Record

63/56

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

1. SELBOURNE MANTSHI
2. GEORGE NDAMANI

Appellants

&

REGINA

Respondent

CORAM : Centlivres C.J., Hoexter, Steyn, Reynolds et Brink JJ.A.

Heard : 12th June 1956. Delivered : 14-6-56

JUDGMENT

CENTLIVRES C.J. :- The appellants were convicted of murder and sentenced to death by Price J.P. sitting with assessors in the Queenstown Circuit Local Division. Leave to appeal was granted by Price J.P.

The following facts are undisputed. On December 26th, 1955, the two deceased left Lady Frere in a green Opel car after breakfast on a hunting expedition. They parked the car a little distance off the road at Mackay's Nek. During that day two natives were seen placing large stones in the road in the vicinity of the parked car at about 4 p.m. These two natives were seen going towards the parked car in which there was a .303 rifle, the property of one of the deceased. Two shots were fired in quick succession and the bodies of the deceased

were subsequently found in the neighbourhood of the car : they had both been killed by rifle fire. At the time they were killed the deceased were apparently sleeping on the veld a little way from the car. The bodies were found to be partially covered with twigs. After the shots were fired two natives were seen picking twigs off some bushes and disappearing with the twigs behind the car. After a while the two natives got into the car which proceeded towards Queenstown. The police found the car in a street in Queenstown on the following day and in the car they found two rifles and a cash sale slip. No tools were found in the car but the evidence showed that one of the deceased had taken tools with him when he left Lady Frere on the previous day. One of the deceased wore a wristlet watch when he left Lady Frere.

The trial court found that the two appellants were the two natives who were seen going towards the parked car on December 26th, 1955, and driving away in that car. The main evidence identifying the appellants with those two natives were the cash slip, the tools and the watch. The cash slip was proved to have been issued to the second appellant in respect of a plough wheel which he had bought at a shop in Queenstown. It was proved that the first appellant had sold the major portion of the tools to another native after December 26th, 1955,

and it was also proved that a shifting spanner, the property of one of the deceased, was found by the police in the possession of the first appellant. It was further proved that the wristlet watch was sold by the second appellant to another native. The facts relating to the cash slip, tools and watch are admirably set forth in the careful judgment of Price J.P. and they need not be repeated here. The trial court rejected the defence of an alibi which had been set up by each appellant.

Despite the fair and able argument advanced on behalf of the appellants by Mr. Blovo there is, in my opinion, no reason to question the finding of the trial court that the appellants were the two natives who placed stones in the road and ultimately drove away from the scene of the crime in the Opel car. The Crown did not prove which of the appellants fired the shots which killed the deceased but the trial court found that the Crown had established a common purpose. On this point it said :-

" The final matter which the Court had to consider is whether common purpose has been established. It is not known which of the two accused fired either or both of the shots which killed the two deceased, and it is important to decide in this case whether there was co-operation by both the accused in the commission of the murders. There is proved co-operation between the two

" accused in the performance of various acts immediately concerned with the murder. The two accused together put stones on the road. The two accused together were trying to get a car to come into Queenstown. They tried to stop a car by means of these stones. At the time of the murder one remained behind the car where the two victims were lying asleep (if they had not been asleep there would certainly have been a struggle) while the other got the gun out of the car and went behind the car where the other was. After the two fatal shots had been fired the two accused together put rapesi twigs over the bodies of the two deceased. The two accused drove off together. Each of the accused tried to reap the fruits of the crime, the one by selling the watch and the other by selling the tools. Some of these acts were committed immediately after the murder and some a little later. It is quite true that we cannot infer common purpose from acts committed after the event, but most of the acts I have referred to took place either at the time of or in connection with the murder and were part of the res gestae. If a person is killed by one of two people and these two people together proceed to bury the body, the Court would certainly infer from that circumstance that there was common purpose, and I think that the evidence of common purpose in this case is overwhelming."

Mr. Slovo contested the finding that there was a common purpose. He urged that there was no evidence to show that when the appellants proceeded towards the car they were armed. There was no such evidence but the absence of such evidence is not, in my opinion, decisive, for on the proved facts the appellants may have formed a common purpose to kill the deceased when they arrived at the car and found the rifle which was used to kill the deceased. The doctrine

of common purpose was discussed in R. v Mkize (1946 A.D. 197 at pp. 205 - 206) where Greenberg J.A. said :-

" This doctrine, which is based on implied mandate, was recognised in this Court in McKenzie v van der Merwe (1917 A.D. 41) and was recently referred to by my brother Tindall in Rex v Duma and Another (1945 A.D. 410). I agree with what was there said (at p. 415), viz: that a mandate can be implied even if there is no previous conspiracy between the persons concerned ; in my opinion, it is sufficient if they act in concert with the intention of doing an illegal act, even though this co-operation has commenced on an impulse without any prior consultation or arrangement."

As the doctrine of common purpose is based on implied mandate, common purpose is usually established not by direct evidence but by inference from proved facts. In the present case all the proved facts go to show that the appellants intended to take the car of the deceased, that they intended to overcome any resistance by force and that they intended to use the means at hand, namely the rifle, in order to ensure that there would be no resistance. Indeed right throughout the day of the murder they were acting in concert. The appellants relied on an alibi and there is therefore nothing in their evidence to rebut the inference which must be drawn from the proved facts.

In the circumstances it cannot be said that the trial court erred in finding that there was a common purpose.

The appeal is dismissed.

Hoexter J.A.)
Steyn J.A.) Concur.
Reynolds J.A.)
Brink J.A.)