IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A832/2013

DATE: 9 September 2014

IN THE MATTER BETWEEN:

STHEMBISO MSAWU **APPELLANT**

AND

THE STATE **RESPONDENT**

JUDGMENT

KOLLAPEN J:

l. The appellant together with two others were convicted and sentenced on the 20th of October 2006 by COETZEE J sitting in the Eastern Circuit of this Court on the following charges:

i. Murder - life imprisonment;

ii. Robbery with aggravating circumstances - twenty years imprisonment;

iii. Robbery with aggravating circumstances - twenty years imprisonment.

2. Leave to appeal to this Court against both conviction and sentence was granted by the Supreme Court of Appeal, on petition, on the 23rd of July 2009.

3. In the Court ***a quo***, the appellant pleaded guilty to the two robbery charges and pleaded not guilty to the murder charge. His stance in respect of the robbery charges was that there was a duplication of charges. In essence, he pleaded guilty to a single charge of robbery. He made various admissions in terms of Section 220 of the Criminal Procedure Act 51 of 1977 in so far as they related to the correctness of the post-mortem report and the photo album which was tendered into evidence.

4. His written plea explanation in respect of the murder charge was that while he was present when the deceased was killed by accused number 3 and another person, he did not foresee that they would kill the

deceased and throw his body into a dam, and as such, he did not reconcile himself with the death of the deceased.

BACKGROUND

5. The deceased and the appellant were in the employ of one Mr Naidoo and were involved in the business of selling crockery and cutlery. The latter made available a Nissan 1400 bakkie to the deceased for the purpose of conducting the aforesaid business. The appellant knew the deceased since about December 2003 as they were work colleagues.

6. It is not in dispute that after the deceased was over-powered by a group of men which included the appellant and his co-accused, his bank card was forcibly removed and his pin code extracted. The appellant, together with one Marena, drove to the bank in the deceased's vehicle to withdraw money from the deceased's account. The appellant then returned to the scene of the crime and states that he noticed that the deceased had incurred certain injuries to his head from what he believed was a glass bottle. The group, including the appellant, then made their way in the bakkie to the dam where the deceased was then thrown into the dam.

7. It is clear from the appellant's plea explanation that he believed the cause of death was drowning after the deceased was thrown into the dam and that his reference to being present when the deceased was killed, was a reference to this. The forensic evidence led at the trial indicated that the cause of death was consistent with skull-brain injuries and thus it must follow that the injuries that the appellant alleged he observed on his return from the bank were the fatal injuries. On his version, he was not present when they were inflicted.

8. In convicting the appellant on all three counts, the Court *a quo* concluded firstly that there was no duplication of the convictions of robbery, as the taking of the bank card and the taking of the bakkie did not happen simultaneously and were separated in time.

9. In S' v ***DLAMIN1 2012 (2) SACR 1,*** the Supreme Court of Appeal expressed itself as follows with regard to the test to be applied to decide whether duplication has occurred (at 6e-f):

> '*[19] Our courts have applied different tests to decide whether duplication has occurred. In* S v Maneli (2009 (1) SACR 509 (SCA)) *Streicher J explained:*
>
> '*One such test is to ask whether two or more acts were done with a single intent and constitute one continuous criminal transaction. Another is to ask whether the evidence necessary to establish one crime involves proving another crime. '*

[20] There is, however, no all-embracing formula. The various tests are mere guidelines-they are not rules of law, nor are they exhaustive. Their application may yield a clear result, but, if not, a court must apply its common sense, wisdom, experience and sense of fairness to make this determination. '

10. In my view it is clear that whatever test one applies, the end result would be the same, namely that the robbery of the card and that of the vehicle arose either simultaneously or very close in time. When the deceased was robbed of his card, the necessity to use the vehicle to draw money would have arisen and the robbery of the vehicle would have been inextricably linked to it, making good as it were, the robbery of the bank card. Under such circumstances, I am of the view that the robbery of the card and the vehicle represent a single intent and a common continuous criminal transaction. In addition, common sense, wisdom and a sense of fairness lend themselves to the conclusion that there was a duplication of convictions. In the result, both the convictions in respect of Count 2 and 3 are not sustainable and fall to be replaced by a single conviction incorporating both the bank card and the Nissan 1400 bakkie.

11. With regard to the charge of murder, the Court brought out a conviction on the basis of common purpose. In this regard the Court concluded as follows in its judgment:

'*Beskuldige 1 was teenwoordig toe die oorledene gedood is. Die feit dat hy wel bekend was aan die oorledene, het dit nodig gemaak om die oorledene uit die weg te ruim. Hy het horn van sy geld beroof nadat hy en sy bendelede hom vasgebind het. Sy bewering dat hy nie die oorledene se dood voorsien het nie en nie kon voorkom nie, is klaarblyklik vals. Die blote feit dat hy so sê in sy in sy verklaring, beteken nie dat die Hof dit moet aanvaar nie. Die noodwendige afleiding uit sy verklaring is dat hy geweet het dat die oorledene gedood gaan word en dat hy hom daarmee vereenselwig het, omdat dit in sy belong was dat die oorledene gedood word. Hy en sy bendelede het n geemenskaplike doe I gehad om die oorledene dood te maak. Gevolglik moet beskuldige 1 ook aan moord skuldig bevind word. '*

12. It has been argued on behalf of the appellant that on the evidence available before the Court, it could not have, and should not have, come to the conclusion that it did, as the proven facts were not sufficient to establish on the part of the appellant, the intent to murder by acting in common purpose either by agreement or by active participation.

13. In this regard the only evidence available to the Court *a quo* in respect of the appellant was his written explanation of plea and the various exhibits tendered into evidence including the post mortem report and the album of photographs.

14. In 5 v ***MGEDEZI AND OTHERS 1989(1) SA 687 (AD)*** at 705I-706B, the court expressed itself as

follows:

> '*In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, 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 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 on the inmates of room 12. Thirdly, 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, he must have had 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. '*

15. In S v ***LE ROUX AND OTHERS 2010 (2) SACR 11 (SCA),*** the following was held (at 19e-f):

> '*In* S v Mgedezi 1989 (1) SA 687 (A) *this court dealt with a situation where there was no prior plan to commit the offence of public violence. It was stated there that a general and all-embracing approach regarding all those charged is not permissible. It was stated further that the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene. '*

16. In S v ***THEBUS AND ANOTHER 2003 (2) SACR 319 (CC)*** the Constitutional Court reiterated the applicability of the doctrine of common purpose as follows (at 346g-h):

> '*If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each 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 actively associated himself or herself reckless as to whether the result was to ensue.* '

17. In ***Dewnath v S (269/13) [2014] ZASCA 57 (17 April 2014)*** at paragraph 15-16 the Supreme Court of Appeal held as follows:

> '*Current jurisprudence, premised on a proper application of S v Mgedezi and Others makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited*

participation removed from the actual execution of the crime '

18. Accordingly the question for determination is whether the proven facts establish, on the part of the appellant, the existence of a common purpose to kill the deceased. In ***S v CLOETE 1994 (1) SACR 420 (A),*** in dealing with admissions made in an explanation of plea, the Court emphasised that there was no reason why a court should be entitled to have regard to the incriminating parts of such a statement while ignoring the exculpatory ones. Clearly the exculpatory parts of the appellant's plea explanation suggest that he did not foresee that the deceased would be killed. In addition the State did not prove any act of active association on his part in the killing of the deceased. On the contrary, the evidence by the appellant that he could not have done anything to prevent the death of the deceased on account of the threats made on his life by his co-accused, stood unchallenged.

19. Under such circumstances it could hardly be said that the State, carrying the evidentiary burden of proving the guilt of the appellant beyond all reasonable doubt, succeeded in discharging the evidentiary burden.

20. Under such circumstances the requirements of common purpose with regard to the murder of the deceased were not proved and the appellant is accordingly entitled to his acquittal on this charge.

SENTENCE

21. The sentence of twenty years in respect of the robbery count on Charge 2 does not warrant interference. It could not be said that the Court a quo misdirected itself in imposing that sentence or that the sentence is shockingly disproportionate to the crime.

ORDER

22. In the result I would propose the following order:

i. That the appeal against the convictions on Count 1 and Count 3 be upheld;

ii. That the conviction on Count 2 be amended to include the robbery of a Nissan 1400 bakkie and that such conviction be confirmed;

iii. That the sentence of twenty years on Count 2 be confirmed and that the sentence be antedated to 20 October 2006.

N KOLLAPEN

JUDGE OF THE HIGH COURT

I AGREE,

A A LOUW

JUDGE OF THE HIGH COURT

I AGREE,

J W LOUW

JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

A832/2013

HEARD ON: 20 AUGUST 2014

FOR THE APPELLANT: MR J. VAN ROOYEN

INSTRUCTED BY: LEGAL AID SOUTH AFRICA (PRETORIA JUSTICE CENTRE) (ref: J van Rooyen - 512/13)

FOR THE RESPONDENT: ADV F. W. VAN DER MERWE

INSTRUCTED BY: DIRECTOR OF PUBLIC PROSECUTIONS (ref: volbank 35/2009 (6/8/CM)