REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: AA02/2022
REPORTABLE: YES/NO
OF INTEREST TO OTHER JUDGES: YES/NO
REVISED
Date: 2023/08/04

In the matter between:

WILSON MOTIMELE	First Appellant
MOGALA PEGGIE DIKOTLA	Second Appellant
PETER MODUTWANE MOTIMELE	Third Appellant

and

THE STATE	Respondent

JUDGEMENT

MONENE AJ

1. This is an appeal to the Full Court of this division against the judgement of Makweya AJ handed down on 28 February 2022 in terms of which she convicted

the appellants of murder, attempted murder and two counts of kidnapping.

2. The appeal is prosecuted with leave of the trial court which was granted on 25 March 2022. Although leave therein was granted against both conviction and sentence, the appellants are prosecuting only the appeal against conviction at this stage.

3. From both the notice of appeal and submissions made by counsel before us the main issue for determination in this matter is whether in the wake of very scant evidence of actual participation of the appellants in the assault attendant to the murder and the attempted murder charges, the trial court correctly applied the common purpose doctrine in convicting the appellants. A secondary issue thereto is whether, regarding the two kidnapping charges, the trial court was correct in discounting the appellant's version of a citizen's arrest and upholding the state's version that there was kidnapping.

THE BACKGROUND FACTS

The appellants were arraigned before the court a quo facing charges of murder, attempted murder, and two counts of kidnapping. The substance of the charges was that consequent upon the first appellant's shop being broken into overnight, the three appellants embarked on a search for the suspected housebreakers and thieves on the morning of 19 November 2019.

4. Their search led them first to the home of Mr Calvin Hine where after breaking his locked fridge, opening it with a spade and identifying some of the contents as being part of the loot stolen at the first appellant's shop, they tied him up and took him away in the second appellant's bakkie. Hine, who testified for the state is the complainant in one of the kidnapping charges as well as in the attempted murder

charge.

> From Hine's home the three appellants went to the home of Mrs Lina Mamaile in search of his son; an apparent accomplice of Hine in the overnight housebreaking and theft at the shop. The appellants then tide up Mrs Mamaila's son, put him in the bakkie driven by the second appellant where Hine was and drove *off* with him. Mrs Hine, who also testified for the state, last saw his son alive when he was taken by the appellants as sometime later that day her son lay dead as the victim in the murder charge and the subject of the second kidnapping charge.

5. From Mrs Mamaila's home the appellants took the subsequently deceased and Hine per the motor vehicle driven by the second appellant to the first appellant's shop where they found a mob having gathered there baying for the pair's blood.

6. Upon arrival of the bakkie at the shop the deceased and Hine were dragged out by people from the angry mob and assaulted with an assortment of unidentified objects resulting in the deceased's fatality and Hine's injuries. As is commonplace in mob injustice matters with its curious solidarity, nobody saw anything done by anybody on the day, despite there having been multitudes of people.

7. Pursuant to prosecuting the appellants, the State called Mrs Mamaila, her daughter and sister to the deceased Mrs Maria Mogale Mmushi, Hine and a sergeant Ralefatane who was the first police officer to arrive at the scene.

8. Only the first appellant testified in his defence with the other two appellants electing to close their cases without leading any evidence.

9. Post all the evidence led, the court a *qou* having earlier granted the second appellant a section 174 discharge only regarding the attempted murder charge, convicted the three appellants on the two counts of kidnapping, on murder and first and third appellant on attempted murder too.

THE DISPUTE

10. Very few aspects are in dispute from the evidence led on record.

11. It being not in dispute that Hine and the deceased were tied with ropes and taken against their will to the shop by the three appellants, the main attack of the appellants on the evidence of Mrs Ramaila was that they did not tell her that they were going to reprimand the deceased but rather that they were intending to hand him over to the police at the shop.

12. The nub of Mrs Mmushi's evidence was that she witnessed the first appellant assaulting the deceased with a sjambok. To that effect all that the appellant disputed was the assault with him testifying that he did not assault the deceased nor Hine at all.

13. The high watermark of Hine's evidence was that he was only able to identify the third appellant holding what he perceived to be a weapon used in the assault, to wit, a fan belt. On this score the third appellant did not give a version under oath but merely denied being in possession of the said item when cross-examining Hine.

14. I have already indicated supra that the evidence on how the assault on Hine and the deceased was meted out and what role the appellants played in that regard is the flimsiest ever. For, beyond the single assault by sjambok on the deceased testified to by Mrs Mmushi there is no other evidence led of any of the

appellants having physically assaulted the deceased. From the J88 and the post-mortem report it is clear that the deceased sustained serious abrasions all over the body leading to the cause of death being crush injuries from assault. Similarly, the J88 in respect of Hinne speaks to multiple abrasions arising from mop assault.

15. Indeed, if all we had to go on was the viva voce evidence of the two eyewitnesses, Hine and Mrs Mmushi, there would be serious difficulties towards confirming the convictions on murder even if their versions of a sjambok assault and a fan belt possession were deemed reliable and credible, an aspect to which I shall return shortly. But the State relied on the common purpose doctrine in this matter, and it was primarily on that doctrine that the appellants were convicted of murder.

16. In this regard it was apt that in both their Heads of Argument and submissions before, counsel for the appellants and the state agreed that the knot in this matter would be untied on an analysis of whether the common purpose doctrine was properly applied. We are obligated to them for their helpful inputs.

THE DOCTRINE OF COMMON PURPOSE

17. It being trite that the doctrine of common purpose finds application in situations where because of people committing an offence in concert the actions of some being imputed on others, it becomes unnecessary to saddle this judgement with a thesis on the doctrine. However, some general and salient aspects pertinent to the peculiar circumstances of the facts *in casu* bear some brief reflection on.

18. Since **S v Mgedezi and Othhers 1989(1) SA 687 ("Mgedezi")** the following have crystalized as the lens through which accused persons' guilt on

common purpose should be assessed:

18.1 Presence at the scene of the crime.

18.2 Awareness of the unlawful conduct happening, normally the assault preceding a death.

18.3 An intention to make common purpose with those perpetrating the unlawful conduct.

18.4 Manifesting the sharing of common purpose by an act associated with the unlawful conduct of the others.

18.5 Having the mens rea to commit the offence, which usually is murder.

19. In **S v Jacobs (2019) (5) BCLR 562(CC) ("Jacobs")** at paragraph 70 the apex court in our land sealed the fact that the operation of the common purpose doctrine is not dependant on whether a participant knew or foresaw what was eventually to happen to a victim of crime. It was held that the State is not required to prove the causal connection between the acts of each participant and the unlawful consequences of the mob conduct.

20. In **S v Musingadi and Others 2004 (4) ALLSA 274(SCA)("Musingadi")** at paragraph 32 it was instructively, for the purposes of the matter at hand, held as follows:

"...*accused, cannot in law just be allowed to wash their hands of what they now knew to be the consequences of leaving the deceased a bound, helpless captive at the mercy of a vicious would-be murderer. By failing to release the deceased when they knew her death was probably imminent if*

she was not released, it is persistence in the unlawful activity of holding deceased captive at the time when they as a fact foresaw that the continuance of that unlawful act would enable others to kill the deceased. They therefore unlawfully continued to hold deceased a captive, reckless of whether or not deceased was killed as a direct result of being held captive."

21. Although referring to a matter where there was prior agreement in conspiracy to commit an offence, which is not *per se* the case in casu, I find the following passage from **S v Beahan 1992(2) SACR 307(2S) at 324b-c("Beahan"),** particularly the tail-end thereof, as referred to by the respondent's counsel in his supplementary heads of argument, to still be very much helpful in determining the dispute in this matter:

"...*where a person has merely conspired with others to commit a crime but has not commenced an overt act towards the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than communication to the co-conspirators of the intention to dissociate is necessary.* ***A reasonable effort to nullify or frustrate the effect of his contribution is required."*** (My emphasis)

22. At paragraph 39 of Musingadi referred to supra, it was stated that much more needs to be done by a person present at the scene of crime and implicated by common purpose to demonstrate effective disassociation with the commission of a crime and further that in certain cases the duty to fully dissociate would call for steps to prevent the further commission of a crime or its completion.

APPLYING THE LAW TO THE FACTS

Were the convictions on Kidnapping sound in law?

23. Kidnapping comprises of the unlawful intentional deprivation of a person's liberty.

24. Both Hine and the deceased were incontrovertibly, and on the appellants' own version, deprived of their liberty when they were tied up, bundled onto the appellants' motor vehicle, and taken away against their will. Even on the appellants version that was a clearly intentional act of the three appellants acting in concert with each other.

25. What remains to be decided is whether their conduct was unlawful, and, in that regard, they proffered a defence to the effect that they were conducting a citizen's arrest and were merely securing the deceased and Hine until they were handed to the police.

26. I am not persuaded that the appellants were conducting a citizens' arrest regard being had to the following considerations:

26.1 There is no reason why they did not call the police to come to Hine and deceased's homes and waited there.

26.2 If they did not favour waiting for the police at the deceased's home, there is no reasonable explanation why they took the deceased and Hine to the shop where the crowd had gathered instead of taking them to the police station.

26.3 Their conduct of using a spade to break Hine's fridge open is indicative of people who were intending to take the law into their hands as

opposed to affecting a citizens' arrest. Afterall, why not wait for the police to conduct a lawful search.

26.4 Upon arrival at the place where the murderous crowd was waiting, they did nothing to shield the deceased and Hine from the mob attack and took no steps to go seek for help from the police when it is them who had brought the deceased and Hine into a dangerous situation.

27. Even without reference to the doctrine of common purpose the mere factual evidence of Hine and Mrs Mamaila coupled with the appellants' own versions point to an unassailable case of kidnapping. With their own version of how they acted in concert with appellant 2 and 3 acting in common purpose with their angry friend, appellant 1, a kidnapping case is, in my view, incontrovertibly proven. Nothing much needs to be said on this score.

28. I am thus unable to fault the trial court's guilty findings on the two kidnapping charges at all.

Did the appellants share a common purpose with the mob in attempting to murder Hine and in murdering the deceased?

29. The only direct evidence of participation in the assault of the deceased was given by the deceased's sister, Mrs Mmushi, and that was to the effect that she saw the first appellant assault the deceased once with a sjambok.

30. Given the blood relations between this witness and the deceased one would have expected this witness to falsely accuse the first appellant of having done much more than a single sjambok attack. She did not embellish the case against any of the appellants at all. That for this court is amark of her credibility and I accordingly have no reason to doubt that she was a credible and reliable witness

regarding what she observed.

31. Similarly, I have, like the trial court, no reason to doubt Hine's evidence that he saw the third appellant holding a fan belt. If he wanted to build up a non-existent case against the appellants, he would have gone on to fabricate that the van belt was used to assault and that he witnessed the other appellants assault him and/or the deceased in other ways.

32. However, on their own, the assault witnessed by Mrs Mmushi and the possession of a fan belt would be insufficient to prove the guilt of the appellants regard being had to the cause of death and the fact that an inference of guilt from mere possession of a fan belt will be a bit of a quantum leap in logic as the second appellant may well have been a motor mechanic whose possession of a belt would not be misplaced.

33. Accordingly, the matter of guilt falls to be decided on whether the prior conduct of the appellants in tying up and delivering the deceased and Hine to the mob is indicative of their sharing of common purpose with the murderous mob.

34. All the appellants' versions are to the effect that they were present at the murder scene, but they did not partake. They aver to have been taken by surprise by the conduct of the mob which interfered with their noble citizens' arrest intentions. Although the second and third appellants did not testify their version, which was never repeated in evidence and has miniscule probative value, was to the effect that at some time during the assault on Hine and the deceased they left because they were going to work. One wonders why they did not, if they left at all, go call the police whom they had earlier said they were to await. We will never know as they chose not to testify but inferences from their conduct we judiciously must draw.

35. I find the reasoning in Musingadi referred to supra at paragraph 21 to be most apt if the question of the applicability of the common purpose doctrine is to be determined properly *in casu.* Indeed, an accused person cannot be allowed to bind a victim, deliver the victim to a dangerous situation still bound sand leave the victim there only to wash his hands of what eventually happened to the victim on a ruse that he himself did not lay a hand on the victim.

36. The appellants *in casu* not only needlessly delivered the deceased and Hine bound to the mob, but having created the clearly dangerous situation they did nothing to prevent the clear and present danger faced by the victims. According to them they just sat there overpowered and did nothing when the deceased and Hine were clearly being assaulted by the crowd arising from what was alleged by the appellants to have been done by the victims at appellant number 1's shop.

37. In my view, this is a matter where, as per counsel from Musingadi, the appellants needed not just to dissociate themselves from the murderous intentions of the mob but needed to go the extra mile in preventing the further assault on Hine and the deceased or its completion. The appellants had, in my view, a duty as outlined in Beahan referred to supra, to make a reasonable effort to nullify or frustrate the effect of their earlier contribution of tying up and delivering the victims to the mob. They failed dismally in that regard.

38. In convicting the appellants, the trial court found at lines 22 to 25 of the judgement, on page 362 of the record, that the appellants never for once told the mob that they had to stop assaulting Hine and the deceased as the appellants intended handing them to the police. I concur and find this failure on their part to be telling in determining whether they were acting in concert with the mob or not.

39. It is furthermore difficult to understand how the crowd or mob of people would have been waiting at the shop if they were not so waiting on information from the

appellants that they had gone to collect the "thieves" and were bringing them to the shop to answer for their thieving "misdeeds". Whilst there is no direct evidence of this, an inference in that regard would not be misplaced and would fit in directly with the principles of *R v Blom* on circumstantial evidence.

40. The appellants positively created a dangerous situation for Hine and the deceased and having so created and rendered the victims defenceless by tying them up, did nothing to assist them in either stopping the attack or calling for help. I struggle to find how their Pontius Pilate version of claiming none- involvement and washing their hands can hold, that is, when it is objectively and judicially assessed.

41. In the light of all the afore going I am unable to fault the trial court's conviction of the three appellants for murder and the first and third for attempted murder. In fact, it is in my view, on the facts proven doubtful whether the second appellant should have benefitted from a section 174 discharge for attempted murder at all but that is not before this court to decide as there was no cross-appeal of the discharge of the second appellant by the state.

42. Accordingly, the following order is made:

42.1 The appeal is dismissed.

M S MONENE A.J
ACTING JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION

I AGREE.

M.V SEMENYA
ACTING JUDGE PRESIDENT OF THE HIGH COURT,

LIMPOPO DIVISION

I AGREE.

G MULLER
JUDGE OF THE HIGH COURT,
LIMPOPO DIVISION

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