



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

NOT REPORTABLE

Case no: 40/2023

In the matter between:

THE STATE

and

YAMKELNI FUNAPHI

Accused 1

THEMBELANI MAZIBUKO

Accused 2

ANDILE LUCKY DYANI

Accused 3

JUDGMENT

Govindjee J

Background

[1] Mr Francis John Davidson was the victim of housebreaking on or about 27 April 2023. The three accused gained entry to his property and subsequently assaulted him to the extent that he passed away from his injuries on 30 May 2023.

[2] The accused face charges of housebreaking with the intent to commit robbery (count 1); robbery with aggravating circumstances (count 2); murder (count 3) and attempting to defeat the ends of justice (count 4). The state alleges that the accused acted in the execution of a common purpose or conspiracy in respect of counts 2 and 3.

[3] Pleas of not guilty were entered for all counts in respect of each of the accused. Each made significant written admissions in terms of s 220 of the Criminal Procedure Act, 1977 (Act 55 of 1977) ('the Act'). Mr Fanaphi (accused no. 1) indicated that he had gained entry into the house by kicking a door open, for the purpose of stealing various items. While doing so, the deceased entered and a fight ensued. The co-accused admitted to entering the fray. The accused admit assaulting the deceased with fists, during which time the deceased's head repeatedly struck a table, wooden chairs and a wall. It is admitted that the assault was unlawful and absent any justification, and that the accused foresaw that the deceased may possibly die as a result of the assault, and reconciled themselves with that possibility. It is further admitted that the deceased died as a result of the injuries sustained during the assault.

[4] Having assaulted the deceased in this manner, the accused tied him up, took various items and loaded them on his vehicle, dropped the items at their homes and proceeded to burn the vehicle to prevent fingerprint detection. It is admitted that this was an unlawful and intentional attempt to defeat or obstruct the course of justice.

[5] The accused aver, in their respective admissions, that they were under the influence of drugs during the incident, but not to the extent that they did not know what was occurring or could not distinguish between right and wrong. Leaving aside count 1, the accused admit to acting throughout with a common purpose to commit the various offences.

The evidence

[6] Dr Voster, a registered medical practitioner in private practice, testified that he examined the deceased at Maclear on 27 April 2023, recording various observations on a J88 report, the contents of which he confirmed during evidence. The deceased had been his longstanding patient. Whereas he had previously been healthy, the doctor recorded that the deceased was confused and disorientated, suffering from short-term memory loss and complaining of deafness in his right ear, at the time of the examination. Despite this state of mind, the doctor had managed to capture the history of the assault from the deceased, who indicated that he had been assaulted with blunt objects and broken bottles, and had told him that he had been burnt with hot fluid, which had also been put into his ears.

[7] Dr Voster had noted severe first- and second-degree burns, particularly on the back, front and left side of the chest, left side of the face and on the left ear, approximately 15 percent in extent. There were also multiple bruises on his chest, face and upper limbs, and some abrasions. Superficial linear wounds, not requiring suturing, were present on the deceased's head, which was swollen, and right upper arm. There was haematoma between his eyes and subconjunctival bleeding in the left eye. Dr Voster explained that the linear wounds would have been caused by a sharp object, such as a broken bottle, and that the bruising was consistent with contact with fists, or objects such as tables, chairs or a wall. The burns were consistent with injuries typically caused by hot liquid, and, given the wide spread of burns, unlikely to have been caused by chemicals. Absent credible evidence to the contrary, these assessments, which accord with the probabilities, must be accepted.

[8] Ms Mampantsha, a 19-year-old female, testified that Mr Mazibuko, accused no. 2, was previously her boyfriend. She knew the other accused as his friends. The others had arrived at Mr Mazibuko's residence on Tuesday 25 April 2023. She had been present, sitting on a bed while the others sat in chairs, and heard Mr Fanaphi explain to the other accused his plan to burgle the home of his former employer to obtain money. The accused had smoked tik together. Mr Fanaphi had specifically indicated that the homeowner should not be killed.

[9] When the witness visited Mr Mazibuko on Thursday 27 April 2023, his residence was filled with various items, including a flatscreen television and a generator. Mr Mazibuko explained to her that they had taken the items from the farm where Mr Fanaphi had worked, assaulting the farmer in the process. She understood that Mr Mazibuko had stabbed the farmer on his head after being told by Mr Fanaphi that the man was to be killed because Mr Dyani had uttered Mr Fanaphi's name during the incident. She was also told that the accused had unsuccessfully attempted to sell the deceased's motor vehicle, before deciding to burn it.

[10] Ms Mampantsha, despite being a nervous-looking witness who spoke inaudibly at times, provided context as to what had transpired. She appeared to testify honestly about what she overheard. She had not taken the accused seriously when they discussed their plans in her presence. They had been smoking drugs and were under the influence at the time, so that she ignored the contents of their discussion. She herself had been sober at the time.

[11] The report of a post mortem examination on the body of the deceased was handed in by consent prior to the closure of the state's case. It reflects that the cause of death was 'traumatic brain injury due to blunt force trauma to the head'. The defence closed its case without leading any evidence.

Analysis

[12] It is trite that a trial court must consider the totality of the evidence led to determine whether the essential elements of a crime have been proved.¹ Formal admissions that remain at the end of a trial become 'conclusive proof' in respect of the fact to which the admission applies.² In addition to what has been admitted by the accused, the court must consider the impact of the testimony of Dr Voster and Ms Mampantsha.

[13] It must be accepted that the deceased passed away some four weeks after his assault at the hands of the accused, and that the head injuries he suffered during

¹ *S v Libazi and Another* 2010 (2) SACR 233 (SCA) para 17.

² *S v Sesetse and Another* 1981 (3) SA 353 (A).

that assault was the cause of his death. This after the accused entered his home unlawfully. Having assaulted him, and causing his head to repeatedly strike a table, wooden chairs and a wall, the accused loaded various items onto the deceased's vehicle and left the scene. They later burnt the vehicle in an attempt to destroy the evidence against them.

[14] There is little that remains at issue in this matter. It is convenient to consider the counts of murder and robbery with aggravating circumstances before the remaining counts. Murder is the unlawful and intentional killing of another person. In order to prove the guilt of an accused on a charge of murder, the state must establish that the perpetrator(s) committed the act that led to the death of the deceased with the necessary intention to kill, known as *dolus*.

[15] The only real question is whether the accused acted with direct intent (*dolus directus*) or so-called legal intent (*dolus eventualis*). As the SCA held in *S v Pistorius*,³ in the case of murder, a person acts with *dolus directus* if they committed the offence with the object and purpose of killing the deceased. *Dolus eventualis*, by contrast, arises when the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, in a sense rolling the dice with the life of the person concerned.

[16] The state has, for the following reasons, failed to prove *dolus directus*. Ms Mampantsha's evidence, which the court accepts in this respect, was that the accused's discussion in her presence specifically made mention that the homeowner should not be killed. In addition, it cannot be ignored that the deceased survived for some four weeks after the assault before passing away. Dr Voster's examination, shortly after the incident, makes mention of the deceased being able to conduct a 'normal logic conversation' at times during the examination. Despite the serious injuries suffered, all of this is inconsistent with the state's averment of *dolus directus*. Ms Mampantsha's single piece of evidence about what Mr Mazibuko said to her after the incident is insufficient to alter the position considering the evidence in its entirety. As Mr *Geldenhuys*, for the accused, pointed out, the proven facts are not such that

³ *S v Pistorius* [2015] ZASCA 204 para 26.

they exclude every reasonable inference other than that the accused had direct intention to kill the deceased.

[17] The accused have admitted *dolus eventualis* and, considering the evidence led, must be convicted accordingly. I am satisfied that on their own version, coupled with the medical and post mortem reports received into evidence, they each had foresight of the possibility of death occurring as a result of their joint assault, and proceeded having reconciled themselves with this outcome. This is the only reasonable inference to be drawn from the proved facts.

[18] There can also be no doubt, both from what has been admitted and from the inference to be drawn from the proven facts, that the accused acted with common purpose in proceeding with the assault that subsequently caused the deceased's death.⁴

[19] As with the finding of common purpose to murder, the common purpose liability of each of the accused in respect of count 2 arises from the active association and participation of these crimes as they unfolded, with the necessary intention, rather than through prior agreement. All the elements of the crime of robbery with aggravating circumstances have been established, the accused acting in the execution of a common purpose, so that a conviction must follow.⁵

[20] The state has also proved beyond reasonable doubt that the accused attempted to defeat the ends of justice by setting alight the deceased's vehicle, so that a conviction on count 4 must follow in respect of each of the accused.

[21] What remains is count 1. There is no evidence before me to suggest that Mr Mazibuko committed the crime, as he entered the homestead after his co-accused had proceeded to break the door. He was not charged with having committed this offence with common purpose and must be acquitted on this count.

⁴ *S v Mgedezi* 1989 (1) SA 687 (A).

⁵ S 1 of the CPA; see *R v Jacobs* 1961 (1) SA 475 (A) at 484H.

[22] I have considered the evidence of Ms Mampantsha as to the intention of the accused in proceeding to the home of the deceased. That is the only evidence led by the state on the point. Of significance is the witness' recollection that the farm owner was not to be killed. Her evidence makes no mention of any discussion as to what violence, or threats of violence, might be necessary to achieve the ultimate purpose, and housebreaking with intent to commit robbery is not the only inference to be drawn from the facts. The state has failed to prove beyond reasonable doubt that Mr Funaphi and Mr Dyani intended to break into the property in order to take the deceased's property through the use of either violence or threats of violence. What has been shown, as is conceded by these two accused, is that housebreaking was with the intention to commit theft. Accused 1 and 3 must be convicted of this offence, which is a competent verdict in terms of s 260 of the CPA.

Order

[23] I make the following order:

1. Accused no. 1 is found guilty of counts 2, 3 and 4, as charged, and is found guilty of the crime of housebreaking with the intent to commit theft.
2. Accused no. 2 is found guilty of counts 2, 3 and 4, as charged, and is acquitted and discharged on count 1.
3. Accused no. 3 is found guilty of counts 2, 3 and 4, as charged, and is found guilty of the crime of housebreaking with the intent to commit theft.

A GOVINDJEE
JUDGE OF THE HIGH COURT

Heard: 26, 27 February 2024

Delivered: 28 February 2024

Appearances:

For the State:

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For the Accused:

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