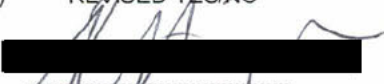


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Case No.: SS 007/2023

In the matter between:

THE STATE

and

NKOSINATHI KOSHE

Accused

JUDGMENT

Strydom J

- [1] This is an *ex-tempore* judgment in this matter. The accused, Mr. Nkosinathi Koshe (the accused) has been charged on two counts, one count of murder read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act) and also on the second count, a count of robbery with

aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (the CPA) read with section 51(2) of Act 105 of 1997.

- [2] The accused, after the charges were put to the accused, he pleaded not guilty on the murder count and guilty on the robbery count.
- [3] Mr. Mavatha appearing on behalf of the accused then handed in a statement in terms of section 112(2) of the CPA pertaining to the plea of guilty on the robbery count. The Court does not intend, at this stage, to read that statement into the record again, suffice to say that the Court was satisfied the all the elements of the crime of robbery with aggravating circumstances were admitted in this statement. Accordingly the accused was convicted on this count.
- [4] The Court explained to the accused that in relation to count 1 reference is made to section 51(1) of the Amendment Act and in relation to count 2 reference was made to section 51(2) of the same Act. In terms of section 51(1) the Amendment Act prescribes that if a person is convicted of an offence referred to in Part I of Schedule 2, life imprisonment would be the prescribed minimum sentence.
- [5] At this stage it can already be found that if accused is convicted on the murder count, it would fall within the ambit of Part I of Schedule 2 of the Act. Schedule 2, Part I provides that a murder would fall within the category of section 51(1) when the murder led to the death of a victim during a robbery with aggravating circumstances. As stated, the accused pleaded not guilty to the murder count but made a statement in relation to the robbery count in terms of section 112(2) of the CPA.
- [6] The State also, as part of its case then sought admissions to be made in terms of section 220 of the CPA in relation to a photo album and the post mortem report. There was no objection to this, and the Court received these documents which were marked EXHIBITS A and B respectively.
- [7] In terms of EXHIBIT B, the cause of death of the deceased, was stated to be gunshot wounds to the head and to the torso\ abdominal areas. After these documents were received in evidence, the State closed its case.

- [8] The accused was then called to testify as part of the defences' case. He placed on record his age of 21 years and that he finished Grade 10 at school. He was referred to EXHIBIT X, the statement in terms of section 112 and yet again confirmed the contents thereof.
- [9] He explained why he pleaded not guilty to the murder count and stated it was on the basis that he did not pull the trigger that killed the deceased. He testified that he did not really understand this so-called concept of common purpose.
- [10] During cross-examination a few questions were asked which again placed him on the scene and he again confirmed that he saw what was happening there. He saw that Sipiwe had a firearm in his possession and confirmed that he and Themba, the other co-perpetrator, had knives.
- [11] After the shooting he saw that the deceased was lying there but they went inside and committed the robbery. What was stolen was the ring of the wife of the deceased as well as two cell phones. He confirmed that he later sold the ring for R2 000.
- [12] The Court must now consider what evidence there is to either convict or acquit the accused on the murder count.
- [13] The accused admitted that on 18 January 2023 he went with two of his friends, Sipiwe Dlamini and Themba Dlamini to the house where the deceased was shot and killed. They were together, driving in a motor vehicle after they attended a drinking place and randomly stopped at a house to rob the occupants.
- [14] They together formed the intention to act in concert to rob these occupants. The role that the accused played was that he stood guard close to the door whilst the other two perpetrators entered the house. He had a knife with him. Before Sipiwe entered the house he took out a firearm. Accordingly accused was aware that Sipiwe had a firearm.

- [15] In his section 112 statement he further stated that he saw the deceased came from the room. He then heard a gunshot. The three of them then proceeded to rob the wife of the deceased.
- [16] According to the evidence it is thus clear that the accused admitted that the deceased was killed during the robbery but explained that he was not the person that fired the shot.
- [17] The only issue for this Court to decide is whether the State proved beyond reasonable doubt that accused acted with a common purpose or with a common intention to kill the deceased. In circumstances of this case the question would be whether the accused had foreseen the possibility that someone can get killed during the robbery.
- [18] This brings the doctrine of common purpose into the equation. In *State v Mgedezi and Others* 1989 (1) SA 6787 (AD) the Court found that an accused could only be liable on the basis of a common intention if certain prerequisites are satisfied.
- [19] In this case the Court found as follows and I quote from the headnote at page 688.

"In the absence of proof of a prior agreement an accused who was not shown to have contributed causally to the killing or wounding of the victims (in casu. Group violence on a number of victims) can be held liable for those events on the basis of the decision of State v Safatsa and Others 1988 (1) SA 868 (A) only if certain prerequisites are satisfied. In the first place he must have been present at the scene where the violence was committed. Secondly, he must have been aware of the assault of the victims. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, the requisite mens rea; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

- [20] The Court also found that inherent in the concept of imputing to an accused the act of another on the basis of common purpose is the indispensable notion of acting in concert.
- [21] Now, testing the situation of the accused against this ratio the Court will also use the numbering as was used in *Mgedezi*.
- [22] Firstly, the accused was present during the robbery and the killing of the deceased. Secondly, accused was aware of the shooting on the deceased. As to three, the Court finds that accused made common cause with the two other perpetrators as they went there together to rob the occupants of that house whilst they all had weapons. In this instance Sipiwe, with the knowledge and within the eyesight of the accused has drawn a firearm.
- [23] As far as the fourth requirement is concerned, the accused played an active role as he was taking guard to warn the other perpetrators should someone have arrived there. As to the fifth requirement, whether he had *mens rea* or the requisite mindset, the Court must draw an inference.
- [24] The question would be, can the inference be drawn that he intended to kill the deceased, or did he foresee the possibility that during this robbery someone might get killed? Did he reconcile himself with this possibility that their actions by robbing that house could lead to the death of someone? An inference can only be drawn from the proven facts and the inference to be drawn must be the only reasonable inference that can be drawn from these facts.
- [25] In circumstances of this case the question is, to put it differently, whether the accused foresees the possibility that the deceased could be killed during this robbery. Now, accused went together with the other perpetrators, being armed himself. He knew the Sipiwe had a firearm.
- [26] In such circumstances he must have foreseen the possibility that either the victim can resist or that the victim can be shot for no apparent reason. This is exactly what happened in this matter.

- [27] Accordingly, it would not assist the accused to say, well, I did not fire the shot, he made common cause with the entire attack and the robbery. He ought to have foreseen in the sense that he in fact foresaw the possibility, that someone can get killed during the robbery. If any person takes part in a robbery, being armed, whilst other members of the group have firearms, such eventuality must be foreseeable.
- [28] The Court finds that accused acted in the furtherance of a common purpose together with the other perpetrators to rob the house of deceased and, if needs be, to kill people inside that house.
- [29] Consequently, accused is found guilty on count 1 as charged.




R STRYDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Heard on: 07 June 2024

Delivered on: 11 June 2024

Appearances:

For the State: Mr. M. Maleleka

Instructed by: The National Prosecuting Authority

For the Accused: Mr. A. Mavatha

Instructed by: Legal-Aid