IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

30/09/2014

Case Number: A 740/13

JOSEPH NDODA SITHOLE — Appellant

and

THE STATE — Respondent

JUDGMENT

BAM J

1. The appellant (accused 2) and another (accused 1) were convicted by Ranchod J on two counts, count 1 robbery with aggravating circumstances and count 2, murder, and sentenced to respectively 15 years and 25 years imprisonment. It was ordered that the sentence on count 1 should run concurrently with the sentence on count 2. With leave of the trial court the appellant appeals his conviction and sentence on count 2.

2. The appellant's grounds of appeal are limited. In par 7 of the appellant's heads of argument it was summarised as follows:
   "It is submitted that the appeal on behalf of the appellant is not directed against the factual findings by the court a quo. It is conceded that the court a quo was correct in having rejected the evidence of the appellant and his co-accused. It will however be argued that the court a quo misdirected itself in the

application of law in regard to the conviction of the appellant on count 2."

3. Mr Maenga, representing the State, submitted that the appellant's appeal is based on a point in law and that the appellant should have followed the procedure provided for in section 319(1) of the Criminal Procedure Act.

4. Mr Nel, appearing for the appellant, submitted that what is really meant is that the court *a quo* wrongly applied the law to the facts.

5. This *"point in law"* involves a finding of the court *a quo* in respect of an inference of guilt of the appellant drawn from the facts. Although the finding of the trial court resulted from the application of the law of evidence requiring that such inference should be the only reasonable inference to be drawn in the circumstances, it is clearly not a *"point in law"* but the result of inferential reasoning.

6. The salient facts of this matter can be summarised as follows:
   The deceased was a security guard employed at a business called Built-It, in Secunda. On 18 February 2007 at about noon three persons, dressed as employees of the business, were observed loading a truck on the premises. The three then left with the truck. At about 17h15 the same day the deceased was found on the premises. He was bound to a fork lift. The post

mortem report indicated that he died of strangulation. A truck belonging to the business and the cell phone of the deceased were missing. Later that day, at Buschbuckridge accused 1 was in possession of the truck. However, subsequent to an argument about the payment of an amount of R1000 for transport, the witness Fundy Mambane removed the truck but returned later with his cousin and transported the appellant and others back to Secunda. One of the people accompanying accused 1 attempted to sell a cell phone to accused 1's cousin. That cell phone was later proved to have belonged to deceased the security guard who had been killed at Built -It.

7. The trial court ruled, after a trial within a trial had been held, that certain admissions allegedly made by accused 1 to Colonel Durr, were admissible. These admissions included the following: That the appellant remained outside at the time accused 1 and a man called Sifiso entered the premises after having persuaded the security guard to open the gate. Accused and Sifiso then tied up the security guard and after they had loaded building material on a truck, they drove the truck out of the premises. The two of them then returned to the security guard who was still alive at that stage. Thereafter they picked up the appellant and left for Embalenhle. Fundy (Mambane) promised to pay accused 1 R65 000 for the truck.

8. The State also adduced evidence of Colonel Durr concerning admissions made by the appellant. The admissibility thereof was not contested. The appellant told Colonel Durr that he had accompanied accused 1 and Sifiso to Built-It. When he heard

there was a security guard on duty he became scared and moved away some distance where he waited. He was subsequently picked up by accused 1 and Sifiso. They slept at a place close to the accused 1's parental home. The next morning he discovered that the truck was gone. They returned to Secunda in a vehicle driven by a man he later identified to Colonel Durr on a photo as Mambane.

9. Accused 1 testified and denied that he had been at Built-It on the day in question and that he knew anything about what occurred there. He said he and the appellant accompanied one Sifiso to Bushbuckridge in a truck. There they found Mambane who drove away with the truck. Sifiso had a cell phone in his possession which he wanted to sell. Accused 1 denied that he had any agreement with Mambane.
   Accused 1's evidence was not challenged by the appellant's legal representative.

10. The appellant told the court that he had accompanied accused 1 and another unknown man who drove the vehicle. They did not tell him where they were going. The unknown driver dropped them off at a field and they walked to Built-It. He did not know what was going to happen there. He then turned and waited at a spot where there are trees, an estimated distance of about 500 metres from the premises. The gate to the premises was visible from that vantage point. He noticed the truck when it left the premises. He was then picked up. Along the road he got drunk. They eventually ended up in a village where he slept. When he woke up the truck was missing.

During cross examination the appellant experienced problems in explaining certain discrepancies and contradictions. He had no answer to the fact that from the spot where he allegedly waited, as discovered during an inspection in loco, the gate to the premises was not visible.

11. The trial court rejected the appellant's version. The appeal does however not lie against this finding of the trial court. There is also no appeal against the trial court's finding that the appellant was guilty of the robbery. What then remains to be considered is whether the trial court was justified to find that the appellant was correctly convicted of murder.

12. The evidence adduced by the State did not prove that the appellant entered the premises of Built- It. It is however clear that he had common purpose with the other robbers to commit robbery. He associated himself with their conduct. The appellant also knew that a security guard was on duty and that he would have to be overpowered and put out of commission in order to enable the perpetrators to steal the truck and other items.

13. Mr Nel, with reference to several decisions, argued that reasonable doubt existed that the perpetrators committed murder. In this regard Mr Nel argued that in view of the fact that the deceased was still alive when the robbers left, they did not have the intention to kill him. Mr Nel further submitted that if the robbers intended to murder the deceased they would have used a lethal weapon like a fire-arm.

14. However it must be taken into account that the deceased died of strangulation. The post mortem report reflected that the hyoid bone in the left side of his neck was fractured. The deceased was found with his feet and hands tied with a nylon rope and with a nylon rope around his neck. The other injuries to his body included bruises and scratch marks on his neck and face, and a laceration across his right eye brow ridge. It appears that the deceased was severely assaulted. This was not a case where the assailants merely intended to prevent the deceased from crying out. No object covered his mouth. The rope was put around his neck to strangle him. Accused 1 was employed by Built-It. On the probabilities the deceased knew his assailants. Accordingly they had a motive to silence him permanently to prevent him from identifying them to the police. Accused 1 used to work at Built-It.

15. In my view there cannot be any doubt that the robbers intended to kill the deceased. There is no need to consider whether the form of *dolus* was *dolus directus* or *dolus eventualis.* There is no evidence substantiating a finding that the deceased was negligently killed as submitted by Mr Nel.

16. What remains is to consider whether the appellant, in view of the fact that he possibly may not have been in the immediate presence of the deceased when he was strangled, associated himself with the conduct of the perpetrators in respect of the murder.

17. The only basis upon which the appellant could have been convicted on the murder charge was the principle of common purpose.

18. In *S v Thebus* 2003(2) SACR 319 CC, at par [18], the following appears:

"The doctrine of common purpose is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the 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'".

In par[19] of *Thebus* the Court stated;

"The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."

19. In *S v Mgedezi and Others* 1989(1) SA 687 (A) at 705I, referred to in *Thebus*, the requirements of liability in respect of common purpose were set out as follows:

"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 inmates of room 12. Thirdly he must have intended to make common cause with those who actually perpetrated 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."

20. In par[34] the Court in *Thebus* concluded as follows:

"In our law, ordinarily, in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is a prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the course of joint enterprises'."

21. As alluded to above the appellant knew that the deceased was on duty as a security guard and that he would have to be

overpowered to enable the robbers to achieve their aim. In this regard the appellant, if he did not personally attack the deceased, at least associated himself with the conduct of whoever entered the premises and assaulted the deceased. The appellants conduct clearly satisfies the requirements of common purpose referred to above. It follows that the appellant was correctly convicted of murder.

22. In view of the submission made by Mr Nel that the appeal against the sentence on count 2 is conditional to this Court's finding that the conviction on murder should be replaced by a conviction on culpable homicide, the appeal against the sentence falls away.

23. Accordingly I propose that the following order be made:

The appeal against the conviction and sentence on count 2 is dismissed.

A J BAM JUDGE OF THE HIGH COURT

I agree,

T J RAULINGA JUDGE OF THE HIGH COURT

I agree and it is so ordered.

L M MOLOPA-SETHOSA JUDGE OF THE HIGH COURT
18 September 2014