Republic of South Africa

REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE No: A 271/2007

In the matter of

MNYAMEZELI MICHAEL MBANYARU — **First Appellant**
LUSINDISO MBANYARU — **Second Appellant**

versus

THE STATE

JUDGMENT DELIVERED : 11 AUGUST 2008

MOOSA, J:

Introduction

1]The appellants were convicted on 21 August 2006 on one count each of murder, of attempted murder and of the unlawful possession of a firearm. On 18 October 2006,

first and second appellants were sentenced to 18 and 14 years imprisonment respectively; on the count of attempted murder they were each sentenced to five years imprisonment and on the count of unlawful possession of a firearm they were each sentenced to three years imprisonment. The court further ordered that the sentences imposed in respect of the attempted murder and the unlawful possession of firearm counts shall run concurrently with the sentence imposed in respect of the murder count. The effective sentences of first and second appellants were accordingly 18 and 14 years imprisonment respectively. The appellants, with the leave of the trial court, come on appeal to this court against their convictions and sentences.

2]Despite the fact that only second appellant formally applied for leave to appeal, the trial court granted both appellants leave to appeal. First appellant did not file his grounds of appeal. Second appellant's grounds of appeal are contained in his application for leave to appeal. Adv **Burgers**, who appeared before us for both first and second appellants, was instructed by the legal aid board. He informed us that he had instructions to appear for both appellants and, despite the fact that no grounds of appeal had been filed for first appellant, he has instructions to pursue the appeal in respect of him also. He indicated that the grounds of appeal in respect of both appellants are substantially similar and he is in a position to argue the appeal in respect of both of them. Adv **Raphels**, for the State, had no objection thereto and the court allowed Adv **Burgers** to put the case to us for both of the appellants.

Grounds of Appeal

3]The grounds of appeal on the merits of the convictions are substantially threefold.

Firstly, that the trial court erred in accepting the identification evidence of the State and rejecting the alibi of the appellants and concluding that the evidence, as a whole, established the guilt of the appellants beyond reasonable doubt. Secondly, that the trial court erred in not rejecting the evidence of Nomasibongwe Patricia Hlobo ("Hlobo") and Phazamile Patrick Dyonase ("Dyonase") because of the material discrepancy in their evidence as to whether or not they saw second appellant in possession of a firearm at the time they were seen running away from the crime scene. Thirdly, that the trial court erred in holding that the crime was executed by the appellants in pursuance of a common purpose. The court will deal with each of these grounds in turn.

The Facts

4]It is common cause that on 13 February 2004 and at Old Faure Road, Khayelitsha, one Nasir Frieslaar ("the deceased") was shot and killed and one, David John Van der Westhuizen ("Van der Westhuizen") was shot and injured. The undisputed evidence is that on the particular day and place the deceased was sitting in the driver side of his stationary bakkie and Van der Westhuizen in the passenger side of the bakkie. The deceased had hooted to indicate to his workmen, who were living in the vicinity, that he had arrived to transport them to their work place. While they were waiting in the bakkie, an assailant appeared at the driver side of the bakkie and, without saying a word, shot the deceased. The deceased slumped forward and later died as a result of shot wounds to the neck and chest. Van der Westhuizen who saw the assailant shooting, crouched in the bakkie to avoid being shot, but discovered later that he had been shot in the chest. He also noticed another person standing behind the assailant. After the deceased was shot, the bakkie which was idling, began careening out of

control across the road, while the assailant was hanging on to the steering wheel. In the process the bakkie crashed against another vehicle and came to rest against the wall on the opposite side of the road.

The Identification

5]Van der Westhuizen was unable to identify the assailant or the person standing behind him. Gobodo Tom ("Tom") who was present at the scene near the bakkie, during the shooting, was likewise unable to identify the assailant with the firearm. He did not see a person standing behind the armed assailant as testified to by Van der Westhuizen. He, however, saw two persons standing at the passenger side of the bakkie. He could not say whether they were involved or not with the armed assailant. He, however, testified that they did not run away when other members of the public ran away while the shooting was in progress. Two State witnesses, namely Hlobo and Dyonase, saw two persons running away from the direction of the crime scene soon after they had heard shots being fired. The two persons ran past them. According to Hlobo one was armed, but according to Dyonase both were armed. I will return to this issue later. Hlobo and Dyonase identified the first and second appellants as the persons who had run past them. Dyonase testified that although it was not daylight, the street lights were still on. The street lighting was good. He had no difficulty in seeing their faces as they ran past him. Hlobo testified that they ran behind each other towards her from the scene of the crime. She had enough time to look at them when they came running towards her and passed a few meters away from her. Van der Westrhuizen testified that when he alighted from the bakkie after the shooting, he saw the assailant and the person standing behind him disappear down the embankment towards the

informal settlement.

6]Hlobo knew both the appellants prior to the incident and also knew their nicknames and where they lived. Both appellants confirmed this in their evidence. First appellant testified that he had a love relationship with Hlobo from 1998 till the end of 1999. Dyonase knew first appellant by sight prior to the incident. This was confirmed by first appellant under cross-examination. However, second appellant testified that he also knew Dyonase by sight. Hlobo and Dyonase attended an identification parade and positively identified both appellants as the two persons who ran past them on the day of the incident. The identification of the appellants is strengthened by the fact that both appellants were known to Hlobo prior to the incident and first appellant was also seen by Dyonase in the area prior to the incident. Hlobo informed the police of the involvement of the appellants and went with them to point out where the appellants lived. In pursuance thereto the appellants were arrested.

Alibi

7]The appellants denied that they were at the scene of the crime or ran away as testified to by Hlobo and Dyonase. The appellants, in their plea explanation, said that they were at home on the morning of the incident. They testified that on the morning they woke about 07:00 and went to work as usual, at the business of first appellant's brother and second appellant's uncle, namely Mzwandile Mbanyaru ("Mbanyaru"). They testified that they were not at the scene of the crime. They were busy helping Mbanyaru in the business the whole day. This was confirmed by Mbanyaru who was called by first appellant to testify for him.

8]The principal reason the trial court gave for rejecting the alibi defence of the appellants, is *"that it cannot reasonably possibly true in the light of the evidence of Hlobo and Dyonase to the effect that they, quite independently, saw the accused running from the bridge that morning".* The trial court came to that conclusion after making a credibility finding in respect of the appellants and Mbanyaru. The trial court said: *"In considering the alibi defence of the accused, I must immediately point out neither one of them made a very good impression on me, nor did Mzwandile Mbanyaru, who was apparently related to both of them, although differently".* It is a trite principle of our law that a court of appeal will not easily interfere with the credibility findings of a trial court which sees and hears the witnesses in person, is steeped in the atmosphere of the trial and is furthermore in an advantageous position to observe their demeanour (**R v Dhlumayo and Another** 1948 (2) SA 677 (A) at 677-678).

9]It is improbable that Hlobo could have made a mistake with regard to the identification of the appellants. They lived in the same area. She knew where they lived. She knew their nicknames. She volunteered the information of their possible involvement immediately after the incident and pointed out to the police where the appellants lived. She is corroborated by the appellants that they are known to her. She is also corroborated by Dyonase who places both appellants at the scene of the crime and who identified both of the appellants at an identification parade and in court. First appellant corroborates the evidence of Dyonase that they knew each other by sight. Although Dyonase testified that he did not know second appellant prior to the incident, the latter

confirms that he knew Dyonase by sight. In my view the trial court correctly ruled out the question of mistaken identity on the part of both Hlobo and Dyonase in respect of the appellants. In view thereof, the alibis of the appellants, as the trial court correctly found, could not be reasonably possibly true. I am satisfied, on the totality of the evidence, that the two persons running away from the scene of the crime, at the time of the incident, were the appellants as testified to by Hlobo and Dyonase.

Were both the appellants armed as alleged by Dyonase or only one as alleged by Hlobo?

10]The next question to be determined is whether both the appellants were armed as alleged by Dyonase or only first appellant as alleged by Hlobo. This constitutes the second ground of appeal. Appellants argued that the trial court erred in not rejecting the evidence of both Hlobo and Dyonase as they contradicted themselves on a material point as to whether only first appellant was armed or both were armed. The trial court found that both the first and second appellants were armed. The only eye witness who places the second appellant in possession of a firearm at the time the appellants were fleeing from the crime scene, is Dyonase. Hlobo did not see the second appellant in possession of a firearm at the time. The trial court accepted the evidence of Dyonase that both were armed at the time. However, the trial court did not deal with the contradiction in the evidence of Hlobo and Dyonase on this aspect. In my view the objective evidence and probabilities do not support the conclusion of the trial court in respect thereof.

11]In the first place the ballistic analysis performed on the fired cartridges found at the crime scene and the fired bullets retrieved from the deceased's body, confirm that the

bullets were fired from one and the same firearm. In the second place, Dr Brouwer, who performed the post-mortem examination on the body of the deceased, confirmed that the shots were fired at the deceased at point-blank range. In the third place, Van der Westhuizen testified that he saw one person, at the half open window on the driver side of the bakkie, with a firearm; he saw the person putting the firearm through the opening of the window and shooting at the deceased; and he noticed another person behind the assailant but did not observe him shooting or noticed him being armed. In the fourth place, Tom, after hearing a bang, turned around and noticed a person at the driver side of the bakkie with a firearm and, while the bakkie was moving towards him, the shooting continued; he also observed two other persons on the passenger side of the bakkie, but he did not notice any firearms in their possession.

12]In the fifth place, Willem Diederick Basson ("Basson") testified that he spoke to two of the workers of the deceased at the scene of the crime. They informed him that soon after they heard shots, they saw two men running down the bridge from the direction of the bakkie and past them, one of them had a firearm in his possession; under cross-examination he identified the one of the two workers he spoke to, as Dyonase. In the sixth place, Themba Matwe ("Matwe") testified that he spoke to bystanders at the scene of the crime who told him that they saw two persons running away from the scene of the crime and one of them was armed. The evidence of both Basson and Matwe, although hearsay, on the one hand, is in direct contrast to the evidence of Dyonase and, on the other hand, gives credence to the evidence of Hlobo that only first appellant was armed. In the seventh place, if two of the assailants had firearms, it is probable that the second assailant would have produced the firearm on the bridge

where the incident took place and not when they were fleeing from the scene of the crime. The overwhelming evidence, objective facts and probabilities point to the fact that only one firearm was used. This is consistent with the evidence of Hlobo and inconsistent with the evidence of Dyonase. The possibility that he could have been confused and made a *bona fide* mistake, by testifying that the second appellant also had a firearm, cannot be excluded.

13]In the light of the objective evidence, I re-iterate that the persons Hlobo and Dyonase saw running away from the scene of the crime were appellants as found by the trial court. I further find that only first appellant was armed and second appellant was not armed. I am satisfied that the trial court misdirected itself by holding that second appellant was also armed. In this regard the trial court, for the purpose of its reasoning in the judgment, ignored the evidence of Hlobo and assumed the correctness of Dyonase's evidence to the effect *"that each of the persons he saw running from the bridge was carrying a firearm".* On the basis of such assumption, the trial court concluded *"that the two persons seen running from the bridge by Dyonase perpetrated or were involved in the attack on the deceased and Van der Westhuizen".* In coming to such conclusion, the trial court failed to evaluate an important contradiction between the evidence of Hlobo and Dyonase on the basis of probabilities, regarding the question of whether second appellant was armed or not. In my view the reasoning of the trial court was accordingly flawed and led to an incorrect finding of fact.

Common Purpose

14]I now turn to the third ground of appeal namely, the question of common purpose. It

is common cause that the State relied on the doctrine of common cause to convict the appellants. The trial court correctly found that the common purpose was not based on prior agreement. It is settled law that, in the absence of prior agreement, an accused charged with murder based on common purpose and whose actions are not causally related to the death of the victim, can only be convicted if certain prerequisites are met. They are firstly that, he must have been present at the scene of the crime; secondly, that he must have been aware of the assault; thirdly, he must have intended to make common cause with the person or persons perpetrating the assault; fourthly, that he must have manifested his sharing of the common purpose by himself performing some act of association with the conduct of the perpetrator or perpetrators and lastly, he must have had the requisite intention ie the *mens rea*. (**S v Mgedezi & Others** 1989 (1) SA 687 (A) at 705I-706B.) The court can only convict an accused for murder if he had formed the common purpose before the fatal blow was delivered. (**S v Motaung and Others** 1990 (4) SA 485 (A) at 520G-521A.) No liability in terms of the doctrine of common purpose can arise for acts committed after the attainment of the common purpose (**R v Garnsworthy & Others**1923 WLD 17). Where no common purpose can be proved, no liability can arise in terms of the doctrine of common purpose (**S v Petersen** 1989 (3) SA 420 (A) at 425G-426A).

15]I have earlier found that that the first appellant was armed and second appellant was not armed at the time they were fleeing from the scene of the crime. There is no direct evidence to link appellants to the crime. Both Van der Westhuizen and Tom testified that they saw a person at the driver side of the bakkie with a firearm, shooting at the

deceased. They were not able to identify the person. Van der Westhuizen testified further that he saw *"the shooter"* and a second person standing behind him, disappearing down the embankment after the bakkie came to a standstill on the opposite side of the road. I have already found that the two persons who disappeared down the embankment were the first and second appellants. Having found that only first appellant was armed, the only reasonable inference the court can draw is firstly, that first appellant was the person who was seen by Van der Westhuizen and Tom at the passenger side of the bakkie, shooting at the deceased and Van der Westhuizen in the bakkie and secondly, the person standing behind him as testified to by Van der Westhuizen, was second appellant. (**R v Blom** 1939 AD 188 at p 202-203.)

16]Because of second appellant's presence at the scene of the crime,, he must have been aware of the shooting. There is, however, no evidence that he had intended to make common cause with first appellant or had manifested a common purpose by performing some act of association with the conduct of first appellant or had the necessary *mens rea*. The only incriminating evidence against second appellant is that, after the shooting, he ran away with first appellant who was armed. There is also evidence that many other persons ran away from the scene after the shooting. In my view the mere presence and running away from the scene of the crime with the perpetrator, do not meet the requisites of common purpose as set out above. (See **S v Petersen** *(supra)*.) The trial court held that the presence of second appellant on the facts of this case *"go beyond mere presence and, in itself, constitutes an act or acts of association that are sufficient to satisfy the requirements for the establishment of a*

common purpose". I cannot agree. In my opinion that finding is clearly wrong and a misdirection in that it stretches the doctrine of common purpose beyond reasonable and legitimate boundaries.

Finding

17]Although second appellant was at the scene of the crime, I am not satisfied that the State has proved the guilt of the second appellant beyond reasonable doubt. He is, therefore, entitled to his acquittal on all the charges. As far as the first appellant is concerned, I am satisfied that the trial court was correct in rejecting his alibi as not reasonable possibly true and convicting him on counts one, two and three.

Sentence

18]I now turn to consider the sentence of the first appellant. He was sentenced to 18 years imprisonment on the murder charge (count one), five years on the attempted murder charge (count two) and three years on the unlawful possession of the firearm (count three). The trial court further ordered that the sentences on counts two and three run concurrently with the sentence imposed in respect of count one. He was effectively sentenced to 18 years imprisonment. It is a trite principle of our law that the imposition of sentence is pre-eminently a matter for the discretion of the trial court. The appeal court will only interfere with the sentencing discretion of the trial court, if it has misdirected itself in a material respect, or if the sentence imposed was shockingly inappropriate or that no reasonable court would have imposed such sentence, or where the discretion was not exercised reasonably or properly. (**S v Rabie** 1975 (4) SA 855 (A) at 857D-E; **S v Pieters** 1987 (3) 717 (A) at 727F-H and **S v Malgas** 2001 (2) SA 1222 (SCA) at para 12.)

19]The first appellant was sentenced on the basis that he committed the murder in the execution or furtherance of a common purpose as envisaged in terms of Section 51(1)(a) of the Criminal Law Amendment Act, 105 of 1997, ("the Act") which attracts life imprisonment in the absence of substantial and compelling circumstances. I have found that the State has failed to prove common purpose. From the evidence it is quite clear that it was a cold, calculated and callous murder perpetrated on a defenceless victim. The close range at which the shots were fired, shows that *dolus directus* or direct intention to kill was present. I have found that while the deceased was waiting for his workmen to arrive, first appellant appeared and without saying a word, shot the deceased and then ran away. The State did not advance any motive for the murder. This was conceded by Adv **Raphels**. From the circumstances, the only reasonable inference I can draw is that the murder was planned or premeditated as envisaged in Section 51(1)(a) of the Act.

20]In the light of all the circumstances and the facts found by me, I am satisfied that there are substantial and compelling circumstances not to impose the minimum sentence of life imprisonment. Although the sentence, on the face of it, appears to be lenient and I may have considered imposing a heavier sentence sitting as a court of first instance, I do not regard the sentence imposed by the trial court in respect of the three counts, as unreasonable or inappropriate. I would accordingly exercise my discretion to impose the same sentence. The only altered circumstances faced by this court in relation to the trial court on the question of sentence, is the fact that this court specifically made a finding for reasons given, that the first appellant was the actual

perpetrator whereas the trial court did not make such a finding. The trial court found that it was unable to make a finding as to who was the actual perpetrator.

Conclusion

21]In the premises I am of the view

a) that the appeal of second appellant should succeed, his conviction and sentence on all counts should be set aside and he should be acquitted and

b) that the appeal of first appellant should be dismissed and his conviction and sentence on all counts should be confirmed.

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E MOOSA

BOZALEK, J: I agree. ……..

L BOZALEK

DLODLO, J: I agree. ……..

D V DLODLO

For Appellants : Adv P J Burgers
Attorneys) : Cape Town Justice Centre

For Respondent : Adv S Raphels

Heard on 21 July 2008

Bench: Moosa, Bozalek et Dlodlo, JJ