IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG
JUDGMENT

Not Reportable

Case No: AR 340/2015

In the matter between:

VUKA ISHMAEL SITHUNZA **Appellant**

And

THE STATE **Respondent**

Coram: Gorven, Seegobin and Olsen JJ

Heard: 25 January 2016

Delivered: 9 February 2016

ORDER

On appeal from KwaZulu-Natal Division of the High Court, Southern Circuit, and Ramsgate (Moodley J sitting as court of first instance):

The appeal is upheld and the conviction and sentence of the appellant is set aside.

JUDGMENT

Gorven J (Seegobin & Olsen JJ concurring):

[1] At 07h30 on the morning of 20 December 2010, the deceased, Sibusiso Victor Gumede, was driving his blue Nissan Skyline vehicle along a road in the Bhoyibhoyi area near Port Shepstone, KwaZulu-Natal. One of his sisters had caught a taxi from her workplace. At the Ndaleni bus stop, she was met by another sister who gave her a wallet because she planned to continue with the taxi to town. She saw the deceased's vehicle approach and, just then, heard a shot ring out. The vehicle then careened into a field. She and other onlookers rushed to the vehicle, saw that the deceased was wounded and arranged for him to be rushed to a nearby hospital. The deceased did not survive. It is common cause that the shot fired when he approached the bus stop caused his death. Two men were seen running from the scene. One of them had fired the fatal shot.

[2] Three persons were charged with the murder of the deceased before the High Court. Of these, the appellant was accused one and the two men seen running from the scene were accused two and three respectively. All three of the accused pleaded not guilty and raised alibi defences under section 115 of the Criminal Procedure Act 51 of 1977 (the Act). The appellant's defence was that

he was at his parental home in Harding from 23 November 2010 to 17 January 2011. Harding is a considerable distance from the murder scene. All three of the accused were convicted of the planned and premeditated murder of the deceased on the basis that they formed a common purpose to do so by conspiring and acting accordingly. They were each sentenced to life imprisonment. They all applied for leave to appeal in respect of their convictions and sentences. Apart from the application of the appellant for leave to appeal against his conviction, the trial court dismissed the applications. This appeal is accordingly with the leave of that court and is limited to the question of whether or not the appellant was correctly convicted.

[3] Accused two and three were identified by the sister of the appellant who was returning from work and a 16-year-old youth by the name of [K……] [M……] ([K……..]). In addition, a contested confession by accused two and a contested pointing out by accused three (the extra-curial statements) were found to be admissible against them after a trial-within-a-trial was conducted. Along with the evidence led against them, these made it plain that they had reached agreement, along with others, to murder the deceased, and that they were the two assailants near the bus stop who fired the shot resulting in his death.

[4] A contested statement attributed to the appellant was ruled inadmissible after a trial-within-a-trial was held. After the rulings on the extra-curial statements and the contested statement of the appellant were given, the status of the evidence which had been led during the trials-within-a-trial was agreed. That evidence was received into the main trial, except for that led in the trial-within-a-trial of the appellant. At the close of the state case, the appellant applied for his discharge in terms of s 174 of the Act and, when that was refused, closed his case without leading any evidence.

[5] As regards what was found proved, the judgment of the trial court refers to the firing of a shot in the presence of the appellant the afternoon prior to the murder. It says of the firing: 'On its own it may appear to be a recreational activity, but given that firearms are used by accused 2 and accused 3 on the very next day to shoot the deceased, the knowledge of [the appellant] of a firearm gains significance.' The trial court also found to be significant the evidence that there were multiple communications between the appellant and one Sphamandla Mzobe on the morning of the murder. Only the extra-curial statements show this person to have been involved in the offence. The judgment goes on to refer to the cellphone communications between the appellant and his co-accused on the morning of the offence. Of the cellphone communications by the appellant with his co-accused and Mzobe, the trial court held, 'This . . . [indistinct] of course cannot be dismissed as coincidental, but are clearly related to the killing of the deceased as accused 2 and accused 3 were at the time waiting for the deceased at the Ndaleni Bus Stop. Further corroboration for the state's version can be found in [the appellant's] mendacity. [The appellant] was clearly not where he alleged he was at crucial times and his alibi therefore lies to be rejected as false.'

[6] The state accepted in argument that it is now clear law that extra-curial statements by accused two and three are not admissible against the appellant.[1] This is so regardless of whether they contain admissions or confessions.[2] A court does not only excise from evidence those parts of the statements which implicate a co-accused. Those statements are excluded in their entirety. As such, no part of the extra-curial statements should have been taken into account in the trial of the appellant. The reliance on and reference to the contact between the

[1] *Mhlongo v S; Nkosi v S* 2015 (8) BCLR 887 (CC).
[2] *Mhlongo* Paragraph 37.

appellant and Mzobe thus amounts to a misdirection on the part of the trial court.

[7] The state also accepted that, if no regard is had to any part of the extra-curial statements, there is insufficient evidence on which to found a conviction against the appellant. This concession is an appropriate one. If one disregards the extra-curial statements, the evidence relating to the appellant comprises the following. [K……], who knew the appellant and whose evidence was correctly accepted by the trial court, testified that the afternoon prior to the murder he saw the appellant in the company of accused two and three and another person approximately 1.5 km from the scene. Within minutes of his being seen by [K…….] that afternoon, a gunshot was heard from their vicinity. The further evidence is that between 05h45 and 09h45 on the morning of the murder, the cellphone of the appellant was used to communicate with either accused two or three on at least 10 occasions. That is the sum total of the admissible evidence against him.

[8] In addition, it was appropriate for the trial court to find that the state had disproved the defence of an alibi raised by the appellant. This defence was decisively shown to be false by records demonstrating that the appellant's cellphone was used in the Port Shepstone and Marburg areas on the day before, and the day of, the murder. Without an explanation by the appellant that he was not in possession of his cellphone that day, the inference can properly be drawn that he was operating it at the time. His alibi was further disproved by the evidence of [K……..] mentioned above which placed him near the scene of the crime during the previous afternoon.

[9] The trial court recognised that the conviction of the appellant relied on circumstantial evidence. In its judgment, it relied on the following dictum in *S v Reddy & others*[3] as to the approach to be taken as a result:

'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piece-meal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by an accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted *dictum* in *R v Blom* 1939 AD 188 at 202-3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, firstly, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such "that they exclude every reasonable inference from them save the one sought to be drawn".'

The judgment, seeking to apply this approach, concluded as follows:

'In my view the accumulative effect of the evidence and the only reasonable inference to be drawn therefrom absent a reasonable explanation offered by [the appellant], which supports his alibi defence, is that [the appellant] was involved in the planning and execution of the murder of the deceased.'

[10] In the case against the appellant, the state relied on the doctrine of common purpose arising from a prior agreement between the appellant and accused two and three (and any others who may have been involved) to murder the deceased. This was the only course open to the state because it is clear that the appellant was not one of the two assailants. The assailants were identified as being accused two and three.

[11] Some general comments concerning the doctrine of common purpose must frame this enquiry. The requirements for a finding that there was a common purpose were summarised in *S v Mgedezi & others*[4] as follows:

---

[3] *S v Reddy & others* 1996 (2) SACR 1 (A) at 8C-E.

[4] *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706C. See also *S v Sefatsa & others* 1988 (1) SA 868 (A) at 893-901.

'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 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.'

The first requirement does not have to be proved when, as in this matter, a previous agreement to commit the crime is relied upon.[5] The requisite elements must be proved beyond reasonable doubt in respect of each accused.[6]

[12] In *Jama* the state relied on a previous agreement. The appellants had attended a meeting which preceded the assaults for which the appellants had been charged. There was no reliable evidence of what took place at the meeting and therefore no evidence that any decision had been taken at the meeting. The identification of the appellants as members of the crowd present at the scene of the crime was rejected. The court upheld the appeals, holding that the trial court should not have adopted a global view of the totality of the defence cases in rejecting the evidence of an individual accused.

[13] Because circumstantial evidence was relied upon in the present matter, it must be considered whether the proved facts exclude every reasonable influence other than the guilt of the appellant.[7] A finding of guilt requires a positive answer to each component of the following question. In the case against the appellant, did the state prove beyond a reasonable doubt that there was a prior agreement to murder the deceased, that the appellant was part of that agreement

[5] *S v Yelani* 1989 (2) SA 43 (A) at 46F-G.
[6] *S v Jama & others* 1989 (3) SA 427 (A) at 436G-H.
[7] *R v Blom* 1939 AD 188 at 202-3.

and that, as such, he formed a common purpose with accused two and three to do so.

[14] The first issue, then, is whether the state proved the existence of an agreement to murder the deceased in its case against the appellant. Despite the concession of the state that if no regard is had to the extra-curial statements there is insufficient evidence to found a conviction against the appellant, the state persisted in its submission that a prior agreement was so proved. The argument proffered in support of the submission was a novel one. It developed along the following lines. The trial court made findings of fact in the case before it. This was based on evidence which was admissible against accused two and three. Such findings included a finding that an agreement existed to murder the deceased. This involved accused two and three and others. This finding was binding on the appellant. This is because it no longer had the character of evidence. The fact that it and other such findings were contained in the judgment of the trial court converted them into 'irrefutable findings of fact'. These could therefore be brought to bear against the appellant even though the findings could not be arrived at without regard being had to the extra-curial statements.

[15] This argument overlooks at least two fundamental principles. The first is that, leaving aside agreements or admissions of facts, all findings of fact must be based on evidence. There are no factual findings which can exist independently of the evidence which supports them. If the evidence does not support a factual finding, the factual finding must amount to a misdirection on the part of a court. The second principle is that any finding which is made against a particular accused must be based solely on evidence which is admissible against that accused. This is precisely what was meant in *Jama* when the Supreme Court of Appeal emphasised the need to consider the case against

each individual accused. An example may be considered. If accused two and three had been tried separately before the trial of the appellant, and the same factual findings had been made in that trial, could findings made in their trial be applied in a subsequent trial against the appellant? The answer is no. Those factual findings could not be taken into account any more than the extra-curial statements could be ruled admissible against him. When confronted with this scenario, the state readily conceded this to be the case. It was unable to distinguish the present matter.

[16] This means that there is no evidence, admissible against the appellant, that an agreement existed to murder the deceased. The fact that he was in the company of accused two and three and that a shot was loosed off the afternoon before the crime and that he had a number of cellphone contacts with them on the morning of the murder does not give rise to that inference. Still less does it exclude any other reasonable inference. The issue of whether an agreement was proved does not appear to have been considered by the trial court. The only issue enquired into was whether, assuming the existence of such an agreement, the evidence went far enough to prove that the appellant associated himself with it. That approach, however, is to put the cart before the horse. Before that enquiry could be entered into it required as a foundation the finding that an agreement had been struck to murder the deceased. This foundation was absent. Since no such agreement was proved in the case against the appellant, there was no evidence which could support his conviction. In my view, the appellant should not have been put on his defence, let alone convicted at the end of the trial.

[17] In the result the following order is made:

The appeal is upheld and the conviction and sentence of the appellant is set aside.

GORVEN J

DATE OF HEARING:	25 January 2016
DATE OF JUDGMENT:	9 February 2016
FOR THE APPELLANT:	X Sindane, instructed by the Pietermaritzburg Justice Centre
FOR THE RESPONDENT:	S Sankar, instructed by the Director of Public Prosecutions, Pietermaritzburg, KwaZulu-Natal.