

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: A17/2023

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: NO
16/9/2024	
DATE	SIGNATURE

In the matter between:

PHATE, SHEA

Appellant

and

THE STATE

Respondent

JUDGMENT

Coertse CJ, AJ

- [1] This is an appeal against conviction and sentence imposed on 5 June 2018 by Mokgoatlheng J, with leave to appeal granted by the trial court. The appellant was charged in the Gauteng Local Division of the High Court of South Africa, Johannesburg with three (3) other accused on several charges.

[2] Appellant was convicted and sentenced as follows:

- 2.1. Count 1, kidnapping and sentenced to five [5] years imprisonment;
- 2.2. Count 2, attempted murder and sentenced to eight [8] years imprisonment;
- 2.3. Count 3, kidnapping and sentenced to five [5] years imprisonment;
- 2.4. Count 4, murder and sentenced to life imprisonment; and
- 2.5. Count 5, defeating the ends of justice and sentenced to five [5] years imprisonment.

[3] The trial court ordered that counts 1 and 3 should be taken together for the purpose of sentence.

[4] The court of appeal was referred to the indictment and specifically the allegation of the state relying on the doctrine of common purpose where it is stated:

"The state alleges that the accused, at all relevant times, committed the above-mentioned **offences in the execution of a common purpose**. Precisely when, where and in what manner the common purpose was formed, is at present unknown to the state. The state will, however allege that the common purpose existed, at the very least, immediately prior to the commission of the offences **and continued for the duration thereof.**" [Emphasis added.]

[5] The Constitutional Court in the *Jacobs-matter*¹ dealt extensively with the necessity of having the doctrine of common purpose as well as what it is.

[6] Theron J. at para [59] had this to say about the doctrine of common purpose:

"The doctrine of common purpose is a set of rules of the common law that regulate joint criminal liability. It is important to note that Superior Courts are protectors of the common law. Moseneke J, speaking for the Court in *Thebus*, said: "**Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome**

¹ *Jacobs and Others v S* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC)

would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. *Effective prosecution of crime is a legitimate, 'pressing social need'.* The need for 'a strong deterrent to violent crime' is well acknowledged because 'widespread violent crime is deeply destructive of the fabric of our society'. There is a real and pressing social concern about the high levels of crime." (Footnotes omitted by me as well.) [emphasis added].

- [7] Zondo DJC, as he then was, at paragraph 135 referred to an article about the doctrine of common purpose

"In an article titled: "Thebus and Tadic: Comparing the application of the doctrine of common purpose in South Africa to its application in the Yugoslav Tribunal" Pieter du Toit compares two decisions on the doctrine of common purpose, namely, this Court's decision in Thebus and the decision of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in Prosecutor v Tadic. He then concludes thus in part: "The ICTY Appeals Chamber and the South African Constitutional Court both upheld a rather broad notion of common purpose liability. Policy considerations are at the heart of the doctrine of common purpose at the international and domestic level. Society must respond effectively against collaborative misdeeds and the role of any participant therein should not be understated. The focus of criticisms against this approach is that it casts the net of criminal liability too widely and ignores the fundamental principle of individual culpability." The policy considerations referred to in this passage are public policy considerations. I agree that public policy considerations are at the heart of the doctrine of common purpose." [Emphasis added] [footnotes omitted.]

- [8] With respect, I agree with these statements by Zondo DCJ as he then was, and Theron J, setting out the law pertaining to common purpose as well as the community's values underpinning it.

- [9] The doctrine of common purpose² is:

"... [A] set of rules of the common law that regulate the attribution of criminal liability to a person who undertakes jointly with another person or persons the

² Jacobs and Others v S [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at paragraph 128.

commission of a crime. *Burchell and Milton* define the doctrine of common purpose 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". [Emphasis added.]

- [10] The appellant held a common purpose or goal with his co-accused to seek the alleged perpetrator and to punish him even to the point where he illegally sentenced the deceased to death when he said "nobody is going to leave this room alive and further whatever happens, happens ...". I am of the view that the appellant was part and parcel of this mob-justice that took place where the deceased suffered his ultimate fate with the acquiescence of the appellant; it was their common desire that the deceased should be punished. I find that the appellant actively associated with the other accused to seek the perpetrator[s], to punish them even to the point of death. I am further of the view that the appellant was the "ringleader" of the murderous mob.
- [11] I agree with Prof. Snyman's³ explanation of common purpose and found it to be directly applicable to the instant matter:

"The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, **act together in order to achieve that purpose**, then the conduct of each of them in the execution of that purpose is imputed to the others." [Emphasis added.]

- [12] It was argued that the appellant's "withdrawal or departure from the scene" exonerated him from culpability. The trial court "erred" in its interpretation of the existence of common purpose. I find that this so-called "withdrawal" is superficially effective but in substance and reality the appellant's saying that "... nobody is going to leave this room alive ..." was effectively an illegal death penalty and he reconciled himself with the possibility of the deceased being killed; he cannot now hide behind this mask of him being not present during the

³ *Criminal Law* 5 ed (LexisNexis, Durban 2008) at 265.

actual killing of the deceased. The appellant was the "leader" of this murderous mob; after all it was his house that was broken into and items stolen from it and he had the intention to find the perpetrator and to punish such a person. He was the directing mind behind the killing of the deceased. His words shortly before he left the scene are chilling and foreboding of unspeakable evil that culminated in the killing of the deceased.

- [13] The way a person, such as the appellant, withdraws or departs from a criminal scene depends on the circumstances prevailing at the time. It is clear from those words he uttered, that he did not dissociate himself from the common purpose to find the perpetrators and to punish them. In fact he foresaw that the deceased might be seriously injured and possibly be killed and then he left the scene. Can he now rely on his withdrawal and say to the court of appeal: "I had nothing to do with the killing of the deceased"? The appellant actively participated in preparing the tense moving scene which left a person killed. The only thing the appellant did not do was to kill him.
- [14] It is clear that for a departure from the scene to favour an accused, more is required than merely going away. In this instant, he did not dissociate himself from the dire consequences that he himself predicted would befall those present at the interrogation which led to death. One would expect that if he really withdrew with an intent to dissociate himself, he should have expressed it clearly and forcefully. The question was posed in *S v Ndebu and Another*⁴ when the court posed the question of "... what is meant by the word 'dissociate'?" Is it enough to have left the scene immediately after he uttered those words for him to escape criminal liability? I don't think so. I find that him leaving the scene for his co-accused to complete the task of killing the deceased renders him culpable and the trial court rightly found him guilty and found that he acted in common purpose with the other accused. Although he was absent when the deceased was killed, I find that, in the words of the court in *Chabalala*,⁵ the accused was still the "prime mover" of the offence.

⁴ 1986 (2) SA 133 (ZS) at 138F.

⁵ *S v Chabalala* 2003 (1) SACR 134 (SCA) at para 21.

[15] Did the trial court err in its finding that the appellant acted with a common purpose to kill the deceased? For all of the above reasons, I agree with the trial court's finding that the appellant acted with common purpose with his co-accused.

[16] The State submitted that the witnesses at the scene were faced with a tense moving scene and that eyewitnesses ordinarily lay emphasis on different details.⁶ The Supreme Court of Appeal had this to say about tense moving scenes and the alleged contradictions:

"In my view the contradictions referred to do not detract from the trial court's findings in respect of Mhlambi, Miya and Twala. **The contradictions are not material and relate to details. It must be borne in mind that we are dealing with a tense moving scene.**"⁷ [Emphasis added.]

[17] I find that the trial court's approach was correct that it should not evaluate the evidence with mathematical exactness. It is often stated that evidence should not be evaluated piecemeal or in isolation but the evidence as whole should be evaluated. I should look holistically at the evidence of the entire case before me as I was reminded by Nugent J in *S v Van der Meyden*⁸ where he said the following:

"The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the court has before it. **What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence.** Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored." [Emphasis added.]

⁶ *S v Sithole* [2006] ZASCA 173 at para 12.

⁷ *Ibid*

⁸ 1999 (2) SA 79 (W) at 82C-E. This case is often quoted with approval by the SCA.

- [18] During the argument, it was strenuously argued by Adv Potgieter that the question whether the appellant was an integral part of the murderous group who killed Lucky Titus is the decisive question? The gist of appellant's arguments is that his cell phone records prove that he was not present at the scene when the deceased was killed. The state argued that the appellant's version, that he dissociated from the murder, is disingenuous. I agree with the state. It was submitted that this riddle of whether the appellant was present at the scene would be satisfactorily unlocked through close scrutiny of the cell phone records of the appellant. This argument applies the fine callipers of the mind by measuring and evaluating evidence piecemeal and using the result to argue the case on appeal. Nugent J reminded me that the trial court as well as the court of appeal should have regard to the totality of the evidence.⁹
- [19] It was argued that when the appellant left the "meeting", he distanced himself from what happened to the deceased. To the contrary, I take the view that the evidence shows that the appellant was an integral part of the events that resulted in the death of the deceased. It was submitted that the appellant left the "meeting" during which the deceased was "interviewed" regarding who burgled the appellant's home. I find it was not a friendly meeting of friends to find the culprits who burgled the appellant's home; he had a "vested interest" in finding the perpetrator[s]. It would be more appropriate to class the "interview" as an "interrogation". The evidence that he said, when he left the room, "nobody is going to leave this room alive and further whatever happens, happens," is chilling. The appellant has not, by leaving the room and leaving the dirty work to his associates, managed to secure for himself an escape route. All he did was leave the dirty work to his co-accused. He actively foresaw the possibility that someone was going to die and he reconciled himself with that possibility. The appellant pronounced an illegal death sentence upon "someone". I find that he had the necessary *dolus directus*. In *Director of Public Prosecutions, Gauteng v Pistorius*,¹⁰ at paragraph 26, the Supreme of Appeal re-stated what *dolus directus* is:

⁹ See *S v Van der Meyden* at n 8 above.

¹⁰ [2015] ZASCA 204; 2016 (2) SA 317 (SCA) at para 26.

"In cases of murder, there are principally two forms of *dolus* which arise: *dolus directus* and *dolus eventualis*. These terms are nothing more than labels used by lawyers to connote a particular form of intention on the part of a person who commits a criminal act. ***In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased.***" [my emphasis].

- [20] In light of the above, I find that the accused is guilty of murder with him having had criminal intent in the form of *dolus directus*.
- [21] It is further argued that three midnight cell phone calls on the appellant's cell phone records that are marked "call forward" are clear proof that he was not present and therefore he is not part and parcel of the murderous intentions and actions. The essence of this argument is that the appellant was not physically at the scene and therefore he should go free. This argument is not persuasive. The fact that a call was forwarded does not mean that the call was not received or taken, by being forwarded to another number. The fact that the appellant received calls from his associates throughout the night may show that he was not there, but not that he was not involved, considering the rest of the evidence against him. Once again, I am reminded of the *dictum* of Nugent J in *S v Van der Meyden*.
- [22] I am of the view that the long and strenuous argument about the content or non-content and the relevance of the appellant's cell phone records is a red-herring. It was debated with the appellant's representative that it is abundantly clear from the trial record that appellant was a continuous part of this murderous group. I hasten to add that I do not exclude the cell phone records. I look at the evidence as a whole presented by the state and the evidence presented by the accused inclusive of the appellant.
- [23] The appellant's cell phone records are private documents and the provisions of both the Criminal Procedure Act 51 of 1977 and the Civil Proceedings Evidence Act 25 of 1965 are applicable. Section 222 of the Criminal Procedure Act ("the CPA") makes sections 33 to 38 of the Civil Proceedings Evidence Act ["the CPEA"] *mutatis mutandis* applicable in criminal proceedings. Section 33 defines

"document" to include any book, map, plan, drawing or photograph; and "statement" includes any representation of fact, whether made in words or otherwise [emphasis added]. The following portions of section 34(1) are relevant:

"In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall on production of the original document be admissible as evidence of that fact, provided—

(a) the person who made the statement either—(

(i) had personal knowledge of the matters dealt with in the statement; or

...

(b) the person who made the statement is called as a witness in the proceedings..."

[24] The effect of the CPA on section 34(1) of the CPEA would be to refer to criminal proceedings and that the direct oral evidence of the appellant pertaining to his cell phone records are admissible as evidence of that fact. The appellant had personal knowledge of the cell phone calls that he made or received; the cell phone records were downloaded directly from his cell phone. And it was argued that appellant was not present during the killing of the deceased. I find that it is common cause that he was not physically present at the killing, but that does not exonerate him from this gruesome killing. I am mindful of Nugent J's *dictum* in the *Van Der Meyden* case and my finding is that the appellant had the necessary intention to kill albeit with *dolus eventualis*. In light of these findings, I reiterate that the long and strenuous argument about the interpretation of the cell phone records is a red-herring.

[25] It was submitted on behalf of the state that the guilty finding of attempted murder on count 2, ought to have been a finding of guilty of assault with intent to cause grievous bodily harm, a competent verdict, as the injuries suffered by the complainant were not life-threatening.

- [26] The charge contained in the original indictment was of assault with intent to do grievous bodily harm, although by the time it was put to the accused, it was a charge of attempted murder. I am satisfied that the evidence supports the charge and the verdict that the appellant was guilty of attempted murder.
- [27] The next question to be answered is whether the court of appeal can intervene in the trial court's conviction. It is trite, and the law reports are replete with references pertaining to the court of appeal's approach to intervening in a trial court's conviction. The court should not lose sight of the totality of the evidence and not to consider contradictions in isolation. I am bound to conclude that the appellant's guilt was proven beyond reasonable doubt. Looking at the facts as a whole, it is inescapable that the appellant was an integral part of this murderous mob and therefore rightly convicted in that they were acting with the necessary common purpose. In my view, it was correctly rejected by the trial court. I am satisfied on the evidence, as a whole that the appellant was correctly convicted by the court *a quo* and consequently, I cannot interfere with the trial court's finding.
- [28] Furthermore, in the absence of any misdirection or irregularity, there is no basis upon which I can interfere with the findings of the trial court in respect of the conviction. It follows that the appeal against conviction fails.¹¹
- [29] It was argued that the court *a quo* further erred in that the brutality of the case was overemphasised. This was with reference to the fact that the body of the deceased was mutilated when the train ran over it. The appellant's argument was that the trial court sacrificed the appellant on the proverbial altar of deterrence. The State's case was that the deceased was already dead when his body was placed on the railway lines. It was argued that this act was designed to hide how the deceased was killed. The argument was that a sentence of life imprisonment is shockingly disproportionate to the role that appellant played during the commission of the offences. I disagree with this argument. I am of the view that the appellant was the prime mover of this murderous mob even when he left them.

¹¹ *Dube v S* [2011] ZASCA 236 at para 19.

- [30] The offence of murder in furtherance of a common purpose is subject to a minimum sentence of life. A trial court may impose a lesser sentence if there are substantial and compelling circumstances.
- [31] It was argued for the appellant that the failure by the State to specify in the indictment which subsection of section 51 of the Criminal Law Amendment Act 105 of 1997 applies, resulted in an irregularity. The State submitted that there was no prejudice because it is not as if the incorrect subsection which indicated a different minimum sentence had been cited. If the appellant was not warned at all, it would have been held against the respondent as well.
- [31] In *Dube v S*¹² it was stated at paragraph 20:
- "Turning to the question of sentence: The imposition of sentence is a matter falling pre-eminently within the judicial discretion of the trial court. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by an irregularity or misdirection or is disturbingly inappropriate. In this case the provisions of the Criminal Law Amendment Act 105 of 1997 are applicable. The prescribed minimum sentence in respect of a conviction of robbery with aggravating circumstances is 15 years' imprisonment. A court may impose a lesser sentence if there are substantial and compelling circumstances."**
[Emphasis added.]
- [32] At para 7 (d) of the *Dube* case the court of appeal found that the appellant who "... had been legally represented, was at all times aware that the minimum sentence legislation was applicable." It is common cause that the appellant in this matter was at all times legally represented. He was also aware that the minimum sentence legislation was applicable. I don't find that the sentence imposed by the trial court is vitiated by an irregularity or misdirection or is disturbingly inappropriate. The trial court did not find any substantial and compelling circumstances to deviate from the prescribed minimum sentences and I agree with that as well.
- [33] The respondent argued, rightly so, that in respect of a serious offence, the personal circumstances of the offender recede into the background. I am of the

¹² Id at para 20.

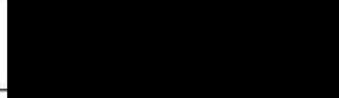
opinion that the trial court was correct in not attaching undue weight to the age and previous non-criminal behaviour of the Appellant. The sentences imposed by the trial court, with reservation to the custodial sentence of 8 years for the non-lethal assault on Matsotso, is well balanced and fair. There was no basis on which to deviate from the minimum sentence as far as the murder charge is concerned.

[34] The sentence the trial court imposed is fair and cannot be interfered with. I order as follows:

The appeal against conviction and sentence is dismissed.



COERTSE CJ,
Acting Judge of the High Court of South Africa


Yacoob, S
Judge of the High Court of South Africa


Mooisa, G
Judge of the High Court of South Africa

Date of Hearing: 26 February 2024

Date of Judgment: 16 May 2024

Appearances:

For the Appellant: Adv. H. Potgieter

Instructed by: Attorney H.J. Groenewald, Pretoria

For the Respondent: Adv F. Mahomed

Instructed by: The NPA, Johannesburg