

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – MTHATHA**

Case no: CA&R61/147
Case Heard: 11/03/16
Date Delivered: 28/04/16

In the matter between:

SIBONGISENI MABHENGU

1ST APPELLANT

SINETHEMBA MABHENGU

2ND APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

SMITH J:

[1] The appellants and their co-accused were convicted of murder in the Mount Frere Regional Court on 10 April 2014, and sentenced to 10 years' imprisonment each. They appeal against their convictions with the leave of the court *a quo*.

[2] The state alleged that the appellants and their co-accused, acting with common purpose, unlawfully and intentionally killed one Lucky Godfrey Mcasa ("the deceased") by stabbing him with a knife or knives. The post-mortem

examination has established that the cause of death was a single knife wound to the heart.

[3] They all pleaded not guilty and did not proffer any plea explanations.

[4] At the hearing of the appeal the appellants were represented by Mr *Zilwa* SC, and it is a matter of great concern that there was no appearance on behalf of the state. While comprehensive heads of argument (prepared by Ms Trietsch) were filed by the state, there has not been any explanation by the office of the Director of Public Prosecutions ("the DPP") why the state was not represented at the hearing of the appeal. In our view this is a rather serious matter since this conduct not only amounts to an unacceptable discourtesy to this court, but in our view also amounts to a serious dereliction of duty on the part of that office. We accordingly direct that a copy of this judgment must be transmitted to the office of the DPP, Mthatha, for appropriate action.

[5] In convicting the appellants and their co-accused, the magistrate found that the state proved beyond a reasonable doubt that they acted with common purpose when they attacked and stabbed the deceased.

[6] The state relied on the evidence of two witnesses, namely Mzolisi Mbasane and Sivuyile Mngambi.

[7] Mzolisi Mbasane is the deceased's nephew. On Sunday 26 September 2010 he and the deceased were at a local tavern when the appellants and their co-accused, Sibusiso Sigwili (who was accused no 1 in the court *a quo*) also arrived. Sigwili then accused Mbasane of making a sign signifying that he is a member of a prison gang, and an argument ensued between them. The

deceased intervened and suggested that they should rather move to a different room in the tavern.

[8] After they have moved to that room, the appellants and Sigwili again confronted them, and the second appellant attempted to hit him. When he got up to defend himself, the deceased again intervened. At that stage they had also been joined by the other state witness, Sivuyile Mngambi.

[9] The deceased, who was by then already fairly inebriated, requested him and Mngambi to accompany him home.

[10] After they had left, the appellants and Sigwili followed and eventually caught up with them. Sigwili and the second appellant brandished knives, and the latter threatened to assault him. The deceased and Mngambi again intervened and the appellant's group thereafter left. He, the deceased and Mngambi also thereafter proceeded in the same direction, walking behind the appellant's group.

[11] At some stage the deceased moved off to the other side of the road, apparently to urinate. Mbasane then saw the deceased falling down and the appellants and Sigwili running away. He and Mngambi rushed to the deceased and found him bleeding from a wound in his chest.

[12] Although he did not see who had stabbed the deceased, he assumed that it must have been one of the appellant's group because he had seen them turning around, approaching the deceased, and thereafter running away from the scene after the deceased had fallen down. He was about 15 metres from the deceased at the time.

[13] Apart from him, the deceased, Mngambi and the appellant's group there was nobody else in the vicinity. Although the visibility was not good there was some illumination by virtue of moonlight. He knew the appellants and Sigwili well as they all grew up together in the same area.

[14] Sivuyile Mngambi had also grown up in the same area as the appellants and Sigwili, and he also knew them well. He testified that upon his arrival at the tavern he saw the two groups quarrelling. It appeared to him that the appellant's group wanted to assault Mbasane. He and the deceased intervened and they managed to defuse the situation. He, Mbasane and the deceased thereafter left on the latter's request.

[15] The appellant's group followed them, and eventually caught up with them along the way. They again wanted to assault Mbasana. The second appellant and Sigwili were brandishing knives and threatened to stab him.

[16] He and the deceased again intervened and the appellants and Sigwili then walked away. They also proceeded in the same direction, walking behind the appellant's group. At some stage the deceased told them that he wanted to urinate, and moved to the other side of the road. The appellants and Sigwili then turned around and approached the deceased.

[17] Although he initially said that he saw them stabbing the deceased, in reply to a question by the prosecutor as to what they stabbed him with, he replied that it was "with a knife". Upon further questioning by the prosecutor, it transpired that he had seen one of the appellants' group stabbing the deceased, but could not say which one. All three of them ran away after the deceased fell

down. He and Mbasane then rushed to the deceased. He noticed that the deceased was bleeding from a wound on the left side of the chest.

[18] He was about 15 metres away from the deceased when he saw him being accosted by the appellants and Sigwili. He also confirmed that although the visibility was poor, there was some illumination by virtue of the moonlight.

[19] The appellants gave a totally different version of the events at the tavern and the circumstances of the attack on the deceased. According to them Mbasane was the aggressor. After insisting that he wanted some of their liquor, he quarrelled with the second appellant. The owner of the tavern then moved Mbasane, the deceased and Mngambi to a different room where they were locked in.

[20] When the appellant and Sigwili left, Mbasane's group jumped through the window and pursued them. They eventually caught up with them, and Mbasane told Sigwili to come and play "cha-cha", thereafter slapped him, and assaulted the second appellant with a knife on the bridge of his nose. Mbasane's group then chased Sigwili who had run away. After they had cleaned the second appellant's wound they both proceeded home. Along the way they came across the deceased who was clutching the left side of his chest. The appellants' also gave different accounts of the words that the deceased allegedly uttered: according to first appellant he said: "he has finished me", and according to second appellant: "they have finished me". They both denied that they were carrying knives on the night in question.

[21] Mr *Zilwa* argued that the state failed to establish that the appellant and their co-accused acted with common purpose, and that the magistrate should have found that their versions were reasonably possibly true.

[22] In our view the magistrate was justified in accepting the evidence of the two state witnesses. They both appeared to have been good and truthful witnesses, and were prepared to concede that neither of them saw which of the appellant's group had stabbed the deceased. Mngambi's testimony in this regard was significantly more specific than that of Mbasane. While Mbasane had only seen the appellants and their co-accused approaching the deceased and thereafter running away from the scene after the deceased had fallen down, Mngambi had actually seen them attacking the deceased, although he could understandably not see which one of them inflicted the stab wound. They have, however, otherwise corroborated each other in all material respects.

[23] On the state's version then the appellants and Sigwili were acting in concert, both during the altercation at the tavern and subsequently when they accosted and attacked the deceased. And there can be little doubt that on that version they acted with common purpose, and regardless of which one of them had stabbed the deceased, all three of them would accordingly have been guilty on the basis of the doctrine of common purpose.

[24] That inference is ineluctable and compelling and I did not understand Mr *Zilwa* to contend otherwise.

[25] Mr *Zilwa* argued, however, that the appellant's version to the effect that Sigwili was chased by Mbasane's group and that the two of them remained

behind, was reasonably possibly true, and on that version common purpose would not have been established by the state.

[26] On the facts of the case the inference that the deceased must have been killed by one of the appellant's group was so compelling that neither of them, nor their co-accused, has contended otherwise. This much was clearly established by the evidence which was common cause, namely that only the two groups were present at the time, and that for obvious reasons it was improbable that either of the state witnesses would have attacked the deceased.

[27] The issue of visibility is therefore not important insofar as identification of the deceased's assailants is concerned, and would only have had some relevance in respect of the state witnesses' claims that they saw the appellant's group approaching the deceased and running away after he had fallen down. There can be little doubt that the illumination provided by the moonlight would have been more than sufficient for the state witnesses to conclusively see the appellants' group approaching the deceased from a distance of 15 metres.

[28] The appellants and their co-accused were thus constrained to accept the ineluctability of that inference. Both appellants appeared to have insinuated that Sigwili was the one who had stabbed the deceased. Crucially then it was that explanation that must pass muster as being reasonable possibly true.

[29] However, in our view that is in fact the one aspect of their version that is the most improbable. It was clear that there had been at least two altercations between the two groups at the tavern, and even on the appellants' version, the quarrel was essentially between them and Mbasane. That all three of them would later pursue only Sigwili and leave the other two appellants behind, is

highly improbable. Their testimony in this regard was, in our view, contrived and palpably false. In that scenario it would have been improbable that Sigwili had stabbed the deceased. Their testimony to the effect that they came across the deceased who declared that he had “been finished”, and simply ignored him and walked home, was similarly improbable. It was highly unlikely that Mbasane and Mngambi would have left the deceased alone after he had been wounded. It had not been contested that they were the persons who had attempted to get him to a hospital. Moreover, it was common cause that the deceased was killed by a single stab wound through the heart. That injury would have caused him to collapse almost immediately after the wound had been inflicted, and on the state witnesses’ uncontested evidence he did in fact collapse immediately. It was therefore improbable that the appellants would have come across the deceased before he had collapsed and while still being able to talk. It is also unlikely that if they had indeed encountered the deceased in that state that they would not have witnessed the assault upon him.

[30] We are accordingly of the view that the magistrate has correctly rejected the appellant’s version as being not reasonably possibly true and false. The appeal can therefore not succeed.

[31] In the result the appeal is dismissed.

J.E SMITH
JUDGE OF THE HIGH COURT

I agree.

Z NHLANGULELA
DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

Appearances

Counsel for the Appellants	:	Advocate Zilwa SC
Attorney for the Appellants	:	Mdledle Incorporated 606 Old Mutual Building Durban 400
		c/o
		Mlindazwe and Associates 18 Craiser Street Mthatha Tel: 079 862 8528
Counsel for the Respondent	:	No appearance
Attorney for the Respondent	:	Director of Public Prosecutions Broadcast House 94 Sission Street Fortgale Mthatha
Date of Hearing	:	11 March 2016