

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA, PRETORIA

Case no: A777/15

DELETE WHICHEVER IS NOT APPLICABLE	
REPORTABLE: YES/NO	
OF INTEREST TO OTHERS JUDGES: YES/NO	
✓ REVISED	
February 2017.	<i>E. Motshwari</i>
DATE	SIGNATURE

20/2/2017

In the matter between:

HENDRIK SITHOLE

1ST Appellant

MICHAEL KHUMALO

2nd Appellant

THE STATE

Respondent

Heard: 21 October 2016

Delivered: January 2016

JUDGMENT

Molahlehi J

Introduction

[1] This is an appeal against both the conviction and sentences of the appellants by Els J relating to the incident that occurred on 7 May 1999. The appeal in respect of the first appellant concerns both the conviction and sentence and that of the second appellant concerns his sentence. The accused were charged with the following counts:

Count 1- Murder

Count 2- Attempted murder

Count 3- Robbery with aggravating circumstances

Count 4 Attempted house breaking.

Count 5 Illegal possession of a firearm

Count 6 Illegal possession of ammunition.

[2] The appellants were convicted of counts 1, 2, 3 and 4 and were acquitted in respect of counts 5 and 6. They were sentenced as follows:

Count 1- life imprisonment

Count 2- 15 years imprisonment

Count 3- 20 years imprisonment

Count 4- 5 years imprisonment

[3] The appellants were in effect sentenced to life imprisonment and a further 40 years' imprisonment. The trial court further requested that Correctional Services not release them on parole until a period of 40 years' imprisonment had been served.

[4] The appeal has been referred to the Full Court of the Gauteng Division with leave of the Supreme Court of Appeal dated 15 November 2012, following the refusal of the application for leave to appeal by the trial Court on 7 December 2006.

[5] The appeal of the second appellant, Mr Michael Khumalo, was disposed of in the order of a full court division dated 18 January 2013. His case is, however, dealt with in the heads of argument of the appellants. His Counsel conceded that the matter was not before this court and that this court must concern itself only with the case of first appellant (the appellant). This appeal therefore, only focuses on the appeal of the appellant.

The background facts

[6] The facts in this matter are generally common cause. I therefore do not deem it necessary to deal in any detail with the testimony of all of the witnesses who testified during the trial. I refer to the testimony of those witnesses whose evidence I regard as being relevant to the determination of this appeal.

[7] The first witness of the State was Mrs Middleton, the complainant in the matter and the wife of the deceased, testified that on the fatal day, 7 February 1999, she and her deceased husband, driving in separate cars, arrived at their house at about 22:55 in the evening.

[8] After entering the house they both moved to their bedroom which is on the upper floor of the house only to discover on arrival there that the window was broken and the burglar bars bent. The deceased then went downstairs to inspect and returned into the house with the dogs which did not pick up any scent inside the house.

[9] Mrs Middleton then went downstairs, followed by the deceased. As she arrived downstairs and as she was coming out of the front door she was shot in her face. She then ran towards her neighbour's house. As she was running she heard two gunshots and after the second shot she heard her husband screaming. She was unable to jump over the fence of the neighbour's yard. She was, however, fortunate in that shortly thereafter the neighbours arrived.

[10] Mr Cole, the neighbor and the Superintendent with the South African Police Service, testified that he arrived at his house to find Mrs Middleton who was seriously injured outside their yard. After relating to him briefly what happened it was arranged that his wife should take her to the hospital. He phoned the police and went into the yard where he found the deceased lying on the grass appearing to be dead.

[11] After the state closed its case the appellant also closed his case without leading any evidence. It is, however, common cause that the appellant voluntarily made a statement to the police which was handed in during the trial. The statement together with the photos taken at the pointing out of the scene of the crime by the appellant were submitted and accepted as exhibits "G1 and G2." The appellant confirmed that the statement was true and correct. The relevant part of the of pointing out statement for the purpose of this judgment reads as follows:

"Persoon wys uit waar hy observasie gehou het terwyl hy sy vriende besig was om die huise se venster te breek. (Foto word geneem waar hy gesit het). Die beskuldigde deel verder mee dat hy voertuig ligte gesien het wat die woning nader waarop hy sy vriende gewaarsku het deur vir hulle te fluit. Hy het toe skote in die woning gehoor afgaan waarna hy wegge-hardloop het na die teerpad. By die teerpad het hy na 'n drinkplek gegaan waar hy 'n koeldrink gedrink het voordat hy terug gekeer het na sy woning."

[12] The defense presented their case through the testimony of the second and third accused. The second accused testified that he accompanied a certain Tebogo to go and pick up his property. He did not enter the yard. Tebogo and accused number three went into the yard. Whilst standing outside the yard he heard a window breaking. Soon thereafter he saw two cars driving into the Middletons' yard, after which he then heard gunshots.

- [13] The second accused further testified that soon after the gunshots Tebogo and the third accused came out with a 4x4 Nissan bakkie which belonged to the Middletons. They according to him left the premises of their victims without the appellant.
- [14] The third accused testified on how after entering the yard of the Middletons, a scuffle broke out between him and Tebogo. The scuffle was because he refused to obey the instruction from Tebogo to break the window. Tebogo finally broke the window with his gun.
- [15] Soon after breaking the window, the third accused and Tebogo including the other co-perpetrators were warned of the arrival of the victims by the appellant who did that by whistling. The third accused further testified that after the shootings they left the premises with the bakkie belonging to the victims. He also confirmed what was said by the second accused that they left the scene without the appellant.

Grounds for appeal

- [16] The appellant contended that the state failed to prove that he had common purpose with his co-perpetrators to commit murder, attempted murder and robbery. It is for this reason that it was contended that the court erred in finding that the appellant had common purpose with the co-perpetrators to commit the offences for which he was found guilty of.

The decision of the court.

[17] The relevant part of the decision of the court relating to the appellant reads as follows:

“ . . . Uit die getuienis uit, en dit word hoofsaaklik behels uit bewysstuk G1 en 2, dit is die uitwysing deur beskuldigde 1 gedoen, was hy op die toneel gewees. Beskuldigde 2 en 3 plaas hom (the appellant) ook op die toneel.

Hy het daar gestaan as klaarblyklike wag, op sy eie weergawe in sy verduideliking. Toe die voertuie aankom het hy sy mededaders in hierdie huisbraakpoging van hulle, gewaarsku deur vir hulle te fluit en hy het toe die hasepad gekies. Maar, dit is duidelik, op sy eie weergawe dat hulle daar was met die opset om in te breek by daardie betrokke huis.”

[18] The court in dealing with the legal principles governing the doctrine of common purpose relied on the decision in *S v Malinga en Ander*,¹ where the Appellate Division in dealing with this issue said:

“In the present case all the accused knew that they were going on a housebreaking expedition in a car, and that one of them was armed with a revolver which had been obtained and loaded for the occasion. It is clear that their common purpose embraced not only house breaking with intent to steal

¹ 1963 (1) SA 692 (A) at 695.

and theft, but also what may be termed the gateway. And they must have foreseen, and therefore by inference did foresee, the possibility that the loaded "firearm" would be used against the contingency of resistance, pursuit or attempted to capture. Hence, as far as the individual *mens rea* is concerned, the shot fired by accused number 4 was, in effect, also the shot of each of the appellants. On the question of intention to kill, they must have foreseen, and therefore by inference did foresee, the possibility that the use of the loaded firearm would have fatal consequences. Violence, fire-arms, and death are ever an easy and sombre trinity . . . And the appellants were clearly reckless whether death would in fact ensue or not. Hence the intention to kill must be imputed to each of them."

[19] It was based on the above authority that the court concluded on the facts of this case that:

"Volgens wat hier gese is dit duidelik dat al vier beskuldigdes skulddig is op klagtes 1, 2, en 3."

[20] In other words the court found that the appellant was part of the common purpose to commit murder, to attempted murder and robbery. The shooting of the victims and the robbery by the co-perpetrators were imputed to him.

The issue for determination

[21] As alluded to earlier this appeal concerns both the conviction and the sentence. The first issue to determine in this matter is whether the appellant had common purpose with the co-perpetrators to murder, and rob the victims. The enquiry into the issue entails an investigation into the intention on the part of the appellant.

The doctrine of common purpose

[22] The doctrine of common purpose has been defined by Burchell and Milton,² in the following terms:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.”³

² Burchell and Milton *Principles of Criminal Law* 2nd ed at 393.

³ The definition was referred to with approval in *Thebus and Another v S* (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC); 2003 (10) BCLR 1100 (CC) (28 August 2003). In this case the constitutionality of the doctrine of common purpose was unsuccessfully challenged.

[23] The essence of the doctrine of common purpose is stated by Snyman,⁴ in the following terms:

“ . . . 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.”

[24] It is apparent from the authorities that liability in terms of the doctrine of common purpose arises where the participants agree or associate together with others to commit a particular crime with the requisite *mens rea*. The basis of common purpose can thus be by way of prior agreement which may be express or implied. It may also be by way association between the co-perpetrators. In general active association may be evidenced by conduct of the co-perpetrators. It is not necessary to show that the participation of the co-perpetrators was causally connected to the consequent crime.⁵ The other principle governing common purpose is that it is not necessary for the prosecutor to prove beyond reasonable doubt that each of the co-perpetrators directly and/ or actively participated in the unlawful conduct. Once the element of fault has been satisfied, then the conduct of the co-perpetrator of the crime is attributed to the other participants. In other words what the prosecutor needs to establish is that one of

⁴ Snyman *Criminal Law* 4thed at 261.

⁵ See *S v Sefatso* 1998 (1) SA 868 at 895. This judgment confirmed those decisions that overruled the cases that had held that the doctrine of common purpose required causal connection between the act of the accused and the consequent death to be shown.

the group members caused the consequent crime. However, the intention of each of the co-perpetrators must be determined independently without reference to the mental state of the other participants.⁶

[25] The prerequisites in order to attract liability in a case based on the doctrine of common purpose are set out in *S v Mgedezi*,⁷ in the following terms:

- (i) The accused must have been present at the scene where violence was committed.
- (ii) He or she must have been aware of the crime committed.
- (iii) He or she must have manifested his sharing of a common purpose by himself performing some act of association with the conduct of the others.

[26] In *S v Thebus*,⁸ the Constitutional Court in dealing with the doctrine of common purpose held that:

"If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed. That means that he or she had intended that criminal result or must have foreseen the

⁶ See *S v Leroux and Others* 2010 (2) SARC 11 (SCA),⁷ where the court found on the authority of *S v Mgedezi* 1989 (1) SA 687, that the conduct of "the individual accused should be individually considered with the view to determining whether there is sufficient basis for holding a particular accused person is liable on the ground of active participation in the achievement of a common purpose that developed at the scene."

⁷ (415)/1987 [1988] ZASCA 135.

⁸ 2003 (2) SACR319 (CC).

possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.”

- [27] Having agreed or associated himself or herself in a crime, the accused may withdraw or disassociate himself or herself from such criminal conduct. The authorities are in agreement that a defense of disassociation from the original agreement or association with the purpose of committing a crime is a good defense. It was thus held in *S v Nduli & Others*,⁹ that:

“Dissociation consists of some of or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defense to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates.”

- [28] In *S v Musingadi and Others*,¹⁰ the court in dealing with the defense of disassociation had the following to say:

“What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation. Compare Snyman: *Strafreg* (4ed) at 267-9. It appears that much will depend on the circumstances: On the manner and degree of an accused's participation; on how far the commission of the

⁹ 1993 (2) SACR 501 (A) at p504d-e.

¹⁰ 2005 (1) SACR 395 (SCA) at para 35.

crime has proceeded; on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime. The list of circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise."

Evaluation and analysis

- [29] It is common cause that the appellant agreed to go with the co-perpetrators to the Middletons' residence for the purposes of house breaking and theft. The applicant was thus present when the consequent offence was committed. However, the key question to answer is whether on the totality of the evidence presented, it was established that he had the necessary *mens rea* to meet the offences for which he was convicted of.
- [30] In my view, having regard to the totality of the evidence in this matter, the state has failed to prove that the appellant had the intention to murder, injure another person and rob. The facts in the Malinga's case (*supra*) are distinguishable from the present one in that the co-perpetrators in that case went to the scene of the crime whilst knowing that one of them was in possession of a loaded gun. They were clearly prepared to deal with any resistance to their plan in a violent manner and they by inference foresaw the possibility of violence and a fatal confrontation.
- [31] There is no evidence, in the present case that the co-perpetrators went to the Middletons' house to do anything other than break and steal. That is what they had

agreed upon before Tebogo and the other co-perpetrators entered the yard of the victims.

[32] On an objective and proper analysis of the evidence it is clear that the appellant stood outside the yard so that he could guard the arrival of the Middletons and warn the others of their arrival. The warning was to give the others the opportunity to run away before the Middletons reached their house. This the appellant did as soon as he saw the Middletons arriving in their two cars. It is apparent that the other co-perpetrators did not react to the warning.

[33] The appellant ran away as soon as he heard the gun shots, signalling his disassociation from what the others were doing. The shooting was not within the mandate to break and steal. The co-perpetrators were now acting outside the agreed mandate. It is important to note that there is no evidence that the appellant was aware that Tebogo had a gun with him when he entered the yard of the Middletons. Counsel for the State sought to persuade this court to infer knowledge of the firearm from the fact that the group spent some time together planning the house breaking with intent to steal. In my view no sufficient basis has been laid to draw that inference.

[34] This case is distinguishable from *S v Magwaza*,¹¹ where the court on appeal confirmed the finding of the trial court that the appellant was guilty on the basis of common purpose. In that case the court found that the appellant had been aware that his

¹¹ 1985 (3) SA 29 (a) AT 41B.

companion was in possession of a loaded firearm. The appellant knew as a matter of fact that the gun was loaded and foresaw that it could be used with fatal consequences.

[35] The appellant in disassociating himself to what his co-perpetrators were doing ran away from the scene as soon as he heard the gunshots. He did not wait for them to come out of the yard. Put in another way he did not wait to receive the report on how successfully the others had carried out the 'mandate.' It is important to note that he did not only run away from the scene but that he never went looking for the others to find out what had happened. He clearly disassociated himself with what the others had done in 'breach of the mandate' of house breaking and theft.

[36] The version that the appellant ran away when he heard the gun shots and that he left the others behind is supported by the evidence of both the second and third accused. As indicated above they both testified that they left the premises of their victims without the appellant. It is also indicated in the statement that he made to the police during the pointing out that after running away from the scene he went to the tavern where after purchasing a drink he went home.

[37] In light of the above, I find that the court erred in convicting the appellant on the charges in question as the state had failed to prove beyond reasonable doubt that the appellant was guilty of murder, attempted murder and robbery in the context of the doctrine of common purpose.

[38] Turning to the issue of culpable homicide, Counsel for the State contended that in the alternative the appellant was guilty of the offences he had been convicted of on the basis of negligence. In other words he ought to have foreseen that in the process of breaking into the house there may be resistance that may result in murder.

[39] In support of the proposition that the appellant was liable for negligent killing of the deceased, Counsel relied on the decision of the Appellate Division in *S v Nkwenja*.¹² The court in that case, similar to what happened in Malinga's case, upheld the conviction of culpable homicide on the basis that it was reasonably foreseeable that the use of violence to overcome resistance could in the circumstances have resulted in death. In this respect the Court quoted with approval what was said in *S v Ngobozi*,¹³ where in dealing with the issue of negligence in a case involving common purpose the court had the following to say:

"The starting point is that culpable homicide is the unlawful negligent causing of the death of a fellow being. See De Wet and Swanepoel *Die Suid-Afrikaans Strafbreg* 2nd ed 211 in fin; *S v Thenkwa en 'n Ander* 1970 (3) SA 529 (AD) at 534E; and *S v Matshiza* 1970 (3) SA 747 (A) at p752.

Suppose A and B, each carrying a knife, from an unlawful common purpose, in the execution whereof each is to play a contributory part, to assault C by

¹² 1985 (2) SA 560 (A).

¹³ 1972 (3) SA 476 (A).

stabbing him. In the ensuing scuffle, first A gets in the first and only stabbing blow; and as the result C falls dead.

Each is guilty of murder if he subjectively foresaw the possibility of the execution of their unlawful common purpose causing the death of C, but nevertheless persisted therein, reckless whether the possibility became fact. Failing such subjective foresight each is guilty of culpable homicide if, objectively, he ought to have foreseen the reasonable possibility of the execution of their unlawful common purpose causing the death of C. In other words, each unlawfully and negligently caused the death of a fellow being."

[40] The facts in that case are distinguishable to those of the present case in that the two accused in that case had decided to rob the owners of motor car that was standing in an open piece of land. They both used violence in their attempt at taking the car from the owners. One of the occupants of the car died as a result of the violence. The court found that by the time the accused decided to rob the victims of their car they had already devised their plan and the role that each would play including the use of violence which was clearly devised.

[41] There is, however, no doubt that the appellant did associate himself and in fact went to the scene of the crime with the intention of house breaking and stealing. The evidence which was presented before the court indicates very clearly that the appellant agreed with his co-perpetrators to commit the crime of house breaking with the intention to steal.

[42] Accordingly, I find that the court was correct in convicting the appellant on the charge of attempted house breaking. It follows therefore that the appeal as concerning the conviction on attempted house breaking stands to fail.

[43] The issue that then remains for consideration concerns the punishment imposed by the court in relation to the attempted house breaking.

[44] It is trite that the appeal court does not have a general discretion to overturn the decision of the trial court concerning the sentence imposed.¹⁴ It has been said that the appeal court will interfere with the sentence where the sentence is out of proportion to the gravity of the offence committed or where it is clear that the trial court failed to exercise its discretion correctly.¹⁵

[45] It is quite clear from the reading of the record that the court in imposing the five years' imprisonment on the charge of attempted house breaking considered all the relevant factors and arrived at a decision that is appropriate in the circumstances of the case before it. I have therefore not been persuaded that there is a basis for interfering with the sentence imposed on the appellant regarding the attempted house breaking.

¹⁴ See *S v De Jager* 1965 (2) SA 616 (A).

¹⁵ See *Mokela v S* (135/11) [2011] ZASCA 166; 2012 (4) SACR 431 (SCA) (29 September 2011), where the court held that: "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court."

Order

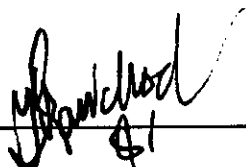
[46] In the premises I propose the following order:

1. The appeal is upheld in relation to the conviction on murder, attempted murder and robbery.
2. The order of the trial court regarding convictions on murder, attempted murder and robbery are set aside and substituted with the following:
 - i. "The First Accused is not guilty of murder, attempted murder and robbery with aggravating circumstances.
 - ii. The First Accused is discharged in relation to the charges of murder, attempted murder and robbery. .
3. The appeal against the conviction of attempted house breaking with intent to steal is dismissed.
4. The appeal against the sentence on the conviction of attempted house breaking with intent to steal is dismissed and accordingly stands as 5 years imprisonment,
5. This order is antedated to 31st December 2001.



E.M MOLAHLEHI
JUDGE OF THE HIGH COURT

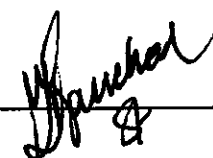
I AGREE



for A.A LOUW J

JUDGE OF THE HIGH COURT

I AGREE



RANCHOD J

JUDGE OF THE HIGH COURT