

✓✓
29/03/2018

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

[REPUBLIC OF SOUTH AFRICA]



CASE NUMBER: A940 / 12

NGHC CASE No CC317/2004

- (1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

29 / MARCH / 2018

DATE

SIGNATURE

In the matter between:

ZABENZENI MALI MAHLANGU

FIRST APPELLANT

GIBI DRIVER MAHLANGU

SECOND APPELLANT

THOMAS JABULANI MAHLANGU

THIIRD APPELLANT

VS

THE STATE

RESPONDENT

JUDGMENT

- [1] The three appellants were convicted on count 1 of murder and count 2, robbery with aggravating circumstances and were each sentenced to **life imprisonment** for the murder count and **fifteen years imprisonment** on count 2, by Motata J in the Local Division for the Eastern Circuit Court sitting at Middelburg on the 10 February 2005.
- [2] The appellants are appealing against conviction and sentence with leave having been granted on petition by Shongwe DJP, (as he then was) on 17 September 2007.
- [3] The conviction of the appellants is a sequel to the unlawfully and intentionally killing of Jasper Streaker, an adult male, on or about 2 December 2003 and at or near the farm ERF Deel in the district of Middelburg (count 1 of murder), and the unlawful and intentional assault of the deceased at the place and date mentioned in count 1 above.
- [4] The conviction of the appellants, particularly on count 1 is being assailed on the basis that the Court *a quo* misdirected itself in convicting the three appellants on common purpose because the State failed, first and foremost to disclose in the indictment that it would rely on common purpose to secure the conviction of the appellants; secondly the court *a quo* erred in finding that the State had proven all the prerequisites of common purpose.
- [5] It is now trite that a court of appeal is reluctant to upset, *inter alia*, the factual findings of the trial court, which is in a better position to estimate what is probable or improbable. The court of appeal will only reverse the trial court's findings where the reasons for its findings are unsatisfactory; vide *Rex v Dhlumayo and Another*¹.
- [7] The crisp issue in this appeal is whether the State is obliged, where it intends to secure the conviction of an accused relying on common purpose, to disclose this intent in the indictment.
- [8] The three appellants were convicted on the basis of common purpose on counts 1 and 2 in that the Court *a quo* found that they acted in common purpose with the accused 1 and 5 in that they were present at the scene of crime, were all aware that the deceased was being assaulted, they merely looked and did not disassociate

¹ 1948 (2) SA 677 (A).

themselves from that because they shared the deceased's money after he was assaulted, and they saw that the deceased was bleeding on the head and therefore they had the intention that the must die.

- [9] Burchell and Milton² 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."

- [10] It is trite that the *onus* of establishing common purpose rest on the State. In the matter of *S v Mgedezi and Others*³ the Appellate Court held that: "the prerequisites for common purposes are: "firstly 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 victim; 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 common purposes with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended the victim to be killed, or he must have foreseen the possibility of the killing and performed his own act of association with recklessness as to whether or not death was to ensue."

- [11] Section 144(3) of the Criminal Procedure Act provides in peremptory terms that the accused person shall be provided with an indictment which shall be accompanied by a summary of substantial facts of the case, which in the opinion of the attorney-general, are necessary to inform the accused of the allegations against him.

- [12] The above referred to section must be read together with section 35(3)(a) of the Constitution (Act 108 of 1996), which provides that every accused person has a right

² Id Burchell and Milton at 393.

³ 1989 (1) SA 687 (A) at 705I-706C .

to a fair trial, which includes *inter alia*, the right to be informed of the charge with sufficient detail to answer it..

[13] In *S v Chauke and Another*⁴ Noorbhai AJ, pointed out that:

“Section 35(3)(a) of the Constitution (Act 108 of 1996) brings about a new major dimension to giving an accused person notice of the danger of being convicted of an offence which constitutes a competent verdict. It provides that every accused person has a right to a fair trial, which includes *inter alia*, the right to be informed of the charge with sufficient detail to answer it. Dealing with s25 (3)(b) of the previous interim Constitution (Act 200 of 1993), which is similar to s35 (3) (a) of the present constitution, Friedman JP and Waddington J held in *S v Kester* 1996 (1) SACR 461(B) that the right to be informed with sufficient particularity of the charge includes the right to be informed of competent verdicts on a charge. A failure to inform an accused person of a competent verdict amounts to a violation of s 35(3)(a) of the Constitution and is therefore a fatal irregularity which vitiates the proceedings where the accused was convicted of an offence which constitutes the competent verdict. See in particular 469h-i of the judgment.” Section 35(3) of the Constitution provides that: “Every accused person has a right to a fair trial, which includes the right to: (a) be informed of the charge with sufficient detail to answer it.”

[14] In *S v National High Command*⁵ at para 464 the court held that:

“Now it is clear that where a common purpose is alleged, the State has to supply particulars of the facts on which it will rely in order to ask the Court to draw the inference that each and every one of the accused was a participant in the conspiracy, or party to the alleged common purpose.”

[15] When one has regard to the doctrine of common purpose, it is clear that it is wide enough to be regarded as a dragnet, catching anyone within its ambit. Section 35 (3)(a) requires of the State to inform the accused with sufficient detail of the charge. The stage of informing the accused what the charge he is to meet, is through the indictment and the summary of facts. The right of the accused to a fair trial does not

⁴ 1998 (1) SACR 384 at 356I to 357a..

⁵ 1963 (3) SA 462 (T).

commence at the plea stage, or at commencement of leading evidence, but when he is served with the indictment or charge sheet. It can hardly be said that a charge sheet or indictment which does not spell out that reliance on common purpose will be made to secure conviction, does not prejudice the accused in preparing for his trial. The failure to specify the common purpose simply means that the State has not provided the accused with sufficient detail in breach of subsections (a) and (b) of s35 (3), which must be read together.

- [16] In *S v Mphetha and Others*⁶, the court ordered the State to furnish further particulars to the accused adhering to the set of guidelines it ordered. It went on to quote with approval from *R v Adams and Others*⁷:

"It is a well-known principle in our law that an accused person is entitled to such particulars as he properly requires for the purpose of preparing his case before he is called upon to plead and enter upon his defence, and he is entitled to such particulars even if it entails a disclosure of Crown evidence."

- [17] In the matter of *S v Ndaba*⁸ where the state relied on common purpose, which it had not alleged in the charge-sheet, or summary of substantial facts in terms of s144(3)(a) of the Act, or in the opening address, given by the State advocate in terms of s150(1) of the Act, the Court held that:

"[102] I am satisfied that the allegations of common purpose has to be made by the State in the indictment, or at least in the summary of substantial facts furnished in terms of s144(3) (a) of the Act."

- [18] It is common course that the indictment and the summary of facts, *in casu*, did not indicate that the State would rely on common purpose to secure their conviction. It is also common cause that the State neither applied for the amendment of the charge sheet in terms of s86 of the Criminal Procedure Act, during the trial nor before judgment was handed down. The accused were dully legally represented. At the closure of the State's case they decided not to take the stand nor call witnesses

⁶ 1981 (3) SA 803 (C).

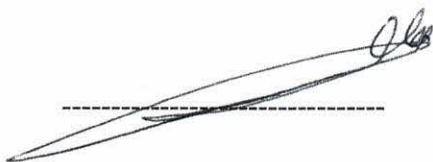
⁷ 1959 (1) SA 646 (SCC) at 656F.

⁸ 2003 (1) SACR 364 (WLD) at 381h-i

in their defence but closed their case. This Court need not speculate as to whether the accused would have taken the stand were they aware that common purpose would be relied upon by the state. The very fact that the appellants were not duly informed prejudiced them in preparing their defence. In my view, prejudice set in at the very moment they were presented with the indictment and summary of substantial facts, thus tainting the entire process of a fair trial as required by s35 of the Constitution; *vide Nombewu v S*.⁹

[19] In my view, and in the light of the above authorities, the nature of the prejudice is such that it deprived the appellants of a fair trial, thus warranting that their conviction and sentences should be set aside, without dealing with the second point upon which the conviction is assailed, namely the *Mgedezi* principle or the merits of the trial; *vide S v Khuzwayo*.¹⁰

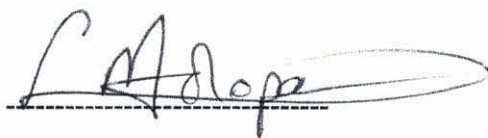
[20] In the premises, the appeal against both conviction and sentence in respect of all counts are set aside.



N.M. MAVUNDLA

JUDGE OF THE HIGH COURT

I agree and it is so ordered.



L. M. MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

I agree and it is so ordered

⁹ 1996 (4) ALL SA 621 (E) at 629f-g.

¹⁰ 2002 (1) SACR 24 NCD) at 28,c et 29G.

I agree and it is so ordered

A handwritten signature in black ink, appearing to read 'N. Ranchod', is written over a horizontal dashed line.

N. RANCHOD

JUDGE OF THE HIGH COURT

DATE OF HEARING : 13 / 10 / 2018

DATE OF JUDGMENT : 29 / 03 / 2018

APPELLANT'S ADV : ATT O. P. MAKUBE

INSTRUCTED BY : ATT MAKUBE

RESPONDENT'S ADV: ADV S. SCHEEPERS

INSTRUCTED BY : DIRECTOR OF PUBLIC PROSECUTION