *S v Post* 2001 (1) SACR 326 (W) at 329j-330c.

Therefore the omission to conduct a trial-within-a-trial to isolate the evidence in the statement was not fatal once it was found to be admissible.[3]

[10] Unedited, the appellant's statement read as follows:

'Wawito Mawala

On Saturday 2011-11-19 at about 08:00 I together with Jose whose surname unknown to me, Mazwila Erasmo and the other person whose name and surname unknown to me, left the place known as Khathwane area in Mozambic and we proceeded to Ndumo Game Reserve. We went to that Game reserve to hunt the rhinoserous.

While we were on that game reserve we hunt for those rhinoserous but we could not find them. It then happened that about 17:00 we decided to return back to our homestead. While we were about to left at where we were eating food, I heard the gun shot to where we were. I noticed that Mazwila Erasmo was shot and thereafter I ran to my own direction and the others were also on their own running direction. I ran until I get into the bushes. I get lost and I could not be able to see to where I should go to. I even sleep on the bushes.

Then in morning on 2011-11-20 early in the morning, I woke up and I proceeded with my walk to home. I found that the Maputo river was full and there were crocodiles, I could not be able to cross over to my homestead place. I decided to return back to where I was coming from.

On my way back I met with the vehicle of the Game Rangers and I stopped it. There were three (3) occupants and I explained to them that I was at where we ran away and that I was available in the Game reserve on that time. Thereafter they conveyed me to their office and later to the police station.

I have never heard as to what happened to Jose and that other unknown person, but the Game rangers had informed me that Mazwilo Erasmo was shot to death.

While we were in the game reserve, I was only carrying the bag with food, while Mazwilo Erasmo was in possession of the rifle firearm, Jose in possession of an axe and that other male person was in possession of the sharp iron. There were no rhinoserous which we catched on that day. We were seen while we were deciding to return back to our homesteads.'[4]

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[3] *S v Dhlamini & another* 1971 (1) SA 807 (A) at 810E.
[4] Pages 428-430 of the transcript.

[11] With this confession the State proved the identity of the appellant; that he was one of four poachers and that he was in the reserve to hunt rhinoceros (count two). The appellant was convicted of murder and unlawfully trespassing in an area where game was likely to be found, while carrying a weapon or trap, even though he did not pull the trigger that shot the deceased or carry any weapon or trap. On both counts one and three the conviction of the appellant rested on whether the State proved that he had associated himself with others in the group.

[12] During the initial appeal hearing it became clear that the full bench was divided as to whether the facts justified a conviction of murder or culpable homicide. This formulation of the issue was based on the appellant's statement that common purpose was proved at least in so far as the appellant intended to hunt rhinoceros illegally. Whether murder or culpable homicide could be inferred from such common was the issue. Eventually a full court was constituted to hear the appeal. I invited further and better heads of argument. Anticipating a debate on constitutional questions of an individual's autonomy, agency and dignity, I asked the Chairman of the Bar to assign an amicus to assist the court. I acknowledge the efforts of the amicus, Mr *Suleman*, rendered at short notice.

[13] Whilst preparing my judgment it occurred to me that the omission from the charge sheet of any reference to the appellant acting in common purpose with his accomplices to commit murder could implicate the appellant's rights to a fair trial under s 35(3) of the Constitution of the Republic of South Africa, 1996. The omission had received no attention at the trial nor had it been canvassed in the appeal. On 27 August 2018 the presiding judge (Koen J) alerted counsel to *S v Msimango* 2018 (1) SACR 276 (SCA) and invited further heads of argument. We are indebted to counsel for their prompt responses.

[14] Counsel for the State submits that the reference to the doctrine of common purpose in *Msimango* did not form part of its *ratio decidendi* and therefore this court is not bound to follow it. Furthermore, *Msimango* is distinguishable because in this case common purpose was proved and it formed part of the State's case from the outset. If it were not, then the defence would have argued that there was no prima facie case against him; the defence 'must have realized … that the state will allege …common purpose.' While the failure to allege common purpose in the charge sheet

is, as shown by my colleague Vahed J, to be dispositive in this case, there may be instances when it is not. My approach is not meant to encourage prosecutorial sloppiness in preparing and amending charges but to ensure that justice is done substantively. Furthermore, the submissions of State counsel invite the court to look beyond the omission to the evidence to determine whether justice was done substantively.

[15] 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'.[5] This requirement is not merely formal and procedural but substantive and material to a fair trial.[6] When the State intends to rely on common purpose it must communicate its intention clearly, unambiguously and adequately.[7] If the evidence proves common purpose the State can apply to amend the charge sheet even after all the evidence has been led.[8] The trial court has wide powers to amend the charges at any stage before judgment, regard being had to prejudice to the accused.[9]

[16] 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* [2018] 1 All SA 780 (GJ) paras 41-52. 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.[10] Prejudice, actual or potential, will always exist if the

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[5] 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..
[6] *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.
[7] *Du Toit Commentary on the Criminal Procedure Act* RS 60, 2018 ch14-p15; *S v Msimango* above para 16.
[8] *S v Thakeli & another* 2018 (1) SACR 621 (SCA) para 7.
[9] S 86 of the CPA.
[10] *S v Maqubela & another* 2014 (1) SACR 378 (WCC).

defence would have been different if the allegation had been made in the charge sheet, amended if necessary.[11]

[17] Similarly, in a case concerning the omission from the charge sheet of relevant provisions of the minimum sentence legislation, the Constitutional Court held that while it is desirable that an accused be explicitly informed of the applicable law, this is not 'a hard-and-fast rule' that, if not complied with, will automatically render a trial unfair. [12] Each case must be judged on its particular facts. If an essential element of the law or charge is not mentioned then:

'. . .a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in [the] trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed.'[13]

[18] In *Msimango*[14] above, the silence in the charge sheet about any reliance on the doctrine of common purpose, the lack of any amendment to it and the absence of any evidence of common purpose led the Supreme Court of Appeal (SCA), with the acquiescence of both counsel in that case, to set aside the conviction for attempted murder. In this case for the reasons that follow the State had to allege from the outset that it was relying on common purpose.

[19] Common purpose is conceptual, a legal construct, to aid the State in prosecuting fractured cases in which the evidence is insufficient to link offenders to each other and consequently to the crimes. For a lay-person accustomed to associating punishment with his own criminal acts, accepting liability on a notional basis is a gigantic leap of understanding and acceptance. Therefore, the State had to inform the appellant in the charge sheet of the basis on which he was being charged for murder and trespass while carrying a weapon. Only if he had been forewarned of this information from the outset would he have been able to anticipate the case against him fully and defend himself effectively.

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[11] *Moloi* & others *v Minister for Justice and Constitutional Development & others* 2010 (2) SACR 78 para 19; 2010 (5) BCLR 497 (CC).
[12] *M T v The State; A S B v The State; Johannes September v The State* 2018 ZACC 27 paras 39-40.
[13] *M T v The State; A S B v The State; Johannes September v The State* 2018 ZACC 27 paras 39-40; *S v Msimango* above para 14.
[14] *S v Msimango* above para 18.

[20] For proof of intention to murder the State relied on *dolus eventualis*, another legal construct to aid the State when it had only circumstantial evidence from which to infer intention. Additionally, the State could apply at any stage before judgment to amend the charges. Thus, on a charge as serious as murder, both the act and the intention rested entirely on notion, legal construction and a defective charge sheet. From the outset then the law tipped the scales unfairly in favour of the State. Informing the appellant in the charge sheet of the State's reliance on common purpose was indispensable to rebalancing the fairness of the trial. Ensuring that the appellant was not burdened with the onus of proving any element of the offences was another vital safeguard.

[21] Aside from the omission in the charge sheet and the lack of any amendment of it, the appellant had no notice of the State's reliance on common purpose even when the charges were explained to him. At the commencement of the trial the magistrate informed the appellant that on count one he could be found guilty of culpable homicide, assault and pointing a firearm. Furthermore, if the murder was pre-planned he could face a minimum sentence of life imprisonment if convicted, and lesser sentences if the murder had not been planned. The appellant indicated that he understood the explanation. However when the court asked him to plead to the murder charge he replied 'I was not the one who killed'.[15] Manifestly, the appellant was unaware that liability could be imputed to him on the basis of common purpose.

[22] Compounding the unfairness were the attempts by the prosecutor to elicit concessions from the appellant under cross-examination to establish common purpose in the following extract:

'You would agree with me, sir, that if four people – and I am not saying it's you – if four people went into the game reserve with the intention to poach a rhino and they anticipate that they will see rangers, it is quite understandable that they would accept that the firearm that they had in their possession could be used to ensure them not being arrested? --- Yes.

You would agree, sir, that poachers, knowing that they are committing something illegal, when they are confronted by rangers, they would know that there is every possibility that there could be shooting by either the rangers, or by themselves? --- I do not know.

[15] Page 4 line 14 of the transcript.

Well, it is likely that if Law enforcement officers come across people trespassing or committing a crime, there might be a confrontation between them. --- I am aware.
And you will agree with me that if people are armed, that confrontation could involve shooting at each other? --- Yes.

And you will agree with me that firearms being dangerous weapons, whenever there is shooting there is always a possibility that someone can die? --- Yes.
Sir, I am not suggesting that it is you, but if you were amongst those four people, would it be fair then in that circumstance to agree that knowing all of that information, that you would have foreseen the possibility that somebody could die, but went into the game reserve anyway, if you were amongst them? --- Yes.

Now sir, if the Court finds that you were amongst those four people - I know you're going to tell me that you were not - but if the Court finds that you were amongst those four people in the game reserve, can the Court accept, having the knowledge and the common sense that you have just displayed, that you would have foreseen the possibility of a death occurring and you went into the game reserve anyway? --- I don't know.'[16]

[23] Even under cross-examination, the appellant disavowed any foresight of death of the deceased with 'I don't know'.[17] At this point in the proceedings when all the evidence for the State had been led, the appellant was unable to link the death of the deceased to anything that he had done.

[24] The prosecutor terminated the cross-examination by inviting the appellant to offer any evidence of dissociating himself from the events resulting in the killing of the deceased.[18] This invitation and the tenor of the cross-examination was an unfair attempt at reversing the onus upon the appellant to prove common purpose as a vital element to sustain the charge of murder. The State bore the onus of proving all the elements of the charge. By allowing the cross-examination, and by accepting the evidence as sufficient proof of common purpose to convict the appellant of murder, the magistrate effectively shifted the onus upon the appellant to prove material elements of the crime, namely the intention (dolus eventualis) and the act of killing and carrying a weapon via common purpose. This was a serious violation of the appellant's fair trial rights.

[16] Page 251 lines 1-25 and page 252 lines 1-5 of the transcript.
[17] Page 252 line 5 of the transcript.
[18] Page 252 lines 11-19 of the transcript.

[25] Manifestly, the unfairness caused by the omission of the essential averment of common purpose from the charge sheet was apparent from the appellant's responses throughout the trial. Significantly, his confession also reinforced his dissociation with any weapons and the murder. The murder charge had not materialised when he had confessed. The first time it emerged was on 17 January 2012 after the office of the Deputy Director of Public Prosecutions issued a minute to this effect. [19]

[26] Omitting any reference to invoking the doctrine of common purpose in the charge sheet impacted substantively to contaminate the entire charge of murder and trespass. If the appellant had been put on notice he would have had the option of giving a more detailed and, from what follows, possibly even an exculpatory account of the poachers' plans.

[27] First, the evidence was that the appellant had associated himself with the other poachers at the behest of their employer. He did not know the name of one of his accomplices and the name and surname of another. The two men who employed them had transported them 'as usual' to carry out their mission to poach. The only evidence of any common purpose was that the appellant and three others entered the reserve to hunt rhinoceros for their horns, on the instructions of their employer.[20] Otherwise, there was no better information about how the group came together and what their intentions were. Having regard to the haphazard way in which the poachers were assembled, the likelihood of the appellant having any detailed foresight and plan to poach, let alone to murder, was remote.

[28] Second, he was acquitted on count four of unlawful possession of a firearm first on the basis that possession of a prohibited object should not be based on common purpose to commit say, robbery, but principles of joint possession.[21] Second, the mere knowledge and even acquiescence that other assailants were armed for the common purpose to commit robbery, was insufficient to hold an accused liable as joint possessor of the weapons.[22] Third, for there to be joint possession the appellant had to have the intention to hold the weapons through his

[19] Annexure B1 page 384 of the transcript.
[20] *S v Mgedezi & others* 1989 (1) SA 687 (A); *S v Thebus & another* 2003 (6) SA 505 (CC).
[21] *S v Mbuli* 2003 (1) SACR 97 (SCA).
[22] *Cele and others v S* 2012 (JOL) 29774 (KZN).

accomplices who in turn had to intend to hold them on his behalf. Having failed to prove joint possession the State also did not prove an essential element of the trespass count. Omitting to allege common purpose to possess weapons in the charge sheet compounded difficulties for the State. His admission that he joined a group to hunt rhinoceros does not go far enough to prove his association with the weapons. Nor can it be said that the omission made no difference to the appellant's case.

[29] Furthermore, the ballistic report disclosed that the firing pin of the rifle was broken and it was not able to discharge ammunition. Whether the appellant knew this and the purpose of carrying it was not tested in evidence. Possessing a firearm, axe and a sharp iron in a game reserve leads to more inferences than simply evidence of an intention to shoot or hack law enforcement officers or to put up 'dangerous resistance'.[23] It could lead to the inference that they were to be used in poaching.

[30] Third, the poachers' plan could not have included an agreement to resist arrest by the security forces. Their weapons were hardly capable of withstanding an attack from the security forces. Armed as they were with a (dysfunctional) rifle, an axe and a sharp iron they would have been no match for the superior weaponry, technology, equipment and sheer numerical strength of the security forces. If they had planned to use the weapons for both poaching and defending themselves they would have known that they had little prospects of succeeding. They would also have had to take the precaution in their planning to ensure that the rifle was functional.

[31] Fourth, if the poachers had planned what they would do if they were caught, the stronger inference is that they agreed to flee rather than fight. This inference gains traction from the evidence that the appellant and his accomplices ran off in different directions after the deceased was shot. Additionally, on the State's version, the appellant raised his hands to surrender when they found him. This conduct fortifies the inference that if there was any plan at all, it was to avoid detection as far as possible and, if detected, to avoid any aggressive or violent confrontation and to

[23] *S v Nkosi* 2016 (1) SACR 301 (SCA) para 13.

concoct a version to explain their illegal presence in the reserve. This is exactly what the appellant did when he was caught.

[32] Fifth, hunting rhinoceros unlawfully in a game reserve differs from robbing a bank or a similarly guarded institution in an urban setting. Bank robbers must anticipate that they would encounter head-on armed security forces guarding the bank. A bank is also a confined space where such an encounter is inevitable. In contrast, poachers in the wild might genuinely believe that they are unlikely to encounter opposition.[24] Rhinoceros in game reserves roam wide-open bushveld. Finding them is not as easy as locating a bank. For rangers and more so for poachers less familiar with the terrain, to locate rhinoceros could involve spanning a vast veld. The likelihood of rangers encountering poachers and vice versa is not as inevitable as bank robbers encountering security guards. So it is not axiomatic that because the appellant participated in the crime of hunting rhinoceros he would therefore, like a bank robber, actually or even reasonably have foreseen the possibility of death ensuing. The appellant's answers to the prosecutor's questions support the inference that this possibility had not occurred to him.

[33] Sixth, in *Minister of Justice and Constitutional Development & another v Masingili & another* 2014 (1) SACR 437 (CC) para 37 the court reminded:

'The requirement of culpability encapsulates an accused person's blameworthiness. Much of our criminal law is predicated on imposing legal liability on accused persons who perpetrate acts for which they are culpable; it is a general principle that criminal liability should broadly match personal culpability. In this sense, our criminal law recognises the importance of autonomy, which this court has affirmed a number of times.'[25] (Footnotes omitted)

Attributing exclusive accountability to the appellant for the death of the deceased who must have reconciled himself to the consequences of his own criminal conduct would conflict with the constitutional principles of human autonomy, agency and dignity. The deceased must bear the burden for his own decision to participate in the crime.[26]

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[24] C R Snyman *Criminal Law* 6 ed (2014) at 183-185.
[25] See also S Hoctor 'Dignity, criminal law, and the Bill of Rights' (2004) *SALJ* 304.
[26] For commentary see Y Davidson 'The Doctrine of *Swart Gevaar* to the Doctrine of Common Purpose: A Constitutional and Principled Challenge to Participation in a Crime' (Unpublished master's thesis, University of Cape Town) 2017.

[34] Seventh, on the principle of proportionality, the finding that the appellant should have foreseen the possibility of someone, including himself, killing or being killed applies equally to the deceased. The evidence was not that the appellant commanded or compelled the deceased to participate in the crime. On the contrary, the deceased's possession of a firearm exposed him more than the others to being shot. In contrast, the appellant was unarmed. He should not be punished for the deceased's decision both to participate in the commission of the crime and to do so by carrying a firearm.

[35] Eighth, even if the appellant did foresee that someone could be killed, when that someone was his accomplice, his comrade, the likelihood of him reconciling himself to the death of one of his own or even his own death is remote unless the evidence showed that he was indifferent to whether they lived or died, or that they valued their lives less than anyone else.[27] There is no such evidence. The appellant could hardly have been on a suicide mission when the very reason he resorted to crime in the first place was to survive unemployment after he had lost his job as a plumber.

[36] The facts do not lead inexorably to the inference that the appellant actually or reasonably foresaw the killing of a person as a result of their crime of poaching. The State had no independent sources of information other than what the appellant disclosed, the rangers' observations of the poachers and the circumstances in which they found the appellant trespassing in the reserve. Forewarning the appellant of the State's reliance on common purpose was especially critical to a fair trial to enable the appellant to adduce facts from which the court might draw inferences favourable to him.

[37] Despite the paucity of facts the magistrate drew inferences fatal to the appellant as if he bore the onus to prove his disassociation. The onus rested upon the State to prove all the elements of the common purpose amongst the poachers, to not only poach rhinoceros for their horns but also to kill and be killed in the process.[28] For the magistrate to then conclude that the appellant had the intention in the form of dolus eventualis to commit murder was another instance of shifting the

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[27] *S v Humphreys* 2013 (2) SACR 1 (SCA) para 18.
[28] *S v Mgedezi* paras 50; *Minister of Justice and Constitutional Development v Masingili* 2014 (1) SACR 437 (CC).

onus onto the appellant to dissociate from his armed accomplices and to prove his innocence. This was another misdirection.

[38] In conclusion, am unable to find from all the circumstantial evidence that the only reasonable inference to draw is that the appellant acted in common purpose to commit murder when he conspired to kill rhinoceros for their horns. Furthermore, even though the undisputed evidence was that the appellant was trespassing for the purpose of hunting rhinoceros, common purpose could not be assumed without forewarning the appellant of the basis on which the State intended to associate him with the weapons his accomplices carried. Accordingly, the State failed to prove the charge of murder in count one and trespass in count three.

[39] The order I grant is the following:

a) The appeal against the convictions is upheld in respect of
   i) count one (murder), and
   ii) count three (unlawfully trespassing in an area where game was likely to be found while carrying a weapon or trap).
b) The convictions and sentences on counts one and three are set aside and the appellant is acquitted on these counts.
c) The appeal against the conviction is dismissed in respect of count two (hunting specially protected game, namely, rhinoceros without having a valid permit being issued).
d) The sentence of nine (9) years imprisonment on count two is unaffected by this appeal.

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D Pillay J

Vahed J (Koen J concurring):

[40] I have read the judgment (in draft) prepared by my colleague D. Pillay J and agree only with her conclusions and that the sentence of nine years

imprisonment imposed as a consequence of the conviction on count 2 must stand. For the rest, (and in large part), I disagree with her reasoning.

[41] My colleague has set out the facts relevant to the considerations that we are concerned with and there does not seem to be any necessity for me to state them differently.

[42] My colleague has also, in her draft judgment, set out the details of her divers interventions during the course of this appeal coming before the court. There is no need for me to add thereto either.

[43] Originally when my colleague and I constituted the Full Bench we were, as she correctly points out, divided as to whether the evidence sustained a conviction for murder as opposed to one for culpable homicide. I was of the view that sufficient had been established with regard to the appellant's complicity in the murder charge while my colleague took the opposing view. Those differences were underscored by our respective approaches to the doctrine of common purpose as it applied to and underpinned a conviction for murder where the deceased was a co-perpetrator and the fatal act was committed by someone other than one of the co-perpetrators. In the cases that have come before the courts that other person is usually a law enforcement officer, as in this case it was one (or both) of the game rangers. That differing approach, to my mind, has been rendered academic owing to the matters raised by my colleague *vis a vis* the implications of the judgment in *S v Msimango* 2018 (1) SACR 276 (A) as alluded to in paragraph 13 of her draft judgment.

[44] As I read *Msimango*, it fundamentally alters the approach one has to take to this case. The doctrine of common purpose, to my mind, is intrinsically and directly connected to the charges both with regard to murder and with regard to count 3 because they involved imputing to the appellant, via the application of the doctrine, actions of his co-perpetrators. Those actions are the ones that he made common purpose with, sufficient, all other things being equal, to sustain his guilt.

[45] In *Msimango* the following was said:

> '[14] It is common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose, even though it was never

> either averred in the charge-sheet or proved in evidence. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3, as this never formed part of the state's case.'

[46] Referring to that extract, counsel for the respondent correctly submits that that extract is, in the context of *Msimango*, a discussion and does not form part of the *ratio decidendi* and was accordingly made *obiter*. The *ratio decedendi* is, to my mind, contained in paragraph 18 of *Msimango*, which reads as follows:

> '[18] Both counsel conceded that, as the charge-sheet is silent on any possible reliance on the doctrine of common purpose, and further that there was no application for amendment of the charge-sheet in terms of s 86 of the CPA, the conviction of the appellant on attempted murder in count 3 cannot stand. I agree.'

[47] The failure to allege common purpose in the charge sheet relating to those two counts rendered the charges defective in that essential elements of the charge itself had been omitted. In this case aspects of the *actus reus* of others which, by the doctrine of common purpose became the *actus reus* of the appellant, had not been put to him in order for him to quite properly prepare for his defence. That was manifestly unfair.

[48] It is undoubtedly correct and must be accepted that the rationale underpinning the discussion is that the failure to allege with sufficient clarity the charges an accused person faces implicates a person's fair trial rights in the context of section 35(3) of the Constitution.

[49] In *Msimango* it was articulated thus:

> "[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 s 35(3)*(a)* of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), under the heading 'Arrested, detained and accused persons'. In fact, it is subversive of the notion of the right to a fair trial which is contained in s 35(3)*(a)* of the Constitution, which provides in clear terms that:

> '(3) 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 . . .'

[16] Section 35(3) falls under ch 2 of the Constitution under the heading Bill of Rights. Section 7 of the Constitution commands the state to respect, protect, promote and fulfil the rights in the Bill of Rights. However, this is subject to legitimate limits in terms of s 36 of the Constitution. The requirement embodied in s 35(3) is not merely formal, but also substantive. It goes to the very heart of what a fair trial is. It requires the state to furnish every accused with sufficient detail 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 s 35(3)*(a)*, this is intended to enable such an accused person to answer and defend himself or herself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice is both adversarial and accusatory.

[17] The Constitutional Court enunciated the right to a fair trial as follows in the seminal case of *S v Zuma and Others* 1995 (1) SACR 568 (CC) (1995 (2) SA 642; 1995 (4) BCLR 401; [1995] ZACC 1) para 16:

> 'That *caveat* is of particular importance in interpreting s 25(3) of the Constitution. The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras *(a)* to *(j)* of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In *S v Rudman and Another;S v Mthwana* 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire
>
> > "whether there has been an irregularity or illegality, that is a departure from the formalities, rules and principles of

> procedure according to which our law requires a criminal trial to be initiated or conducted.
>
> A Court of appeal, it was said (at 377)
>
> "does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice', or with the 'ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration'.
>
> That was an authoritative statement of the law before 27th April 1994. Since that date s 25(3) has required criminal trials to be conducted in accordance with just those notions of basic fairness and justice. It is now for all courts hearing criminal trials or criminal appeals to give content to those notions.'

Although the Constitutional Court was here dealing with s 25(3) of the interim Constitution which has now been replaced by s 35(3) of the Constitution, this dictum is still relevant to s 35(3). See also *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) (2010 (7) BCLR 656; [2010] 3 All SA 304; [2010] ZASCA 8)."

[50] Also highly relevant is s 84 of the Criminal Procedure Act, 1977:

"(1) Subject to the provisions of this Act and of any other law relating to any particular offence, a charge sheet shall set forth the relevant offence in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge.

(2) Where any of the particulars referred to in subsection (1) are unknown to the prosecutor it shall be sufficient to state that fact in the charge.

(3) In criminal proceedings the description of any statutory offence in the words of the law creating the offence, or in similar words, shall be sufficient."

[51] Counsel for the respondent, in additional supplementary heads of argument, has referred us to the recent decision in *MT v The State; ASB v The State; Johannes September v The State* 2018 ZACC 27. That case dealt with the failure to adequately inform an accused person of the minimum sentencing regime applicable to a conviction for the offence such person was charged with. The following extract is instructive (footnotes omitted):

> '[38] The cases before us come after a number of Supreme Court of Appeal judgments with differing approaches to the necessity of citing the Minimum Sentences Act's provisions in the charge sheet. The starting point is *Legoa*, where the Supreme Court of Appeal held that it was not desirable to lay down a general rule as to what is required in a charge sheet and that whether an accused's right to a fair trial, including their ability to answer the charge, has been impaired will depend on "a vigilant examination of the relevant circumstances". Since then, the Supreme Court of Appeal has primarily dealt with cases where charge sheets cite the incorrect section of the Minimum Sentences Act. In *Ndlovu*, this Court held decisively that, where an accused is convicted in a Magistrate's Court of an offence under an incorrect section of the Minimum Sentences Act, that Court will only have jurisdiction to sentence under that section.
>
> [39] This precedent has not created a hard-and-fast rule that each case where an accused has not been explicitly informed of the applicability of the Minimum Sentences Act will automatically render a trial unfair. However, a practice has developed to include the relevant section of the Minimum Sentences Act in the charge sheet because of this precedent.
>
> [40] It is indeed desirable that the charge sheet refers to the relevant penal provision of the Minimum Sentences Act. This should not, however, be understood as an absolute rule. Each case must be judged on its particular facts. Where there is no mention of the applicability of the Minimum Sentences Act in the charge sheet or in the record of the proceedings, a diligent examination of the circumstances of the case must be undertaken in order to determine whether that omission amounts to unfairness in trial. This is so because even though there may be no such mention, examination of the individual circumstances of a matter may very well reveal sufficient indications that the accused's section 35(3) right to a fair trial was not in fact infringed.

> [41] The cases before us do not take the matter any further. The applicants attempted to locate their cases in precedent on incorrect citations in charge sheets, with a bald statement that it is an even worse infringement of the right to a fair trial when no section is mentioned at all. This was entirely unsubstantiated. They also failed to present arguments as to which Supreme Court of Appeal approach is constitutionally correct. It is not even clear whether they argue that the charge sheet itself needs to explicitly include the applicable provisions of the Minimum Sentences Act or if mere mention in the trial would suffice.
>
> [42] It is also not clear what test, if any, the applicants believe should be applied to determine whether the failure to inform an accused person of the applicability of the Minimum Sentences Act renders a trial unfair. These questions may yet be considered and dealt with by this Court if they arise in a subsequent matter.'

[52] When then the Constitutional Court (and indeed the Supreme Court of Appeal as in *Legoa*) spoke of a vigilant (or a diligent) examination of all the relevant circumstances, that was in the context of examining an accused's fair trial rights *vis-à-vis* the failure to inform of the penalty applicable upon conviction. Viewed in that context it seems to me to be permissible to examine all the circumstances of the trial and not simply adopt a 'knee-jerk' reaction to a defective charge sheet. I do not, for one moment, suggest from that examination of the case that it is of no relevance for our purposes. I am simply suggesting that where an aspect or element of the charge that an accused faces is missing, a more stringent test ought to be applied. 'Up-front' knowledge of the possible penalty is important but quite how it facilitates the conduct of one's defence escapes me. It is quite another matter for an accused to be told reasonably early in the case as how his particular involvement (and his particular association with others) renders him liable to conviction.

[53] Thus the case is, for me, about the fairness of the trial from that latter perspective. The discussion in *Ntuli & Ano v S* [2018] 1 All SA 780 (GJ), at paras 42 to 47 lends support to that view which is encapsulated in the reference there (at

paras 45 and 46) to *S v Alexander & Ors* 1964 (1) SA 249 (C) where Van Heerden J, at page 254 A-D said:

> 'It has been authoritatively laid down by the Appellate Division in the case of *Rex v Heyne and Others*, 1956 (3) SA 604 (AD), that when there is a series of acts done in pursuance of one criminal design the law recognises the practical necessity of allowing the State, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, i.e. as a single crime. It was further held in the same case that collaborators participating in such a course of criminal conduct may be joined in one indictment even if they participated therein at different times. It remains therefore to be seen whether the State has in fact alleged in its indictment a criminal course of conduct. To my mind, it is not essential for the State to allege in an indictment in so many words that the accused acted in concert or with a common purpose or in a criminal course of conduct. It will be sufficient if the State alleges in its indictment sufficient particulars to show that the accused in doing what they are alleged to have done became associated with one another in an unlawful purpose or scheme and that the series of acts done by them was done in connection with and in the furtherance of that unlawful purpose.'

[54] To my mind, the upshot of all the authorities is that all the essential elements and facts that go to make up a charge must be known to an accused as early as possible so that prejudice is averted and so that it best informs the conduct of the defence. In the overwhelming majority of cases, if the charge sheet or indictment is lacking in necessary particularity and averment the deficiency will be cured by the s150 address or a response to a request for particularity.

[55] As *Alexander* demonstrates, it is (and always has been) about fairness.

[56] In the present matter the appellant did not receive a fair trial on count 1 (murder) and on count 3 (trespassing while carrying a weapon). In those respects the appeal against the convictions and the accompanying sentences must be upheld

and those convictions and sentences must be set aside. As for the rest the appeal falls to be dismissed. I accordingly agree with the Order proposed by D Pillay J.

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Vahed J

_____
Koen J

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Date of Hearing (Full Bench)	:	03 November 2017
Date of Hearing (Full Court)	:	08 June 2018
Further Heads on Common Purpose	:	07 September 2018
Date of Judgment	:	12 October 2018