IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No. **A153/18**

In the matter between:

GLADYS TSOTETSI Appellant

and

THE STATE Respondent

Coram: Steyn, J et Myburgh, AJ
Date of hearing: 13 September 2019
Date of judgment: 13 September 2019

JUDGMENT

MYBURGH, AJ

Introduction

[1] The appellant was charged, along with Sindiso Mgudlwa ('Mgudlwa'), in the Blue Downs Regional Court with one count of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act (CLAA) 105 of 1977: Part One – Common Purpose Doctrine, in that on 9 May 2014 near Mfuleni in the Cape, she intentionally and unlawfully killed Mr Avumile Nkuwzana, ('the deceased'), by assaulting him. The appellant was represented throughout. She elected not to make use of assessors and she was made aware of the minimum sentence legislation as well as the relevant competent verdict. She indicated that she understood the charge and pleaded not guilty without a plea explanation.

[2] On 19 June 2017 the appellant was convicted of murder based on the common purpose doctrine with direct intent and premeditation. On 3 August 2017 the magistrate, in an unorthodox and surprising manner gave a 'supplementary judgment' dealing with common purpose and mens rea and detailing the actions of the appellant towards the deceased that indicated that she wished him dead, rather than demonstrating that she contributed to his death. The appellant was sentenced to life in prison on 3 August 2017. On 10 August 2017 the appellant applied for bail, which was refused and she remained in custody. This is the appellant's automatic appeal in respect of both her conviction and sentence.[1]

[1] Mgudlwa prevailed in his appeal and his conviction and sentence were set aside.

The evidence

[3] The state called six witnesses, the first of which was Mr Nsikelelo Mvumvu ('Mvumvu'), the chairperson of the SAPS Forum and neighbourhood watch in the area. Mvumvu testified that he was on his way to a Women for Peace gathering on 9 May 2014 when he passed the appellant's home in Nocobu Street, Mfuleni. He was acquainted with the appellant, who he called Nthabiseng or Tsotetsi. They lived in the same area for years. His evidence of what he observed must be seen in the context of the following facts: The community suspected the deceased of having stolen the appellant's daughter/niece's cell-phone.[2] He was apprehended by the community and then a vigilante mob assaulted him. He was dragged to the property of the appellant, by which time he was naked and bound by the hands and feet. By the time Mvumvu saw him he was barely alive.

[4] It was after 17h00 that Mvumvu arrived at the appellant's home, on his way to a meeting. He saw people outside the house and he saw the deceased, his hands and feet bound by wire. The deceased was being pulled or dragged by the appellant from the road into her yard. A young man, who he did not know, was helping her. There was a large crowd on the scene. Mvumvu noticed the deceased's teeth were broken and his face was swollen. He observed that the appellant had a pair of pliers, which she was using to hit the deceased and to remove some of his teeth. The autopsy report noted that teeth were broken rather than removed. This detail is not material.

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[2] The appellant's niece, Nontsiki, was referred to on a number of occasions as well as in the appellant's statement as her daughter. However, whilst giving her evidence in chief, she indicated that Nontsiki was her sister's daughter.

[5] The appellant told Mvumbu that the deceased had stolen her daughter's phone. While he was talking to the appellant, Mgudlwa arrived and threw salt on the injured person's face and kicked the deceased. On appeal it was found that Mvumvu's evidence regarding the throwing of salt did not pass muster and that Mgudlwa had possibly only tapped the deceased on his back. Mvumvu testified that the appellant told Mgudlwa to stop what he was doing, as she would kill the man herself. Mvumvu and the appellant had words as the former wanted her to stop assaulting the deceased. However, as he feared that he might be assaulted by bystanders, he left. The deceased was moving and was still alive. Mvumvu called SAPS. When he returned to the scene, after SAPS had arrived, he was castigated by a woman for interfering.

[6] Under cross-examination, Mvumvu testified that he had been at the appellant's home for approximately five minutes. It was put to him that it was the community and not the appellant who dragged the deceased from the road into her yard. However, he did not waiver and reiterated that it was the appellant and that he had spoken to her (and not the community) regarding what she was doing. He explained that his purpose in entering the appellant's yard and speaking to her was to convince her to stop what she was doing. The appellant told him that the deceased and two others had robbed her daughter of her cell phone. When he encouraged her to allow SAPS to deal with the situation, she declined and said she would kill the deceased herself and come to court to account for it.

[7] It was put to Mvumvu that the appellant would deny all his testimony regarding her involvement in the incident. The appellant would also deny that she pulled out some of the deceased's teeth with pliers. Mvumbu remained resolute and insisted that his testimony was correct.

[8] While Mvumvu was resolute under cross-examination, two characteristics of his testimony are significant: Firstly, it was limited in the sense that he arrived on the scene after the deceased had already been severely wounded. He thus was not in a position to testify to the circumstances surrounding the assault that preceded his arrival on the scene and neither could he shed any light on the interaction between the appellant and those who assaulted the deceased. Secondly, his testimony as a whole was undermined by his evidence regarding Mgudlwa throwing salt, which was improbable and not corroborated by any other witness.

[9] The state called another five witnesses of which Sergeant Thebelo Mofuka ('Mofuka') was the first. She was called to the incident, presumably after Mvumvu had notified SAPS of the vigilante attack. When she arrived, there were many people both surrounding the property and inside the yard of the appellant, where SAPS found the deceased, naked and bound at his hands and feet, and at the time, still alive. The appellant identified herself to Mofuka as the owner of the property. The people inside the yard were upset and unruly. She summoned an ambulance for the injured man. The appellant told Mofuka that the deceased had stolen her daughter's cell phone and that the deceased should be left in the yard to die.

[10] Under cross-examination Mofuka testified that the appellant looked angry, remonstrating that the incident could have caused her daughter to give birth prematurely. Mofuka also testified that there were between 60 and 100 people at the site when she arrived and reiterated that at that stage the deceased was still alive. She tried to speak to him, but he did not answer. It was pointed out to her by the appellant's legal representative that her attempted conversation with the appellant was not mentioned in her statement. Mofuka, given the time she arrived at the scene, was not in a position to give any evidence as to whom

assaulted and/or killed the deceased. In summary, thus, she testified to the expression of an intent to kill on the part of the appellant, but she was not in a positon to testify to the assault in itself, save that the deceased was already severely wounded by the time she arrived.

[11] The next witness for the state was Mr Clinton Scheepers ('Scheepers'), a member of the Mfuleni neighbourhood watch, who attended the scene once SAPS had already arrived. The appellant, who he said had pliers in her hand, did not want to allow the deceased to be taken away by ambulance. He testified that the deceased was 50% conscious and badly injured and that someone threw water from a bucket on the man. Warrant officer M E Ntlebi ('Ntlebi'), who investigated the scene with Mofuka, then testified that the appellant told him about the theft and that the deceased had been caught by the community. He saw the deceased lying on the ground, bound at his hands and feet. He was still alive. SAPS managed to get him into an ambulance with difficulty due to resistance from the appellant and the community.

[12] Constable Mtsolongo ('Mtsolongo'), who testified in similar vein to the other SAPS' witnesses, added that the deceased had tried to talk to him but that he could not make out what he was saying. Mr Eric Nobumba (*Nobumba'*), who lives in Mfuleni and knew both the appellant and Mgudlwa, testified that he went to the scene to investigate out of curiosity. He saw the deceased at the house of the appellant. The deceased was covered in blood. There were many other people there at the time. Nobumba, other than confirming the appellant's presence at the scene, did not implicate her. Scheepers, Ntlebi, Mtsolongo and Nobumba, while good witnesses, could not shed light on the assault of the deceased due to the timing of their arrival on the scene.

[13] Mr Timothy Harris ('Harris') testified about a statement made by the appellant. This gave rise to a trial within a trial regarding the admissibility of the extra-curial statement which was marked as exhibit "C". It is important to locate the statement within the chronology. The incident occurred on 9 May 2014. The appellant made her statement on 1 July 2014. At that stage she was not a suspect. Mvumvu made his statement on 7 July 2014 and statements were also made by Nobumba and Mr Siyabulela Bosch subsequent to the appellant making hers.

[14] On the strength of the subsequent statements SAPS decided to charge the appellant. She was arrested and charged on 5 August 2014. (The record shows that she was on bail until the date of her conviction in June 2017.) While Harris was cross-examined at length about the status of the appellant when she made the statement, his evidence was clear that she was not a suspect when she made the statement. She did so voluntarily and at the time it was envisaged that she would be a witness in the trial, not an accused. He indicated that the statement was taken down in English and not isiXhosa as the appellant understood English and indicated that she was comfortable making the statement in English. In my view the learned magistrate correctly admitted the statement on the basis that the appellant had not been arrested, accused or detained at the time and was not yet a suspect.[3]

[15] In her statement the appellant volunteered that is was she who bound the deceased's hands and feet after he had been brought to her property by the community, attempted to escape, been captured by them and brought back once more. She said the deceased, while bound had attempted to push open a door and it was then that the community assaulted him. She said that she was not able to stop the community from doing so. There were numerous contradictions

[3] The learned magistrate referred to *S v Langa* 1998 (1) SACR 21 (T) and *S v Ngwenya* 1998 (2) SACR 503 (W).

between the statement, the versions put to the state witnesses and the appellant's evidence, the most telling of which was her admission that she had tied up the deceased.

[16] **Applications in terms of s 174 of the Criminal Procedure Act were argued and refused, in my view correctly so in respect of the appellant.**

[17] The appellant then testified in her defence, stating that the deceased stole her niece's cell phone and was apprehended and assaulted by the community outside her house. She was not able to prevent the community from doing so and at no stage did she have the pliers referred to by Mvumvu. Apart from telling Mvumvu that the deceased was the man who stole her niece's cell phone, a conversation they had when they were inside her house, the appellant did not discuss anything further with him. In cross-examination she testified that the deceased's face was swollen and there was blood on his head when he was brought to her by the community. At this stage, he was still wearing clothes but when he escaped through the window again, she noticed that he was no longer wearing clothes. The appellant conceded that she closed the gate and did not want the deceased to be removed. She claimed that she did not see Mofuka on the day.

[18] She testified that she co-operated with SAPS as she thought that if she did not do so, she would be arrested. When asked why she did not prevent the community from assaulting the deceased, she said that she was distracted as she was focused on her pregnant niece, who was lying in the shack, and then the police arrived. The appellant disputed the evidence of Mvumvu and Scheepers, saying that no one assaulted the deceased in their presence, and that the deceased was inside her house at the time. The appellant denied knowing about the deceased's teeth being pulled, stating that she did not see it being done on

her property. The appellant was insistent that she had played no part whatsoever in the assault of the deceased. Her testimony lacked persuasive power. The cross-examination on the question of her interaction with Mvumvu was sparse. Mgudlwa did not implicate the appellant, stating that he did not see that she had anything in her hands.

The common purpose doctrine

[19] As to the underpinning or necessity of the doctrine of common purpose, Snyman states the following about the problematic question of causation:

> 'There is usually no difficulty in finding that everybody's conduct was unlawful and that each member of the group entertained the intention to kill. What is, however, often difficult to establish is that the individual conduct of each member satisfied the requirements of causation.[4]'

[20] The same author summarises the principles relating to the common purpose doctrine as follows:

> '1. If two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.
>
> 2. In a charge of having committed a crime which involves the causing of a certain result (such as murder), the conduct imputed includes the causing of such result.

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[4] *C R Snyman* Criminal Law 6th Edition Lexis Nexis 2014 at 255.

3. Conduct by a member of the group of persons having a common purpose which differs from the conduct envisaged in the said common purpose may not be imputed to another member of the group unless the latter knew that such other conduct would be committed, or foresaw the possibility that it might be committed and reconciled himself to that possibility.

4. A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of the person or persons.

5. A finding that a person acted together with one or more other persons in a common purpose may be based upon the first-mentioned person's active association in the execution of the particular criminal act of the other participant(s). However, in a charge of murder this rule applies only if the active association took place while the deceased was still alive and before a mortal wound or mortal wounds have been inflicted by the person or persons with whose conduct such first-mentioned person associated himself.

6. If, on a charge of culpable homicide the evidence reveals that a number of persons acted with a common purpose to assault or commit to robbery and that the conduct of one or more of them resulted in the death of the victim, the causing of the victim's death is imputed to the other members of the group as well, but negligence in respect of the causing of the death is not imputed.

7. The imputation referred to above in statement 1 does not operate in respect of charges of having committed a crime, which can be committed only through the instrumentality of a person's own body or part thereof, or which is generally of such a nature that it cannot be committed through the instrumentality of another'.[5]

[21] The common purpose doctrine has been found to be constitutional in *State v Thebus*[6]. It was held that the doctrine did not infringe on the accused's right to dignity and freedom, and was rationally linked to a lawful aim, being the combatting of criminal activities by a number of people acting in concert.[7]

[22] Within the framework of the enunciated general principles above, there is a particular category which has become known as that of the 'joiner-in'.[8] This term describes the situation where a person who, while the deceased is still alive, had not previously (whether expressly or tacitly) agreed to kill the deceased, arrives at the scene and inflicts an injury which does not hasten the death of the deceased. This person is referred to as a joiner-in, in that he associated himself with the others' common purpose at a time when the lethal wound had already been inflicted.[9] This must be distinguished from the person who is one of many who inflicts a wound which along with the other wounds, is the cause of death.

[23] A joiner-in is not exonerated. He is punishable for a crime; the question is for what crime he must be convicted. This question was answered in *State v Motaung*[10], where Hoexter JA ruled that the joiner-in could not be convicted of

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5 *Snyman* at 256-257.
6 2003 (2) SACR 319 (CC).
7 See also *Snyman* at 262.
8 *Snyman* at 264.
9 *Snyman* at 265.
10 1990 (4) SA 485 (A).

murder but only of attempted murder. The *Motaung* judgment was followed in *State v Mbanyaru & Another*[11]. In the *Mbanyaru* case, Moosa, J, held as follows:

> '[14] I now turn to the third ground of the 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 active association with the conduct of the perpetrator or perpetrators and lastly, he must have had the requisite intention i.e. the mens rei (**S v Mgedezi and Others** 1989 (1) SA 687 (A) at 705I to 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 to 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 and 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**

[11] *State v Mnyanezeli Michael Mbanyaru and Lusindiso Mbanyaru* 2009 (1) SACR 631 (C).

Petersen 1989 (3) SA 420 (A) at 425G-426A)'.[12] [Emphasis added]

[24] The author, Andrew Paizes, sheds light on the position of a person in the position of the appellant.[13] He distinguishes between two forms of common purpose and opines as follows:

'A further source of confusion is that common purpose may take one of two forms. The first deals with a 'mandate' or agreement, in terms of which the parties form an actual agreement - whether express or implied - to embark on the criminal enterprise. The result is that an act performed by any one of them will be attributed to each of the others provided that the act falls within the borders of the mandate or agreement. The mandate will usually arise as a result of an express agreement but its ambit will include all acts incidental to the conduct expressly agreed upon which the parties must have accepted as being impliedly within its compass. Thus, if the agreement is to rob a heavily guarded store by using firearms known to each of the participants to contain live ammunition, it would ordinarily be impliedly accepted that the mandate includes the fatal shooting of any guard or other person who violently seeks to obstruct this purpose.

The second form of common purpose is described as arising out of 'active association'. It applies ordinarily within the context of mob violence, where the parties do not necessarily know each other and have not been shown to have been operating as a result of any prior mandate or agreement, tacit or express. It arises, in this context, where it has been

[12] Mbanyaru at [14].
[13] Feature article: Why do we so often get common purpose wrong? Commentary on the Criminal Procedure Act (Du Toit)/Criminal Justice Review / No. 2 of 2007 / (A)

established that one of them has performed an act which has led to the prohibited result (usually the death of another) and it attributes this act to others who have, before the performance of that act, performed acts of their own which established both that they were associating actively with the causal act and that they intended to make common cause with the person performing that act. The conditions that have to be proved by the prosecution when relying on this form of common purpose were set out in *S v Mgedezi and Others* 1989 (1) sA 687 (A) at 705-6. A person who has been charged with murder arising out of an incident of mob violence leading to the death of another will be liable, said Botha JA, only if these 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 [victims]. 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 common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of others. Fifthly, he must have had the prerequisite 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 two forms of common purpose, then, operate in quite different sets of circumstances and are governed by fundamentally different requirements. The 'mandate' form is predicated upon actual agreement between the parties to the common purpose. This presupposes some communication between them which sets the boundaries relating to the kind of act that is envisaged and how far the parties are prepared to go in giving effect to their agreed purpose. Once carried out by the immediate party, any act

> falling within the compass of what has been expressly or impliedly agreed upon will be attributed to each of the remote parties. The 'active association' form is fundamentally different. It is concerned with what the remote party actually does at the scene of the crime in associating himself with that conduct of the immediate party which is causally related to the death of the victim. He must then, actually intend to make common cause with the actor or actors engaged in that conduct, and manifest his sharing of common purpose by himself performing some act of association with that conduct'.[14]

[25] When one scrutinises the evidence, it is thus important to consider not only the timing of the appellant's involvement in the assault of the deceased, but also the nature of such involvement. There are typically two scenarios. The accused, by agreement (what Paizes refers to as mandate) embarks on the criminal enterprise with others or does so by way of active association. The former requires, at the very least some communication between the accused and the others involved in the crime, where active association, which typically applies in the context of mob violence, focuses on the conduct of accused.

[26] The deceased was killed in a vigilante mob attack. The record shows that the state witnesses were generally not keen to testify, possibly in fear. In my view, the state's case faltered for the following reasons: Firstly, regarding the timing of the appellant's involvement, it did not prove, beyond reasonable doubt, that the appellant was more than a joiner-in. Secondly there was no evidence of a prior agreement (mandate) between the appellant and the mob. Thirdly, there was no evidence of the appellant's active association with the mob prior to the arrival of Mvumvu, although she did associate herself thereafter. The core of the evidence regarding the appellant's conduct is that the

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[14] Paizes at 5 and 6.

deceased was brought to her by the community already very badly beaten. There is no compelling evidence that what was described in the autopsy report as 'severe blunt force trauma to the face and head, with resulting brain injury' was inflicted by the appellant, or even partly inflicted by the appellant, something which would have shown 'active association'. The appellant, possibly , contributed to some injures mentioned in the autopsy report i.e. the '*numerous abrasions to the back and limbs'*, given that Mvumvu's evidence was that she had dragged the deceased along with the help of another person from the road into her yard. However, his evidence was that the deceased was face down when he was dragged which makes even this proposition open to doubt. Furthermore, the appellant was shown to have used a pair of pliers on the deceased which was consistent with the autopsy report that some of the deceased's teeth were broken. However, even if it is accepted that she hit him with the pliers or that she broke some of his teeth, it is unlikely that this contributed to the death of the deceased. Most certainly it was not proved beyond reasonable doubt that it did.

[27] I considered whether the accused should have been convicted of another offence, such as assault with intent to do grievous bodily harm. However, it is my view that she did form a common purpose with the mob, albeit that it was not proved beyond reasonable doubt that she did so before the deceased was mortally wounded. Thus, on the strength of *State v Motaung*, the appellant was incorrectly convicted of murder and should instead have been convicted of attempted murder.

[28] The counsel in this matter were requested to address the court on the aspect of joining-in and the possibility of a conviction on the basis of attempted murder. Both agreed in detailed supplementary heads of argument that a

conviction of attempted murder would be appropriate in the circumstances of this case.

Sentencing

[29] The basic principles pertaining to sentencing are well known:

(a) The sentence must be appropriate based on the circumstances of the case. It must not be too light or too severe.[15]

(b) There must be an appropriate nexus between the sentence and severity of the crime, full consideration must be given to all mitigating and aggravating factors surrounding the offender. The sentence should thus reflect the blameworthiness of the offender and be proportional. These are the first two elements of the triad enunciated in *State v Zinn*[16].

(c) Regard must be had to the interests of society (the third element of the Zinn triad). This involves a consideration of the protection society so desperately needs. The interests of society are deterrence, prevention, rehabilitation and retribution.

(d) Deterrence, the important purpose of punishment, has two components, being the deterrence of both the accused from re-offending and the deterrence of would-be offenders.

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[15] *S S Terblanche* Guide to sentencing in South Africa 2nd Edition. Lexis Nexis 2007 at 137.
[16] 1969 (2) SA 537 (A).

(e) Rehabilitation is a purpose of punishment only if there is a potential to achieve it.

(f) Retribution, being a society's expression of outrage at the crime, remains of importance. If the crime is viewed by society as an abhorrence, then the sentence should reflect that. Retribution is also expressed as the notion that the punishment must fit the crime.

(g) Finally, mercy is a factor. A humane and balanced approach must be followed.

[30] The appellant's personal circumstances were set out by her representative and in a Pre-Trial Report. She comes from a stable family background and has the support of family members. Before her incarceration she was employed and earned R2 500.00 per month. She passed Grade 9 and had been employed at a number of places before she decided to stay at home to look after her children, who are now adults. In 2014, when the incident occurred, she had casual employment in Cape Town. Importantly, she has no previous convictions. The Probation Officer was of the view that she showed no remorse and does not take responsibility for the offence.

[31] A factor that must be considered in sentencing the appellant is the reality of lawlessness, mob violence and its tragic consequences, as exhibited in this case, as raised by counsel for the respondent. This does not excuse vigilante activity but does explain the frustration of a community that feels let down by SAPS. This is not only so as a general proposition. There was evidence that a member of the crowd at the appellant's home remonstrated with SAPS that they were prompt to responding in this instance, but not when the community needed their assistance.

[32] I have considered the fact that apart from her anger and voicing a wish that the deceased would die, the appellant did not herself inflict any life threating injuries. She is a mother of children and apparently the head of the household. It appears that her anger was based on violence perpetrated on her pregnant niece or daughter.

[33] Given the above, it is my view that the only appropriate sentence is one of direct imprisonment. I find that a sentence of eight years (8 years) direct imprisonment is appropriate, of which four years (4 years) is suspended for four years on condition that she is not found guilty of an offence involving violence of any nature. The sentence will be backdated to the date of sentence in the court a quo, namely 3 August 2017.

Proposed order

[34] The appeal against the conviction and sentence is upheld. The conviction is set aside and replaced with a conviction of attempted murder.

[35] The sentence is set aside and the appellant is sentenced to eight years (8 years) direct imprisonment, of which four years is suspended for four years on condition that she is not found guilty of an offence involving violence of any nature. The sentence is backdated to 3 August 2017.

P MYBURGH AJ

I agree and it is so ordered.

E STEYN J