221/92

Case Nr 506/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

MASHITHE GODFREY SINGO Appellant

and

THE STATE Respondent

CORAM: E M GROSSKOPF, NIENABER, JJA, et VAN COLLER AJA

HEARD: 23 November 1992

DELIVERED: 27 Nov 1992

J U D G M E N T

E M GROSSKOPF, AR

The appellant was convicted in the Supreme Court of Venda of murder by VAN DER WALT J and assessors and sentenced to five years' imprisonment of which two years were conditionally suspended. With the leave of the trial judge he now appeals only against his conviction. The point on which leave was granted was a limited, although important, one, and by agreement between the parties only that part of the record necessary for the determination of the issue on appeal was filed. In effect the parties placed a stated case before us. The parties are to be highly commended for thus cutting down costs and generally facilitating the determination of the matter.

The appellant was one of seven accused. However, before the commencement of the trial, accused no. 5 absconded and the charge against him was provisionally withdrawn. The trial proceeded against the remaining six, although they retained their original numbering. The appellant was accused no. 4.

In view of the form which this appeal took it will be convenient to quote the judgment of the trial court in extenso. The judgment sets out the facts as follows:

> "The events relevant to the case before us are to a large extent common cause and the following history appears to us to be not in dispute. The accused are all young men. The deceased, the witnesses as well as other characters in the drama are all inhabitants of Murangonni residential area and appear to be known to each other to a greater or lesser extent. Most of the accused were secondary scholars at a local school. Some time before the fateful event, a female scholar fell unconscious on the sports ground, and on the 25th of May she again had an attack of some kind in the class room. What exactly her infirmity was, does not appear from the evidence, but it seems likely that she suffered epileptic fits. After she was taken from school on the last mentioned day, she was taken to the local headman's kraal. She was taken there apparently by one or more of the teachers and by her grandfather, one Ben. It is not exactly clear when this happened, but it is fairly clear and not disputed that she had at some stage named three elderly women, one of whom was the deceased, as being responsible for her condition in the sense that they bewitched her. It was apparently as a result of these allegations by the girl that the matter was reported to the headman. It also seems fairly clear that she was not regarded as sane at that stage when she was taken to the headman's kraal, bound.
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> The headman then summoned a tribal meeting at his

kraal by messenger and also sent a posse or posses of what were called young men to fetch the three alleged culprits. One of them, one Nyadzanga, was working in the fields and only returned home at or after dusk. Soon after her return she was fetched by a group of youngsters. Her two daughters were also taken along. ...

When the group arrived at the chief's kraal with her, there was a large number of people, young and old, present. They were gathered in a circle around the fire and Nyadzanga was placed in the middle of the circle where she found the deceased as well as another old woman, one Masindi. It appears that certain information had been conveyed to the chief by a teacher and the girl's grandfather Ben. On account of this, the headman instructed the three women to, as it was stated, 'unbewitch the girl'. The three women's attitude was one of denial that they were responsible for her condition and the deceased suggested that money be obtained, and a witchdoctor or inyanga be consulted in order to establish who was responsible for the girl's condition. This request was refused because the headman stated that the girl could speak for herself. The girl's hands were then unbound and she accused the three old women of having bewitched her. She also gave some, not very clear, explanation of the manner in which she was bewitched alleging that Nyadzanga was calling her with a small horn to work for her grandfather. There was also an allegation by somebody else, I think it was by Ben the girl's grandfather, that Nyadzanga had on a previous occasion bewitched a son or a relative of his who was allegedly by then working in Louis Trichardt as a Zombie. Things then got out of hand with the girl attacking

Nyadzanga, hitting her, also striking her with a stone and attempting to place a tyre of a vehicle which conveniently was on the scene, over her body. It is also clear that the gathered crowd then got excited, they stood up and there was a lot of noise according to the evidence. The headman then defused the immediate situation by ordering the three alleged witches into his cooking hut and by chasing the crowd away, waving a kierie and with the aid of his dogs. There is some evidence to which I will refer later, which seems to indicate that the headman in doing what he did, did not act with unselfish motives or basically in the interest of the three old women. The crowd then dispersed and there is some evidence that at least some of them were not satisfied with the course things took. A large section of the crowd which appears to have consisted mainly of young people, left the meeting place along a footpath which initially leads roughly west and then towards the south where it joins a major road.

They then proceeded towards the east along this road. At a stage they were caught up by accused No. 7 who is the headman's son, travelling on a motor cycle. He then informed the crowd that the three women had been released. According to the evidence he said: 'We have released those women'. He further told them that his father was afraid that if the women were killed at his kraal, the police would also have him arrested. Accused No. 7 proceeded to say that the women had now been released and that they were somewhere towards the front of the mob. ...

Immediately after accused No. 7's report to the crowd they started running along the road towards

the direction in which the three women were stated to be. Somewhere towards the east of where they were, another footpath also leading from the chief's kraal joins the major road. The deceased came along this footpath and landed herself amongst the charging crowd which in their charge got separated into a rear-end and advance guard.

The crowd then converged upon her and assaulted her inter alia by using stones and other instruments such as sticks. After she was assaulted to the extent that she remained lying on the ground, the mob slowly started to disperse moving further along the road towards the west, the direction in which they were originally proceeding. When the mob or at least some of them were 40 to 50 yards or meters away, the deceased got up and followed the mob. Members of the mob apparently on seeing her getting up, stopped and parted towards both sides of the road. Indications are that the deceased was then already seriously injured and she most probably did not realise that she was proceeding right into danger again. Evidence of one of the state witnesses was that she then said 'she will finish them all'. ... The crowd then set upon her again and she was killed. According to photos that were taken of the body on the scene, it is clear that she was stoned with stones of various sizes some of them almost as big as her torso. According to medical evidence her skull was fractured in various places and at some places into fragments, while her legs and lower body had various burns. The cause of death is stated to be shock due to brain haemorrhage and possible burns."

These were the facts which were common cause. The court then had to decide what was the extent of the appellant's participation. Here the court relied largely on the appellant's own evidence. He testified that he was also at the chief's kraal with the meeting and in general he confirmed the account of the events set out above. When the meeting broke up, he left with the group which later attacked the deceased. As they were walking along the road, accused no. 7 overtook the group and everybody stopped. The appellant estimated the group to have been in the vicinity of 70 people. The appellant confirmed that accused no. 7 then told them that the women had been released; that the headman was afraid that if they killed the women at his kraal the police might also arrest him, and that the women were up in front somewhere. When the people started running towards where they understood the women to be the appellant went with them. As they ran along the road, the group broke up into two smaller groups, the faster runners being up front, and

the slower runners at the rear. The appellant was in the front section of the slower group. At a junction the deceased came into view from a side road. She was between the two groups. She turned to the rear group and the groups converged upon her. The appellant said that the mob then started assaulting her by throwing stones at her and hitting her with sticks. He himself threw two stones from a distance of three to four metres. The stones were the size of his fist. One of the stones struck the deceased. The appellant's evidence then continued:

> "COURT: And the other?
> A. I did not see whether the other stone struck the deceased or not because when I was throwing it I felt a blow of a stick on my shoulder by a person who was behind me.
> COURT: Was the stone intended to strike her or not?
> A. Yes
> ADV. RENKE: And was she still on the ground when you threw these two stones?
> A. Yes.
> ADV. RENKE: Now, after having thrown the stones what did you do?
> A. I left.
> ADV. RENKE: Why did you leave?
> A. I was worried about the blow that landed on my shoulder and then had to leave.

.....

ADV. RENKE: What do you mean by saying you were worried about the blow on your shoulder, was it painful or what do you mean?

A. It was painful.

COURT: How thick was the stick which struck you, or did you not see it?

A. According to how I felt the blow my lord, the blow started from my back and this stick bent over and also hit me on my chest then from that I think that it was a thick stick.

ADV. RENKE: Did you then go and sleep?

A. Yes."

Although the court in general accepted the appellant's evidence, it was troubled by two aspects thereof. The first was a matter of credibility. The appellant maintained throughout that he had had no intention to kill the deceased. This part of his evidence was rejected on the strength of his statement in terms of section 119 of the Criminal Procedure Act, his demeanour in court as well as of the contents of his evidence. Of particular importance was the fact that the appellant, in association with the rest of the mob, attacked the deceased in response to a suggestion by accused no. 7 (only slightly veiled) that they

should kill her. And, indeed, the appellant had conceded in the magistrate's court in an explanation of his plea of not guilty that "I was sent by ... the son of the Khosi (i.e., the chief) to assault the deceased to death". Finally the court took into account the nature of the assault perpetrated on the old woman by a mob of approximately 70 people of whom approximately 30, according to the appellant, actively participated in the attack. In the light of all these circumstances the court came to the conclusion:

> "that only one inference can be drawn and that is the accused in fact had the common intent to kill the deceased and that he acted in association with the crowd in executing that intent."

The second problem arising from the appellant's evidence related to his assertion that he did not continue with the assault up to the end. On his version he was not present at the second stage of the assault, when the deceased threatened the mob and they set upon her again. On the evidence there is at least a reasonable possibility that the deceased's fatal injuries were inflicted at this second

stage. This raised the question whether the accused could properly be convicted of murder where he had discontinued his assault on the deceased prior to her receiving mortal injuries. In considering this issue, the court accepted the appellant's evidence as being true (at least as a reasonable possibility) but nevertheless found him guilty of murder on the following basis:

> "In this case the accused at no stage even says that he had a change of mind or a change in intention. He simply stopped because he says his shoulder was injured. I think his position can be for the purpose of principle compared with a man who actively associates in the execution of the common purpose and at the stage when becoming out of breath or becoming tired stops actively participating just for that reason, but not because he mentally wanted to disassociate himself from the actions of the other perpetrators whose actions are also regarded to be his."

However, the learned trial judge granted the appellant leave to appeal "on the question as to whether his discontinuance of participation in the assault on the deceased under the circumstances as found by this Court, amounts to a disassociation from the common purpose to kill

the deceased which would relieve him of responsibility for her murder".

On appeal before us Mr. Renke, who appeared for the appellant, took two points. The first was that the appellant had not been proved to have had the common intention with the other assailants of the deceased to kill her. He conceded that he had not raised this issue when applying for leave to appeal, and that it is not covered by the leave which the learned Chief Justice granted. However, relying on what was said in S. v. Safatsa and Others 1988(1) SA 868 (A) at p. 877 B-F, he requested this court nevertheless to allow him to raise this argument.

As appears from the passage in Safatsa's case on which Mr. Renke relied, the merits of an argument will be an important factor in the court's decision whether or not to allow the argument to be raised even though it is not covered by the leave granted. Now, regarding the appellant's state of mind, it can hardly be doubted that when he joined the

initial assault on the deceased, he and the rest of the mob, (or, at least, those members who actively participated in the attack) had the common intention to kill the deceased. I have summarized the trial court's reasons for holding that the appellant had the intent to kill and they appear to me to be entirely convincing.

However, the argument proceeded as follows. There were, it was argued, not one but two assaults on the deceased. The first came to an end when the mob started dispersing after the deceased had been left lying on the ground. The second commenced when the deceased approached the dispersing mob, threatened them, and was again assaulted, this time fatally. The court erred, Mr. Renke submitted, in regarding this second assault as merely a continuation of the first assault. In fact it was a separate one, and the appellant could only be convicted in respect of the second assault if he had joined into a fresh common purpose in respect of that assault. Since he had not done

so, it was contended, he could not be convicted of a murder perpetrated in the course of that assault.

This argument raises the question whether the appellant was a party to the second assault. This is in effect the question in respect of which the trial judge granted leave to appeal, although he approached it somewhat differently. The trial court's finding, it seems, was that there was in essence only one assault. When considering the appellant's liability for the second assault (or, as the court regarded it, the second stage of the assault), the court consequently saw the question as one of dissociation from an existing common purpose, rather than as one of joining into a new common purpose. Whatever the position may be in theory or in other factual situations, I do not think that on the facts of the present case it makes any difference to the result whether we adopt the approach of the court a quo or that suggested by Mr. Renke. There is, accordingly, no need to consider arguments which go outside the ambit of

the terms in which leave to appeal was granted.

That brings me to the question of dissociation. In considering this question one must proceed from the premise that there was in essence one fatal assault committed in concert by a number of persons and that the appellant initially was associated in a common purpose with the others. It is clear that, if the appellant had effectively dissociated himself from the common purpose prior to the infliction of the fatal injuries on the deceased, he could not be convicted of her murder. See S. v. Nzo and Another 1990(3) SA 1 (A) at p. 11 H-I. What is less clear, however, is what tests are to be applied in this regard. There are several authorities on this topic in our courts and those of Zimbabwe, but most of them deal with common purpose arising from express agreement or conspiracy. Thus R. v. Chinyerere 1980(2) SA 576 (RAD); S. v. Ndebu and Another 1986(2) SA 133 (ZS); S. v. Nzo and Another (supra) and S. v. Beahan 1992(1) SACR 307 (ZS) were all conspiracy cases. S. v.

Nomakhlala and Another 1990(1) SACR 300 (A) was not really a case of dissociation from a common purpose at all. In that case the court held that the appellant had never in fact associated himself with a common purpose to kill the deceased. His dissociation from actions of the murderers served to demonstrate his lack of association with the common purpose rather then to constitute dissociation therefrom.

In Beahan's case (supra) at p. 324 b GUBBAY CJ considered it the shared approach of earlier cases and commentators that it is the actual role of the conspirator which should determine the kind of withdrawal necessary to effectively terminate his liability for the commission of the substantive crime. He then continued (at p. 324 b-c):

> "I would venture to state the rule this way: Where a person has merely conspired with others to commit a crime but has not commenced an overt act toward the successful completion of that crime, a withdrawal is effective upon timely and unequivocal notification to the co-conspirators of the decision to abandon the common unlawful purpose. Where, however, there has been participation in a more substantial manner something further than a communication to the co-conspirators of the intention to dissociate is necessary. A reasonable

effort to nullify or frustrate the effect of his contribution is required."

The approach followed in Beahan's case, and earlier authorities, and the rule stated by GUBBAY CJ, are not of any real assistance for the purposes of the present case, where we are not dealing with the position of co-conspirators. We are also not dealing with a person who incited or instigated others to commit an offence, where the position might also be different. Our case is similar to those which have been considered in a number of recent decisions of this court, where a common purpose arose otherwise than by prior agreement, and was manifested simply by conduct. See S. v. Safatsa and Others (supra); S. v. Mgedezi and Others 1989(1) SA 687 (A); S. v. Motaung and Others 1990(4) SA 485 (A) and S. v. Khumalo en Andere 1991(4) SA 310 (A). It is clear that in such cases liability requires, in essence, that the accused must have the intent, in common with the other participants, to commit the substantive crime charged (in this case, murder) and that there must be an active

association by him with the conduct of the others for the attainment of the common purpose.

If these two requirements are necessary for the creation of liability on the grounds of common purpose, it would seem to follow that liability would only continue while both requirements remain satisfied, or, conversely, that liability would cease when either requirement is no longer satisfied. From a practical point of view, however, it is difficult to imagine situations in which a participant would be able to escape liability on the grounds that he had ceased his active association with the offence while his intent to participate remained undiminished. One must postulate an initial active association to make him a participant in the common purpose in the first place. If he then desists actively participating whilst still retaining his intent to commit the substantive offence in conjunction with the others, the result would normally be that his initial actions would constitute a sufficient active association with the

attainment of the common purpose to render him liable even for conduct of the others committed after he had desisted. This would cover the case, mentioned by way of example in the judgment a quo, of a person who, tiring of the assault, lags behind or stands aside and allows others to take over. Clearly he would continue to be liable. However, where the participant not only desists from actively participating, but also abandons his intention to commit the offence, he can in principle not be liable for any acts committed by others after his change of heart. He then no longer satisfies the requirements of liability on the grounds of common purpose.

The test for dissociation which I have stated above will often be difficult to apply, but ultimately it is a question of fact and evidence. The accused starts with the problem that, ex hypothesi, he was an active participant in the common purpose, and a court may well be sceptical of his avowal of abjuration. Nevertheless here as elsewhere the onus is on the prosecution. If in a case of murder a court

has a reasonable doubt whether at the critical stage when the deceased received his or her mortal wounds the accused was still a party to the common purpose of those assaulting the deceased, the accused is entitled to the benefit of the doubt.

All that remains is to apply the above principles to the facts of the present case. It is accepted that after throwing two stones the appellant was hurt and left the scene to go home. It is clear that at that stage he decided to end his active participation in the assault, and it is at least a reasonably possible inference that he also abandoned his intent to kill the deceased. It is true that his change of intent was not, on the evidence, caused by moral considerations, but this does not seem relevant. The question is a purely factual one: did he cease having the intent to kill? Nor do I think it is decisive that the appellant himself did not say that he had changed his intent. His attitude was throughout that he did not intend to kill

the deceased. On his version there could accordingly be no question of a change of intent. He was disbelieved on this score in regard to the earlier part of the assault, but there must in my view be at least a reasonable doubt whether he continued having the intent after he left for home. His actions would seem to indicate the contrary. And in the circumstances there was, in my view, nothing more which he could have been expected to do to demonstrate a change of intention.

For the reasons aforestated, I consider that the appellant effectively dissociated himself from the actions of the crowd before the deceased received her fatal wounds. He could accordingly not be found quilty of murder and his conviction must be set aside. However, he did actively participate in the attack on the deceased during the initial stage of the assault, and he clearly did so with the intent to kill her. He was accordingly, in my view, quilty of attempted murder and a conviction for this offence must be

substituted.

This then leaves only the question of sentence. The sentence imposed by the court a quo on the appellant was a light one. Accused nos. 1, 2 and 3 received the same sentence (special considerations required different sentences in the cases of accused nos. 6 and 7). In showing clemency the court was influenced by the facts that the accused were young persons attending school, who believed they were killing a witch. To this one should add that they believed they were carrying out the wishes of their chief. These are obviously all cogent factors. Where the appellant's conviction is now reduced to one for attempted murder, it seems right that he should be sentenced to a lighter sentence than had been imposed on him and his co-accused for murder. Mr. Ramaite, who appeared for the State, suggested that a sentence of five years imprisonment with four years suspended, would be appropriate. In the circumstances of the present case I agree. In the result the following order is

made:

The appeal is allowed. The conviction of murder is set aside and replaced with a conviction of attempted murder. The sentence is set aside and replaced with the following:

Five (5) years imprisonment of which four (4) years are suspended for five (5) years on condition that the accused is not convicted of an offence of which violence to the person of another is an element, committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine.

E M GROSSKOPF, JA

NIENABER, JA

VAN COLLER, AJA Stem saam