IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: A523/2010

DATE: 19 NOVEMBER 2010

In the matter between:

THEMBELANI SOPHAZI	1st Appellant
THULANI SOPHAZI	2nd Appellant
MUDI MBABE	3rd Appellant
WITNESS SOPHAZI	4th Appellant
SIBONGILE KETHANI	5th Appellant

and

THE STATE	Respondent

J U D G M E N T

BOZALEK, J:

On 23 June 2009 the appellants were charged in the Cape Town Regional Court with the murder of Luandiso Sifile. The appellants were legally represented and pleaded not guilty to the charges, none offering a plea-explanation. On 29 March 2010 all appellants were convicted of murder and were each sentenced, pursuant to the provisions of the Criminal Law Amendment Act 105 of 1997, to 15 years imprisonment. The appellants now appeal, with the leave of the magistrate,

against both conviction and sentence.

It is common cause that the victim, a man aged about 25 years, was killed in Potsdam Road between Site 5 and Dunoon informal settlements on the night of 21 March 2008. The *post-mortem* report revealed that the cause of death was multiple stab wounds to the chest, the head and the abdomen. The deceased sustained no less than 45 stab wounds. In addition, there were extensive skull vault comminuted fractures, a linear fracture of the occipital bone on the left middle cranial fossa and extensive sub-scapular haemorrhage.

The evidence as to who killed the deceased was fragmentary and also the subject of dispute. The most crucial evidence was that of a Mr Ayanda Mzuko, who testified that he was walking with the deceased along Potsdam Road that night when a car travelling at a high speed stopped and the occupants spilled out. Some of them were armed with screwdrivers and others with knives and they accosted two young men on the other side of the road.

The deceased crossed the road to find out what the problem was, since he apparently knew one of the men being accosted. One of the vehicle's occupants grabbed hold of the deceased and then the group began to stab him whereupon the two

young men originally accosted, ran away. Mzuko ran off to inform the deceased's family and when he returned he observed a police van on the scene and the deceased's body in the road near the group's vehicle. I shall return to his identification evidence later.

The other major State witness was Captain Nyati. He responded to a report of fighting in Potsdam Road at about 10 p.m. that night. On arrival he found the vehicle used by the appellants and, lying on the road, the deceased, still in the process of being attacked. Captain Nyati tried to protect the deceased from the group of five men whom he described as very angry. He called for backup and noticed the group was also in conflict with people from the surrounding area. He made specific observations of the role of two of the group, to which I will revert, and, when backup arrived, he pointed out the group of five men to the relieving policemen and specifically gave an instruction that those two must be arrested.

Another Police Officer, Dovey, testified and confirmed that he arrested two suspects on the instructions of Captain Nyati. Nyati had been accompanied by another policeman, one Lebejo (no rank given), and he confirmed the broad outline of Nyati's evidence. He added that when they arrived on the

scene most of the group were throwing stones at persons on the other side of the road whilst two of their number were assaulting the deceased as he lay on the road. The final State witness was Inspector Gertner, part of the reinforcements which arrived. He testified that Nyati pointed out five men involved in the killing and that he proceeded to arrest one of them.

Neither third appellant nor fifth appellant testified. The remaining appellants testified but called no witnesses. The general outline of their evidence in each case was that a stone had been thrown at and hit the car in which they, the five appellants, had been driving through the area. They turned back and stopped alongside two men to enquire from them whether they knew anything about the incident. The appellants were then attacked by a group of persons in the vicinity and some of their number were stabbed. They fought to defend themselves until the police arrived. They had no idea how the deceased was killed, denied any involvement therein and appeared to suggest that he had been a victim of the group or groups which had attacked them.

In convicting the appellants the magistrate accepted the evidence of the State witnesses and rejected that of the appellants where it conflicted with the State witnesses. She

expressed herself satisfied that the appellants had been correctly identified. She also found that Captain Nyati was an outstanding witness, a conclusion which is borne out upon a reading of his evidence. I might add that his conduct in the dangerous circumstances in which he found himself that night was also outstanding.

On the basis of certain proven facts, namely that five persons were standing around the deceased, some of them assaulting him, two of them having been seen either kicking or beating the deceased with a steel pipe, two being found with knives in their possession and all having blood on their hands and clothes, none of them being so injured that they could no longer fight, the evidence that they acted as a group, the fact that they had to be restrained by the police and were in a rage and still attempting to get at the deceased, the magistrate concluded that this was a case where all the appellants' guilt had been proven in terms of the doctrine of common purpose. The magistrate concluded further that it was clear from the conduct of the appellants at the scene of the crime that they all associated themselves with the acts of the others and had sought to attack the deceased together.

On appeal it was contended that there was no evidence that the deceased had been stabbed by any one of the appellants,

no evidence suggesting that other appellants were aware that the deceased was stabbed one or other co-appellants, no evidence to show that the appellants associated themselves with the killing of the deceased nor any evidence which suggested that any of the appellants intended to kill the deceased or to contribute to his death.

In my view, the core issues in this appeal are the question of whether the requirements of the doctrine of common purpose were met and generally, whether there was sufficient evidence to establish beyond reasonable doubt the guilt of each appellant. In S v Mgedezi & Others 1989 (1) SA 687 AD, the Appellate Division set out the requirements in order to establish the guilt of an accused using the doctrine of common purpose in the following terms:

> "In the absence of proof of a prior agreement, accused 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 & 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 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 them being killed and performed his own act of association with recklessness as to whether or not death was to ensue."

The Court emphasised further that a court was under:

"a duty to consider the evidence of each accused separately and individually, to weigh up that evidence against the evidence of the State witnesses who implicated the accused, and upon that basis to assess whether the accused's evidence could reasonably possibly be true."

The Court was further obliged:

"...to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose."

I propose to embark upon such an exercise in relation to each of the appellants.

First Appellant:

First appellant testified and placed himself on the scene. Captain Nyati identified the first appellant as being armed with an iron bar with which he saw the appellant strike the deceased as he lay on the ground. This steel pipe or bar was found later in the appellants' vehicle and is clearly a deadly weapon. When the reinforcements arrived, Nyati asked the first appellant his name, which he duly provided. Nyati noted that the appellant had blood on his clothes. He pointed him out to Inspector Gertner and instructed that he be arrested.

The latter testified that he approached first appellant, who identified himself by name. He noted that his hands and

clothing were stained with blood and that he was armed with a knife and a steel pipe. He refused to hand these over but placed them in the back of the vehicle. Gertner arrested the first appellant. In his evidence, the first appellant denied any part in the attack upon the deceased or using or possessing a metal pipe or a knife that night. He admitted that he had been bloodstained but explained that this was the blood of a fellow appellant whom he had helped when he had been stabbed. He stated that the limits of his own fighting were using his fists and throwing stones back at the crowd of attackers.

In my view, the magistrate correctly rejected the first appellant's evidence where it conflicted with that of the State witnesses and correctly held, in relation to the incident as a whole, that the deceased had been killed by no one other than some or all members of the group constituting the appellants. Both the evidence and the probabilities point overwhelming in this direction. Quite clearly, one or more groups of nearby residents had tried to intervene to curtail the assault by the appellants on the deceased and this had led to the general fighting. There is not a jot of evidence to support the illogical proposition that the deceased was killed by nearby residents.

It is also important to note that the appellants were part of a small group who found themselves in foreign territory, so to

speak, at night and came under attack from surrounding residents. In these circumstances, they would have kept close together to defend themselves.

Accepting the evidence of Captain Nyati and Inspector Gertner, it was clearly proven that the first appellant was present at the scene where the violence was committed. He must have been aware of the assault upon the deceased and must have intended to make common cause with those who had earlier assaulted the deceased. His striking of blows to the head of the deceased with a metal pipe admits of only one intention, namely, to kill the deceased and his act in doing so, if not rendering him guilty of murder on the basis of direct participation, at the very least manifested his sharing of the common purpose of the group and was an active association with the conduct of those who inflicted all the other fatal wounds. The first appellant was no passive spectator and performed his act of association before the deceased's death. In my view he was correctly convicted of murder.

Second appellant:

Mzuko identified the second appellant as being a stocky person armed with a knife who, by the time the police arrived, had a naked torso and a belt tied on each of his upper arms. He was, in other words, in full fighting mode. At this stage,

Mzuko also noted that the second appellant was close to where the deceased lay and was unsuccessfully attempting to pick up a heavy kerbstone, the clear implication being that he wanted to further assault the deceased with this stone or rock. Mzuko saw the second appellant being arrested by the police.

Dovey testified that he arrested the second appellant and upon searching him, he found a knife tucked "behind his belt and between his bum cheeks". Second appellant identified himself by name to Dovey who noted that there was blood on the blade of the knife. When the second appellant testified he conceded that he had been found in possession of a knife and had been bare-chested. He stated that his shirt had been cut by an assailant armed with a knife and he himself had then torn off the remains of the shirt. He had disarmed the attacker and this was the knife with which he was found by the police, but in his hand and not hidden on his person.

Again, in my view, the magistrate was correct in rejecting the appellant's evidence where it conflicted with that of the State witnesses. His account of how he came to acquire the knife, to be bare-chested and his disavowal of any knowledge of how the deceased was killed is, in my view, utterly improbable. In all the circumstances, the only reasonable inference to be drawn, and one which is consistent with all the facts, is that

the appellant used the knife found hidden on his person to stab the deceased. Furthermore, his act of trying to lift the heavy kerbstone clearly to further assault the deceased, was an act of association with his co-appellants and manifested his sharing of a common purpose with the conduct of his co-appellants in murderously assaulting the deceased.

Second appellant was present at the scene and must have been aware of the assault upon the deceased and clearly intended to make common cause with his co-assailants. He could only have intended to kill the deceased through stabbing him or dropping the kerbstone on him. I can see no basis upon which to interfere with the second appellant's conviction.

Third Appellant:

Only Dovey testified directly regarding third appellant's involvement, stating that he arrested him and searched him but found no weapon upon him. Mzuko could identify no particular act performed by the third appellant, whilst Nyati and Gertner's evidence took the case against the third appellant no further. Lebejo's evidence was that, of the group, four were throwing stones at men on the other side of the road when he arrived. Given the lack of any concrete evidence as to the role of the appellant in the deceased's death, in my view the State failed to prove all the elements necessary for his liability in terms of

the common purpose doctrine.

In particular the State was unable to point to some active association on the part of the third appellant as a manifestation of his sharing a common purpose with the others. The appellant did not testify but, given the deficiencies in the State case, I do not consider that the State had established a *prima facie* case which called for an explanation from him and which, in the absence thereof, established his guilt beyond reasonable doubt. See in this regard Osman v Attorney General Transvaal 1998 (2) SACR 493 (CC). In the result, I am of the view that the appellant's appeal against his conviction must be upheld.

Fourth Appellant:

Captain Nyati identified the fourth appellant as being on the scene and assaulting the deceased by kicking him, together with the first appellant who was using the metal pipe. The kicking by fourth appellant took place before the deceased died. Both men, according to Nyati, were angry, were swearing, were in a fight and wanted to "finish off" the deceased. When the reinforcements arrived, he instructed that the fourth appellant be arrested. The fourth appellant then identified himself by name. Nyati instructed Gertner to arrest two suspects, one of them being fourth appellant.

Gertner testified that he arrested the first appellant only, adding that the other four or five men had blood on their clothing and hands. Gertner did not testify that he arrested the fourth appellant but the latter confirmed in his evidence that he was present on the scene. In his evidence the fourth appellant confirmed that he had been arrested at the scene. He testified that he had nothing to do with the killing and had himself been stabbed three times in his back. He too, improbably, denied any knowledge of how the deceased came to be killed. He stated that he was the innocent victim of an unprovoked assault and he dismissed Nyati's evidence of him kicking the deceased before his death as "a mistake".

For the same reasons expressed earlier, I can consider that the fourth appellant's evidence, where it conflicted with that of Captain Nyati's, must be rejected. His account of events and in particular his denial of any knowledge of how the deceased came to be killed, is most improbable, as is his account of being stabbed for no apparent reason. In my view, the fourth appellant's act of joining in the final assault up the deceased by kicking him after he had been repeatedly stabbed and at the same time as the first appellant was raining blows upon the deceased's head with a steel pipe, constituted an act of association sufficient to establish his criminal liability on the

charge of murder under the doctrine of common purpose.

The fourth appellant must have been present at the scene while the extensive attack upon the deceased was being carried out and indeed must have witnessed this. The evidence is clear that a small group of men rounded upon the deceased. Similarly, the evidence establishes beyond reasonable doubt that the fourth appellant must have intended to make common cause with these persons. For these reasons, I consider that the fourth appellant was properly convicted of murder.

Fifth Appellant:

Fifth appellant's case is similar to that of the third appellant. He did not testify and nor was he specifically mentioned in evidence by any of the State witnesses. Although he was part of the group of five who were travelling in the vehicle and must have been present at the scene and aware of the assault upon the deceased, I consider that the State failed to prove beyond reasonable doubt that he intended to make common cause with his fellow appellants, and in particular that he performed some act of association to manifest his association therewith or that he intended to kill the deceased.

I, furthermore, consider that the State's case against the fifth appellant insufficient to render his failure to testify

instrumental in turning a *prima facie* case into one where his guilt was proved beyond reasonable doubt. In the circumstances, I consider that his appeal against conviction must succeed.

Ad sentence:

There remains the appeals against sentence. In terms of the provisions of Act 103 of 1998, the magistrate found that there were no substantial or mitigating circumstances justifying the imposition of a sentence less than the prescribed minimum sentence of 15 years imprisonment. On appeal it is contended that the appellants' personal circumstances, their lack of any previous criminal convictions and the fact that they were under the impression that there was an attempt to hijack them, which in itself constituted provocation and ought to be viewed as a mitigating factor, constituted substantial and compelling circumstances justifying the Court in departing from the minimum prescribed sentence.

In S v Vilakazi (567/07) [2008] ZASCA 87(2) (September 2008), the Supreme Court of Appeal per Nugent, JA stated that:

> "The essence of Malgas and of Dodo is that disproportionate sentences are not to be imposed

and that the courts are not vehicles for injustice. Whether a sentence is proportionate cannot be determined in the abstract but only upon a consideration of all material circumstances of the particular case, bearing in mind what the legislature has ordained and the other strictures referred to in Malgas."

It is trite law that a court of appeal has limited competence to interfere with sentences imposed by a trial court. It may do so only if the exercise of the trial court's discretion is vitiated by a misdirection as to the law or the facts or if the sentence imposed is so inappropriate as to indicate that such discretion has not been properly exercised. See S v Fazzie 1964 (4) SA 680 at 68, S v Van Eck 2003 (2) SACR 563 (SCA) at 568e. In S v Malgas it was held that:

"All factors ... traditionally taken into account in sentencing (whether or not they diminish moral guilt) continue to play a role. None is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing, must be measured against the composite yardstick "substantial and compelling" and must be such as

cumulatively justify departure from the standardised response the legislature has ordained."

But the Court also held that:

"The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubt as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded."

The first appellant was 30 years old at the time of sentencing and married with two young dependants. He was employed, earning R3 500,00 per month, and had matriculated. The second appellant was 37 years old, married with one young child and was self-employed. He had Grade 8 education. The fourth appellant was 35 years old, unmarried with two young dependants, was unemployed and had Grade 10 education. The appellants' personal circumstances were, therefore, favourable. However, there were in my view no other mitigating circumstances present.

There was little evidence, subjective or objective, to support the contention that the appellants believed they were going to be hijacked. The facts are that a stone was thrown at the vehicle. There was nothing to stop the appellants driving away. Instead they turned back, stopped and accosted two young men at the side of the road. When the deceased intervened they turned on him and vented their anger in the most horrifying and brutal manner. They could hardly have believed that the deceased had done them or meant them any real harm since, if he was the stone thrower, it is most unlikely he would have crossed the road and come to the aid of the two men whom they initially accosted.

The nett outcome of this tragic event was that a young man was brutally murdered when he came to the aid of others. I can find no provocation or mitigating circumstances in the circumstances of this killing at all. The magistrate took the appellants' personal circumstances into account in concluding that there were no substantial and compelling circumstances present. She noted correctly that none of the accused had shown any remorse.

I am not persuaded that the magistrate erred in not departing from the minimum prescribed sentence. Indeed, even were the

minimum sentencing provisions not applicable, in my view the sentences imposed were entirely proportionate and appropriate having regard to the personal circumstances of the appellants, the nature and seriousness of the offence and the interests of the community. For these reasons, I consider that the appeals against sentence have no merit. In the result I would make the following order:

1. The appeals against conviction and sentence in the case of the third and the fifth appellants are upheld and their convictions and sentences are set aside.

2. The appeals against conviction and sentence by the first, second and fourth appellants are dismissed and their convictions and sentences are confirmed.

BOZALEK, J

WEYER, AJ: I so agree and it is so ordered.

WEYER, AJ