REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
DATE: 24 October 2023
SIGNATURE: Ntlama-Makhanya

CASE NUMBER: A309/2022

In the matter between:

MOSES NGONHAMO	1st Appellant
SIMON PRAISE-GOD BUTHELEZI	2nd Appellant
And	
THE STATE	Respondent

JUDGMENT

NTLAMA-MAKHANYA AJ

[1] The appellants were charged and tried for two counts of murder at Putfontein Regional Magistrate Court of the Gauteng Division. They pleaded not guilty and elected to remain silent on the charges put to them. The state was put to prove these charges. Despite pleading not guilty and filing an application for discharge in terms of section 174 of the Criminal Procedure Act 51 of 1977 (CPA), which was dismissed, they were convicted as charged. Their election to remain silent and the inference drawn from such silence alongside the application of the principles of circumstantial evidence and the doctrine of common purpose, were considered for purpose of sentencing. They were sentenced to life imprisonment. No order was made in respect of their fitness to possess a firearm as envisaged in section 103 of the Firearms Control Act 60 of 2000 although they will remain unfit to be in such possession. They were also granted an automatic right of appeal against the conviction and or sentence 'if they considered an injustice was not done in their case'.

[2] The appellants filed a notice of appeal in this Court against the conviction and sentence on the two counts of murders and/or alternative relief. I must mention that the charges and subsequent conviction and sentence arose out of the death of Mr Lucy Jefferson Johnson and Mrs Nontayisa Tswane. The appellants were then charged in terms of section 51(1) of the Criminal Law Amendment Act 105 of 1997 and sections 257 and 258 of the CPA in that upon or about 14 June 2020 they had unlawfully, intentionally and with the furtherance of the common purpose committed such murders. There were four state witnesses: Ms Noleen Johnson and Mr Tebogo Matshata; Sergeant Moswarisheng Makofane and Sergeant Philemon Magwaza.

[3] The appellants proffered different reasons in substantiating their application such as that the trial court erred in finding that the state proved its case beyond reasonable doubt in the determination of their guilt on the two counts of murders. They also contend that the court *a quo* drew inference on circumstantial evidence in the absence of direct evidence that

linked them to the commission of the said murders. In addition, their failure to testify was self-created and put them at the risk of not countering the evidence presented was not justified. Also, the reliance on the doctrine of common purpose in finding their guilt was misplaced. They contend that a different court will come to a different conclusion.

[4] Thereof, given that this matter came before me as an automatic appeal from the trial court, the question is whether a reasonable prospect of success against the conviction exists. This question is reinforced by the caution that must be exercised by this court not to interfere with the decision of the trial court. This court will not easily interfere with the decision of the trial court that may have adopted a holistic approach in considering all the relevant factors and principles in the determination of the guilt of the appellants. The contention was endorsed in ***Hepple v Law Society of the Northen Provinces*** **[2014] ZASCA 75** in that:

> *[the] court would only be entitled to interfere with if [it is] convinced that the [trial court] 'failed to bring an unbiased judgement to bear one the issue; did not act for substantial reasons; exercised its discretion capriciously or exercised its discretion upon a wrong principle or as a result of a material misdirection', (**para 23**, all footnotes omitted).*

[5] The view was similarly expressed in ***Kara v S*** **[2022] ZAWCHC 256** in that:

> *when a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised— 'judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.' An appellate court ought to be slow to substitute its own decision solely because it does not agree with the permissible option chosen by the lower court, (**para 88** and Ackermann J in **National Coalition of Gays and Lesbians v Minister of Home Affairs** **2000 (1) BCLR 39** **para 11**).*

[6] With the above cases, which this court will not further reproduce, it takes cognisance of the fact that voluminous jurisprudence has since been produced in that the court of appeal

need not interfere just because it could have come to a different conclusion with the decision of the trial court.

[7] I must also reiterate that this was an automatic appeal from the court *a quo* which was not opposed by the state. This means that there are no other compelling reasons to be considered, but to focus on the grounds of appeal that are narrowed to those articulated by the appellants, which were brought by notice before me.

[8] It is prudent that I deal with the crux of this appeal that is founded on the misdirection of the trial court on its application of the principles of circumstantial evidence and those of the doctrine of common purpose in the determination of the guilt of the appellants.

[9] In this case, as noted above, the appellants contended that the trial court misdirected itself and they have reasonable prospect of success because there was no direct evidence that linked them to the commission of those murders. Their right to remain silent was not an indirect admission of guilt and the heavy reliance on circumstantial evidence and common purpose was irrational.

[10] With regard to the misdirection on the right of the appellants to remain silent, which was viewed by the trial court as a 'self-created risk' towards their subsequent conviction, I find it difficult to accord such reasoning with the ethos and prescripts of the new constitutional dispensation. The Constitution of the Republic of South Africa, 1996 is the supreme law of the Republic as envisaged in section 2 and protects the upholding of every fundamental right entrenched therein such as the right to remain silence in any proceedings such as in this case. This right is envisaged in section 35 of the Constitution,1996, which provides that:

> *(1) everyone who is arrested for allegedly committing an offence has the right to:*
>
> *(a) remain silent.*
>
> *(b) to be informed promptly: of the right to remain silent.*
>
> *(i) of the right to remain silent; and*
>
> *(ii) of the consequences of not remaining silent.*

(c) *not to be compelled to make any confession or admission that could be used in evidence against that person.*

[11] It is acknowledged that the importance of the exercise of the right to remain silent, particularly at the trial stage as expressed in ***S v Boesak*** **2001 (1) BCLR 36** does not entail:

> *the fact that an accused person is under no obligation to testify [and] does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused, (**para 24**).*

[12] However, I am of the firm view that the right to remain silent cannot be relegated to a sphere of a 'self-created risk' with the consequent result of a conviction. As it appears from the trial record, despite the trial court acknowledging the importance of this right, it reiterated that:

> *when a person decides to remain silent under the circumstances such as this not to present any evidence to the court then **they do so at their own peril'**, (**p148** and my emphasis).*

[13] This gives credence to my contention on the interpretation of '***doing so at their own peril***' as a 'self-created risk' approach. Although the essence of this right is the conscious choice that is made by the appellants, it is not for the trial court to indirectly plant a seed of fear for not rebutting the evidence against them under the pretext of seeking to avoid any consequent result for exercising the said right.

[14] It is the state that is put on a higher bar to prove their guilt beyond reasonable doubt as a foundational principle of criminal law. It is the principles of criminal law that must be infused with constitutional law principles in determining the guilt of the appellants and not some camouflage of a 'self-created risk'. A strong emphasis on self-created risk compromised a

fully-fledged engagement with the foundations of the right to remain silent and its implications for the guilt of the appellants. The limitation of the guidance on the extent to which the right to remain silent entail was left hanging by the trial court. It is the courts, starting from the lower level of the judiciary that must give meaning and guidance on the interpretation of all the fundamental rights and not to choose the easy way out and equate the exercise of the said right with 'self-created risk'. The trial court lowered the bar on the interpretation of the right to remain silent against the traditional test of the reasonable prospects of success that is key to the findings of this court in this appeal. Further, the infusion of constitutional law principles in criminal law was left with no state of influence in the determination of the guilt of the appellants.

[15] With reference to the evidence of the four witnesses, the trial court was also persuaded that the state has proved its case beyond reasonable doubt to warrant a conviction based on circumstantial evidence and the doctrine of common purpose. The interrelationship of circumstantial evidence and common purpose were the gist and core content in the determination of the guilt of the appellants as drawn from the presented evidence of the said witnesses.

[16] The key four state witnesses with the summary and centrality of the evidence of the first witness Ms Johnson was nothing more than a statement that she presented before the court highlighting the chain of events resulting to the discovery of the deceased bodies. She testified that after not getting hold of her mother and posting on social media (Facebook), she learnt of the two bodies that were found in Zesfontein. These bodies turned out to be that of her mother and brother. She also advised the court of the practice that her mother would visit appellant 1's place of business who would then bring her home or take her to the taxi rank and follow up to enquire about the safe travel and on the day of the murder, this practice did not happen and became more concerned when she could not get hold of her on her phone.

[17] In the same vein as Mr Matshaka testified that the appellants arrived at his house driving a marron-coloured Mazda car. Appellant 1 borrowed his car (Matshaka) as he alleged, there was a problem with his car (Mazda) and did likewise and gave him the Honda vehicle. Further, he was requested to perform the valet services on appellant 1's vehicle (Mazda) and he took it to his place of business (carwash) and his employee: Mr Majoro, discovered

blood in the back seat; left hand and carpet of the car, who then stopped washing it and advised him (Matshaka) of his discoveries. Appellant 1 could not be found on being contacted to be advised of the discovery. Thus, appellant 2 then arrived and they went to appellant 1's wife and informed her of his arrest for killing people. It was appellant 2 who advised Mr Matshaka that he was requested to remove the vehicle at his premises (carwash) which turned out not to have fuel. Mr Matshaka gave appellant 2 R200 for fuel under the impression he was taking it to Benoni and for him there was nothing untoward as appellant 2 even called to advise of his safe travel.

[18] With regard to the evidence of the investigating officers: Sergeant Makofane and Sergeant Magwaza, the gist of their evidence related to the arrest of appellant 2 and that of Mr Majoro who was requested by Mr Matshata to wash the car. The centrality of their evidence was that appellant 2 was caught driving the bakkie that the police were looking for and thus, he also knew nothing of the murders except for his involvement in the identity of the car after being called by appellant 1's wife that she wants nothing to do with the car. He then decided to take the car to his hometown in NewCastle in KwaZulu-Natal where it ended at the scrapyard. Mr Majoro's evidence on his interrogation by Sergeant Magwaza is of no further assistance in this court as it is already captured in Mr Matshaka's evidence.

[19] In this case, the nature of this appeal founded on the grounds of circumstantial evidence is that there was no one that witnessed the crucial 'moment' of the murders except the drawing of inferences on the evidence of the state witnesses mentioned above. The post-mortem report indicated that Mr Johnson (I will refer as deceased number 1) died of stab wounds to the chest whilst Ms Tswane (deceased number 2) died of a stab wound to the heart. Thereof, the evidence presented by the two witnesses (Ms Johnson and Mr Matshaka) above is their recounting of the events that remained central to the enquiry on the death of the deceased without having seen the way in which they died. This brings us to the standard of proof relating to the application of the principles of circumstantial evidence and their linkage to the guilt of the appellants. The determination of the guilt based on circumstantial evidence was concretised by Hendricks J in ***S v Nkuna*** **[2005] ZANWHC 87** in that:

> *the evaluation of circumstantial evidence must be guided by a test of reasonableness. The onus on the State is not that it must prove its case with absolute*

certainty or beyond any shadow of a doubt. All that is required is such evidence as to satisfy the court and to prove its case beyond reasonable doubt. It is trite law that the accused is under no legal obligation to prove his innocence. The State must prove the guilt of the accused beyond reasonable doubt, (***para 121***).

[20] This test is important for the grounds before me as they are not complex for a finding whether the trial court indeed misdirected itself in the application of the law relating to the principles of circumstantial evidence and doctrine of common purpose. It is the determinant of the legitimacy of the grounds that have been presented for the consideration of the appeal. In the ***Pretoria Society of Advocates v Nth*ai 2020 (1) SA 267 (LP)** judgment, the court set up a two-stage enquiry for such determination. The Court held that the first step of the enquiry is to 'investigate whether there are any reasonable prospects that another court seized with the same set of facts would reach a different conclusion. If the answer is in the affirmative, the court should grant the leave to appeal. Secondly, if the answer is negative, the next step of the enquiry is to determine the existence of any compelling reason why the appeal should be heard' (***para 4***).

[21] It is my considered view that the trial court was persuaded by the state's address on its comparison of this matter with the *Nkuna* judgment in ensuring the affirmation of the principles of circumstantial evidence. In *Nkuna,* the matter involved the consideration of circumstantial evidence where the body of the deceased was not found but blood found in the car was of direct application in finding the guilt of the accused. It is not my intention to give a detailed account of the *Nkuna* judgment but to affirm that it is distinguishable from the appellant's case with reference to the consideration of blood as a determinant of the guilt of the person. In *Nkuna*, the blood that was found in his car was subject to forensic analysis whilst in this matter, the trial court used 'human instincts' which I refer to them as a 'gut feeling' in establishing whether the blood in the car was that of the deceased human person. As it appears from the trial court record that did not find it necessary for the state to prove beyond reasonable doubt that the blood was not just a general human blood but that of the deceased persons that was found in the car because:

all the witnesses: Matshata and Majoro are adult persons and considered what they saw in this vehicle and what smelled in this vehicle to be blood. Any adult person who had cut meat, who has cut themselves and who has some life experience knows

that the blood has a distinct smell and appearance. And as appears from this case, it could hardly have been mistaken for something else. In the realm of this case therefore, I find that it was not a requirement that the state indeed calls an expert to say that this was blood, (***p 143***).

[22] I express without any reservations that the *Nkuna* judgment is a concrete precedent and serves as a foundation for the application and promotion of the principles of circumstantial evidence where there is no direct evidence that the accused person committed the said crime. The 'gut feeling' is not 'good law or precedent' in finding the missing link of evidence that could have provided an insight on the alleged commission of the crime. South Africa has developed a general uneasiness at the rate of murder convictions due to some, amongst others, the quality of the investigation and interpretation of presented evidence in concrete situations such as in the present matter. If today, after 29 years of democracy and 28 years of the abolition of the death penalty as invalid and unconstitutional in ***S v Makwanyane* 1995 (6) BCLR 665**, the general citizenry has become impatient and call for its reinstatement for violent crimes, is an indication of the regress on the progress made towards the fulfilment of values and principles of the new constitutional dispensation. The trial court was better placed to go beyond the narrow confines of the evidence presented and missed an opportunity for the forensic analysis of the blood found in the car with its direct linkage to the appellants.

[23] I need not repeat the foundations of the importance of circumstantial evidence that were laid down many decades ago in ***R v Blom* 1939 AD 188 at 202-203** and their relevance to this matter today. It is my opinion that the state has not satisfied the cardinal test of the proof beyond reasonable doubt in giving substance to the development of the principles of circumstantial evidence on guilt of the appellants.

[24] Let me repeat, the error of the trial court not to subject the blood found in the car for forensic analysis was a miscarriage of justice and of direct application to the evolution of the principles of doctrine of common purpose. With no direct evidence, and the doubt on the implications of the effect of circumstantial evidence on these murders, the forming of common intention is also doubtful.

[25] Thus, the substance of the application of doctrine of common purpose was long settled and Moseneke J as he then was in ***S v Thebus*** **2003 (10) BCLR 1100 (CC)** held that:

> *the doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals*, (***para 40***).

[26] With this in mind, the primary attack against the trial court judgment was the establishment of the active association and involvement of appellant 2 in the commission of the said murders. In this case, particularly with reference to appellant 2, the court could not find a direct link to the fitting into purpose other than drawing an inference from the 'mosaic evidence' that the appellants were in cohorts with each other. The trial court referred to appellant 2's consultation with appellant 1's wife following which, appellant 2 took the vehicle to be sold as a scrap in the Province of KwaZulu-Natal and not in the Gauteng Province where the murders were committed. It was also the evidence of Seargent Magwaza on his arrest of appellant 2 where the chain of events need not be repeated here as note above. This thin line of reasoning does not assist this court in establishing the furtherance of active association towards proof beyond reasonable doubt. It was appellant 2 that reported appellant 1 to his wife that he was arrested for killing people with no link to the forming of an original intention to execute the said murders until their full execution.

[27] The evidence was inadequate to link appellant 2 to the original plan that will justify the conviction for the murders in the context of the common purpose. I could not find any evidence, let alone being credible, that appellant 2 actively participated in the murder except for his selling of the car in KwaZulu-Natal. This evidence could not be directed to the link to an active association in the initial planning of the murders. His alleged participation was very remote and removed from the actual execution of the murders. The common purpose conviction creates uncertainty on the type of conviction that could have

resulted because common purpose requires a carefully executed plan by all parties until its fulfilment. I find it difficult that the state has proved beyond doubt the common cohort because of the lack of the foundations that could have linked the purpose with circumstantial evidence.

[28] This case, having failed to justify the application of the principles of circumstantial evidence, touching on the core content of the principles of criminal liability, there is no basis to find that the appellants formed a common intention and continued to actively associate towards the final execution of their original plan.

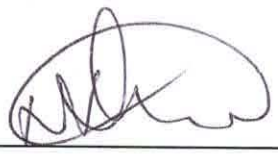
[29] In the result, I find it necessary to interfere with the trial court decision on its conviction of the appellants and I am satisfied that the alleged misdirection is sufficient for the success of this appeal.

[30] It is ordered that:

[30.1] The appeal is upheld.

[30.2] The order of the trial court is set aside and replaced with the following:

[30.2.1] The conviction and the sentence of the First and the Second Appellants are set aside.



N NTLAMA-MAKHANYA
ACTING JUDGE, THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree.

L A RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of hearing : 03 October 2023
Date of Judgment : 24 October 2023

Appearances:

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: 1516

For The Defendant: Adv PCB Luyt
Instructed by: Director of Public Prosecutions; Gauteng Pretoria