IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA) 1/7/15

CASE NO: A831/14

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

1/7/2015 Retoni
DATE SIGNATURE

P P Baqwa J

In the matter between:

KAIZER MALEU MOGAWANE Appellant

and

THE STATE Respondent

JUDGMENT

Baqwa J

[1] This is an appeal against the conviction of the appellant. He was charged in the High Court of South Africa, Gauteng Division (Functioning as Limpopo Division, Polokwane) with the crimes of murder read with the provisions of Section 51 of Act 105 of 1997, attempted murder and arson.

[2] The appellant pleaded not guilty to all the counts on 9 June 2011 but was subsequently convicted and sentenced. He was sentenced as follows:

1. Murder: 18 years imprisonment
2. Assault GBH: 3 years imprisonment
3. Arson: 5 years imprisonment

It was further ordered that counts 2 and 3 run concurrently. The effective term of imprisonment was therefore 23 years imprisonment.

[3] On 4 November 2013 the appellant was granted leave by the Supreme Court of Appeal to appeal against his conviction only, to the full court of this division.

[4] The background to this case was briefly as follows: On 1 December 2009 a group of persons killed the deceased in count 1, who was the son of the complainant in count 2, by throwing stones at him. The deceased died on the scene and the cause of death as recorded in the post-mortem report is "Blunt force trauma to the body." A group of persons, amongst whom was the appellant, also attended at the house of the complainant in count 2 where a stone was thrown at the complainant. The group left and the complainant and his wife were able to flee. A group of persons again attended at the house of the complainant in count 2 when the house and other structures on the premises were set alight. The State averred that the appellant and his co-accused acted in furtherance of a common purpose.

[5] The State called the evidence of several witnesses but for purposes of this judgment. I propose to deal only with the evidence which was pertinent to each of the counts regarding which the appellant was charged.

[6] Regarding count 1 of murder the appellant was implicated by the evidence of one Daniel Mmakhudu Moriri who testified that he was the brother-in-law of the deceased. He was in Dinotje village on the day in question when he received a telephone call from his wife that prompted him to proceed to the residence of the deceased. He observed a group of people at or near a local school. He approached and concealed himself in a donga which he estimated to be about half a metre in depth and from that position he witnessed the killing of the deceased.

[7] Moriri testified that the crowd initially wanted to stone the deceased but that the appellant stopped them. The appellant then pulled out a knife and stabbed the deceased on the left side of the neck or the throat below the chin. Moriri testified that the crowd thereafter stoned the deceased. It is common cause that the incident occurred at night and that Moriri observed the events from a distance with moonlight as the source of light. Cross examination further revealed that there were also 1 metre tall aloe plants in the vicinity of his point of observation. Moriri testified that he had last seen the appellant six months before the incident.

[8] Regarding matters of identification, caution was sounded in **S v Mthethwa 1972 (3) SA 766 (AD)** at 768 A – C as follows:

"Because of the fallibility of human observation, evidence of identification is approached by the Courts with severe caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any, and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular

case, are not individually decisive, but must be weighed one against the other, in the light of the totality of the evidence, and the probabilities; See cases such as R. V. Masemang 1950 (2) SA 488 (AD); R.V. Dladla and Others 1962 (1) SA 307 (AD) at 310 C; S v Mehlape, 1963 (2) SA 29 (AD)"

[9] What is of concern about the evidence of Moriri are the following: First, the trial court did not permit cross-examination that was aimed at discrediting the reliability of his evidence relating to his previous knowledge of the appellant. Secondly, the source of light for the purpose of identification was only moonlight. Thirdly, his evidence that he observed the appellant pulling out a knife and stabbing the deceased in the region of the neck is not supported by the post-mortem report. There is no mention even of a single stab wound in that report and as already stated above, the death of the deceased was caused by blunt force. In the circumstances, I cannot but come to the conclusion that the State failed to prove its case beyond a reasonable doubt on this count.

[10] The complainant in count 2 (Mashabela) was struck with a stone whilst the group of persons, who included the appellant, were at his residence to warn him to leave the area. Mashabela testified that he spoke to the appellant. He further testified that the appellant stopped the people from assaulting him and he opined that had it not been for the appellant's intervention he could have suffered further harm. The charge on count 2 was attempted murder even though the conviction was on the competent verdict of assault with intent to do grievous bodily harm. There is no evidence that the appellant intended to or harmed the complainant on count 2 in any way. If anything, he was his saviour. He could therefore not be said to have acted in furtherance of a common purpose in the commission of this crime. See **S v Thebus 2003 (2) SACR 319 (CC)** para 49 where the Constitutional Court pronounced as follows:

"If the prosecutor relies on common purpose, it must prove beyond doubt that each of the accused had the requisite ***mens rea*** *concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless associated himself or herself reckless as to whether the result was to ensue."*

[11] In the circumstances I find that the court **a quo** misdirected itself in finding that the State had proved its case with regard to count 2 even in respect of the competent verdict of assault with intent to do grievous bodily harm.

[12] Regarding count 3 of arson the witness Tirelo Mashabela (the grandson of the complainant in count 2) testified how he overheard a conversation at or near the communal tap by some persons including accused 4, one Skinny and one Komane Mashigo. The conversation was about the burning down of houses on that day. Thereafter he went and warned his grandfather (complainant in count 2) of what he had heard. In his testimony he also identified accused 4 and accused 1 as having been part of the crowd that burnt down his grandfather's house. Moriri also testified about the preparations for the burning down of the house which included the fetching of petrol by accused 1. He witnessed the burning of the house while he was still in the donga at the time. Both these witnesses do not mention having seen the appellant at the scene when the house and other structures were set alight. The State had therefore also in this instance failed to lay a sufficient basis for a conviction. The doctrine of common purpose can equally find no application with regard to count 3 of arson.

[13] The court **a quo inter alia** found that "[e]ach one of the accused was identified and duplicated in what occurred on that day..." (p 250 of the record) and that on all three counts the accused, including the appellant, had to be found guilty on the basis of common purpose.

[14] In my view this was a further misdirection on the part of the court **a quo** as that conclusion is not supported by the evidence which was presented.

[15] This is **a fortiori** the case when one considers the law as set out in the **locus classicus** regarding common purpose: **S v Mgedezi 1989 (1) AD** 688 B – D where the following was stated:

*"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 in S v Safatsa and Others 1988 (1) SA 868 (A) only if certain requisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on 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."*

[16] **In casu**, none of these prerequisites have been established beyond a reasonable doubt or at all.

[17] In the result, I propose that the following order be made:

17.1 The appeal by the appellant against his conviction on all three counts is upheld.

17.2 The appellant's conviction on counts 1, 2 and 3 and the sentences imposed upon him pursuant to such conviction by the court **a quo** are set aside.

S. A. M. BAQWA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree.

P.A. MEYER
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

I agree and it is so ordered.

C. PRETORIUS
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Heard on:	19 June 2015
Delivered on:	
For the Appellant:	Adv. Legodi
Instructed by:	Legal Aid
For the Defendants:	Adv. Vorster
Instructed by:	The State Attorney