



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Case No: 473/10

In the matter between:

LES FLOYD SCOTT

First Appellant

LAWRENCE BEATON

Second Appellant

JEREMY BEATON

Third Appellant

and

THE STATE

Respondent

Neutral citation: *Scott v The State* (473/10) [2011] ZASCA 121 (31 August 2011)

Coram: HEHER, MAYA and MAJIEDT JJA

Heard: 25 May 2011

Delivered: 31 August 2011

Summary: Criminal law – doctrine of common purpose – whether appellants’ guilt proved beyond reasonable doubt.

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ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Gorven J and Luthuli AJ sitting as court of appeal):

In the result the following order is made:

- 1 The first appellant's appeal against his convictions is dismissed.
- 2 Save as set out below, the first appellant's appeal against sentence is refused.
- 3 The second and third appellants' appeals against their convictions and sentences are upheld.
- 4 The order of the court below is varied as follows:
'1 The sentences imposed against accused number 1 shall run concurrently.
2 Accused numbers 3 and 4 are found not guilty on all counts.'

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JUDGMENT

MAYA JA (HEHER AND MAJIEDT JJA concurring):

[1] The appellants together with their co-accused, Mr Praveen Singh (Singh), appeared in the Durban Regional Court facing (Mr W.F Hahn) charges of the murder of Mr Franktel Mostert (the deceased) and the attempted murder of Mr

Conrad Cornelius Meyer (Conrad). They were all convicted as charged. The first appellant and Singh were sentenced to undergo 15 years imprisonment on the count of murder and seven years imprisonment on the count of attempted murder. The second and third appellants, who are brothers, were sentenced to undergo seven years imprisonment on each count. Their sentences were, however, ordered to run concurrently. The appellants' appeal to the KwaZulu-Natal High Court (Gorven J and Luthuli AJ) against their convictions and sentences was unsuccessful. The present appeal is with the leave of the court below granted in February 2009.

[2] At the commencement of the hearing before us, the first appellant's local attorney, Mr van Vuuren, applied from the bar for a postponement of the matter on the basis that his client had not been able to raise sufficient funds to engage counsel of his choice to represent him in court. Mr van Vuuren had received instructions from his instructing colleague in Durban on the preceding day. The first appellant, who also had not filed heads of argument, had been notified of the date of hearing about six weeks in advance and had rejected his attorneys' advice to apply for legal aid. After some anxious consideration, we refused the application and ordered the hearing to proceed.

[3] Whilst a court will generally be slow to refuse a postponement because of the adverse consequences which may arise, a litigant who seeks this indulgence must nonetheless satisfy the court fully that it should condone his non-preparedness. This, in my view, the first appellant dismally failed to do. As I have indicated, more than two years had passed since leave to appeal was granted, no explanatory affidavit has been forthcoming from the first appellant and his verbal

instructions to Mr van Vuuren are lacking in any persuasion.

[4] Quite apart from his failure to adequately explain his eleventh-hour bid to delay the proceedings and his refusal to heed his attorneys' counsel to obtain legal aid, there are other compelling factors to be considered. These include the undue lapse of time from the commencement of the criminal proceedings and the resultant prejudice to the other parties if the matter was protracted further. As rightly emphasized by State counsel who strenuously opposed the postponement application, the case has dragged on for an entire decade and finality is long overdue for all concerned. This is particularly so for the family of the deceased who have carried the burden of the loss of their young son without the comfort of closure for so long and had travelled a long distance to attend the appeal hearing. Furthermore, the comprehensive nature of the appeal record, which included the legal representatives' addresses at the various stages of the proceedings and the full judgments of the trial court and the court below (in two sets of proceedings in which the first appellant was legally represented and the merits of the case were fully ventilated and determined) convinced us that we could, with no undue risk to the first appellant's interests, fairly adjudicate the appeal, without the additional benefit of his submissions.

[5] I turn to deal with the merits of the appeal. It is necessary to set out the factual background in some detail. During the evening of 30 September 2001 Conrad's parents hosted a 'braai' at their home for a few family members and friends. Among those present were Annike van Rooyen, a female identified only as Lindy and the deceased who was Conrad's close childhood friend. Around midnight Conrad, his mother Lida Susara Meyer (Mrs Meyer), Lindy, Annike and

the deceased, left the premises to buy soft drinks at a nearby shop. Mrs Meyer and the deceased had consumed a little brandy but Conrad, a teetotaler who was only 17 years old at the time, had not consumed any liquor.

[6] The tragic events which culminated in the deceased's death and Conrad's nearly fatal injuries from stab wounds occurred on their way back from this jaunt. Nearby Hillary Spar Supermarket on Stella Road, Conrad's party encountered the appellant (19) and second and third appellants (19 and 17 respectively) described as 'coloured' and Singh (20) described as 'Indian', standing in the road with two white males who did not appear to be part of the group. One of the whites was bleeding profusely from the face and was being pushed and insulted by the appellant's group, some of whom directed racial insults at Conrad's party. In reaction, Conrad and the deceased crossed the road and approached the group to confront them, leaving the womenfolk on the other side of the street.

[7] The course of events from that point differs markedly between the respective versions adduced by the State and the defence. According to Conrad (corroborated in large part by his mother) who testified for the State, the trouble started when the deceased asked the bleeding man why they had sworn at them. The third appellant swung a beer bottle at the deceased's head. The bottle hit the ground and broke. In retaliation, Conrad threw the third appellant to the ground and pinned him down by putting a foot on his chest. Mrs Meyer then crossed the street to fetch Conrad and the deceased. She kicked the third appellant in the ribs as he tried to rise.

[8] Conrad, the deceased and Mrs Meyer crossed the road and rejoined the two

women. At that stage, Annike noticed blood on the back of Conrad's shirt which turned out to be coming from a stab wound he had not felt being inflicted. (In evidence he guessed that he had been struck by the third appellant with the broken bottle during their tussle.) The appellants had followed them and as Conrad turned round to face them, Singh stabbed him above the right collarbone. Conrad pushed Singh away ripping the latter's shirt in the process. At that moment he saw the first appellant, at 'arm's length' away from him, make a stabbing motion with his right hand from an upward angle downwards at the deceased's chest. The deceased pulled a dark object out of his chest and threw it at the appellants who then ran away. As Conrad and the deceased left the scene both collapsed. The deceased shortly died from a penetrating incised wound into the right ventricle of the heart. Conrad was conveyed to hospital where he was treated in the Intensive Care Unit for four days. Conrad had sustained two stab wounds – described by Dr Ogg, who examined him, as stab wounds of the anterior chest above the right nipple and of the posterior chest over the right scapula resulting in a punctured lung.

[9] Mrs Meyer explained that she crossed the street to fetch Conrad and the deceased. She saw the second appellant attack Conrad from the side as he pinned down the third appellant who was trying to get up. She stated that she kicked the third appellant to keep him on the ground and that the second appellant then threw a bottle at her from which she was saved by the deceased who moved her out of its path. She did not see who stabbed Conrad but did observe the first appellant stab the deceased, who stood next to her, in the chest with a dark object.

[10] Another witness called by the State, Mr Mzimela, told how he observed what appeared to be a fight as he drove along Stella Road on his way to drop off

friends who lived in that neighbourhood. The area was well-lit by streetlights – a fact which had been mentioned by Conrad and his mother without contestation – and he was driving very slowly because of the nature of the road. The spectacle engaged his attention and he kept watching the scene from the rear-view mirror as he drove past. He and his passengers had noticed the biggest male in the group, who he identified as the first appellant, and they discussed him as they drove on. At a distance of about 30 metres away from the scene he realised that the fight was getting serious as he saw the first appellant raising his hand and make a stabbing motion towards a white male. He turned back to the scene to assist. This took some time as he was followed by other traffic and he found Mrs Meyer cradling the deceased who was severely injured. She informed him that the deceased had been stabbed by a man who ran down the road. He telephoned the police and gave chase. He saw the first appellant struggling up a hill assisted by others, but they disappeared into the neighbouring houses before he could catch them.

[11] The defence version as told by the first appellant and Mr Trevor Lubbe who he called as his eyewitness – Singh and the second and third appellants did not testify – is different. They both attributed the deceased's stabbing to Singh who, in his plea explanation, had actually admitted to stabbing the deceased in self-defence. According to the first appellant his group was walking home from a tavern and came across one Seun fighting with one Patrick. They intervened and stopped the fight. Seun went into a nearby bar and returned with Lubbe. Seun then demanded a 'fair fight' with Patrick who obliged and then overpowered him. Lubbe intervened and Patrick left. The group walked on until they met Conrad's party at which Seun swore. A woman in that party said they should be assaulted.

[12] According to the first appellant, the deceased crossed the street and argued with Seun but Lubbe intervened successfully. The deceased then attacked the third appellant for no apparent reason and also punched him, Singh and the second appellant. He punched the deceased back. Conrad then joined in and trampled on the third appellant. Beer bottles were thrown around and broke on the ground. But the fight ended and the deceased left. Seun began swearing at the deceased again and then, together with Singh, chased him across the road. The deceased turned back and ran towards them. They met in the middle of the road and the deceased tried to hit Singh who then stabbed him in the chest with a knife. The deceased pulled it out of his chest and threw it at Singh. Lubbe picked it up and they all fled the scene.

[13] Lubbe's version mostly matched the first appellant's. On his account the deceased assaulted the third appellant because the latter made an inflammatory utterance as the deceased walked away after Lubbe had stopped his argument with Seun. He picked up the knife used by Singh to stab the deceased after the latter threw it away and gave it to Singh on his insistence. He last saw the deceased running down the road before he left the scene with his group.

[14] Dr Bana, a pathologist and State witness who conducted the post-mortem examination on the deceased, discounted any possibility that the fatal chest wound could have been inflicted by Singh. It was suggested to her (and, earlier, to Conrad) by Singh's attorney in cross-examination that the deceased was stabbed accidentally when he ran into the knife held by Singh. Dr Bana's opinion was based on the protagonists' disparate body types (on her description, the deceased was big, muscular and tall whereas Singh had a small build), the degree of force

used in inflicting the wound which cut through the breastbone, and the path of the wound.

[15] The magistrate accepted the version of the State witnesses whom he found satisfactory. He dismissed the first stage of the fight, which occurred on the appellant's side of the road, as trivial and refused to infer that it was the third appellant who stabbed Conrad in the back at that stage in view of the patchy evidence in that regard. However, the magistrate found that by chasing Conrad and the deceased across the road, Singh and the appellants manifested a common purpose and actively associated themselves with the assaults on Conrad and the deceased. Moreover the second and third appellants had done nothing to prevent the stabbing of the deceased and Conrad, had left the scene together with Singh and the first appellant and had failed to testify.

[16] The magistrate rejected the version that the deceased was stabbed by Singh. He mentioned that when Singh was granted an opportunity to lead evidence in his defence, he stood, apparently against his attorney's instructions, and muttered that he wanted to tell the truth. The proceedings were adjourned to give him and his attorney time to regroup. It later transpired that during that adjournment the first appellant who, unlike Singh, was out on bail followed the latter to the police cells. On his return to court Singh closed his case without testifying. The magistrate found this incident odd and the judgment suggests that he suspected the first appellant to have influenced Singh to exculpate him. Nonetheless, the magistrate concluded that Singh probably mistook the identity of his victim and thought that he stabbed the deceased whereas he stabbed Conrad, which he did not gainsay.

[17] The magistrate then applied the doctrine of common purpose and convicted the appellants and Singh for the murder and attempted murder on that basis. In determining sentence the magistrate found that the second and third appellants had played a lesser role in the commission of the offences and for that reason, imposed more lenient sentences on them. On appeal, the court below found that the magistrate did not misdirect himself in any way and confirmed the convictions and sentences.

[18] The issues raised in the appeal before us concerned (a) the identity of the person who stabbed the deceased; (b) whether the State established the existence of a common purpose and intent to commit the offences; and (c) the propriety of the sentences imposed by the magistrate.

[19] Regarding the deceased's stabbing, it was not in dispute that visibility at the scene of the offences was good. I find it highly unlikely in the circumstances that Mzimela, the independent witness and passing Samaritan who observed the fight from no more than 30 metres away and Conrad and his mother, who were right at the scene, could all confuse the first appellant, undisputedly the biggest person there, with the slightly built Singh as the person who inflicted the stab wound. It is the very stabbing motion made by the 'big man' which Mzimela saw that prompted him to turn back and it is improbable that he would mistake that with a fist fight as was suggested by the defence. In any event, according to the witnesses, the fist fight occurred only on the other side of the road during the first round of the fight and not where Mzimela observed the incident.

[20] As indicated above, Dr Bana rejected the likelihood that the deceased was

stabbed by Singh or that he could have impaled himself on the knife-blade. In her opinion, that would have required the deceased to run a distance with considerable speed, generating severe force, in order for the knife to go all the way through the breastbone. She concluded as follows:

‘I’m just looking at [Singh], and I have obviously done the autopsy, and the deceased is quite a big, muscular, tall person and for him to run towards a knife held by a small built, average height person . . . he would have to run at great speed . . . and I would expect then expect that knife wound to be much lower down, more likely to be more thoracic and an abdominal wound rather than high up there on the chest’.

I see no reason to disturb the credibility findings made by the magistrate regarding the State eyewitnesses who implicated the first appellant and, in my view, on a consideration of all the relevant evidence and the inherent probabilities, their evidence coupled with that given by Dr Bana established it beyond doubt that Singh did not stab the deceased.

[21] The nature of the fatal wound itself leaves no doubt that whoever stabbed the deceased intended to kill him. Dr Bana described it as a ‘wound which passed from the right going down towards the back . . . through the breastbone . . . through the sac that covers the heart [and] through the right chamber of the heart’ indicating a downward thrust inflicted probably with a knife with ‘a considerable amount of force . . . because the knife went through the breastbone itself which is quite a strong bone to break’. It is inconceivable that anyone, least of all the person who inflicted it, would believe that any human being could survive such an injury. I would accordingly confirm the first appellant’s conviction for the deceased’s murder.

[22] As to the appellants' culpability or otherwise for the attempt on Conrad's life by Singh and the second and third appellants' guilt or otherwise for both offences on the basis of the doctrine of common purpose which the magistrate applied, it is necessary to consider their individual conduct to determine whether there is a sufficient basis for holding that each one of them is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene. (See *S v Le Roux* (444/08)[2010] ZASCA 7; 2010 (2) SACR 11 (SCA) at 19e; *S v Mgedezi* 1989 (1) SA 687 (A) at 703B-I.)

[23] In the absence of proof of a prior agreement to commit the offences, as here, the appellants can be convicted on the basis of the doctrine of common purpose, if (a) they were present where the violence was being committed; (b) they were aware of the assault on Conrad and the deceased; (c) they intended to make common cause with the perpetrator(s) of the assault; (d) they manifested their sharing of a common purpose with the perpetrator(s) of the assault by themselves performing some act of association with the conduct of the perpetrator(s); and (e) they had the requisite *mens rea* concerning the unlawful outcome at the time the offence was committed, ie intended the criminal result or foresaw the possibility of the criminal result ensuing and nevertheless actively associated themselves reckless as to whether the result was to ensue. (See *S v Safatsa* 1988 (1) SA 868 (A); *S v Mgedezi* above at 705I-706C; *S v Thebus* 2003 (2) SACR 319 (CC) para 49.)

[24] I have no difficulty, on an application of these requirements, in confirming the first appellant's conviction in respect of the count of the attempted murder. He pursued Conrad and the deceased after the first round of the fight ended and the

two men had left them and instigated a fresh, unprovoked attack against them. According to Conrad and his mother, Conrad was next to the deceased and the first appellant when Singh stabbed him. The first appellant, of necessity, must have seen this assault. Instead of dissociating himself from Singh's violent conduct, he proceeded to stab Conrad's companion. In my view, by so acting he manifestly associated himself with Singh's behaviour and cannot have been in any doubt that their victims would be seriously injured or even killed, as indeed happened.

[25] The case of the second and third appellants is, however, different. There is no evidence whatsoever that they were armed – apart from the beer bottle which the third appellant earlier threw at the deceased – or knew that Singh and the first appellant were armed with deadly weapons before the stabbings occurred. The first stage of the fight was largely fisticuffs and, according to Conrad, the bottle used contained beer someone obviously intended to consume and was not carried as a weapon. I favour the magistrate's view not to attach any significance to this round of the events (which the victims aided to spark by crossing the road to confront a bunch of rowdy and aggressive males who Conrad himself said appeared drunk) and Conrad's back wound in the light of his own uncertainty as to how and where he sustained it.

[26] The only evidence against the two appellants in relation to the second stage of the fight is that they were part of the group which followed Conrad and the deceased. No one saw them do or say anything thereafter that indicated an intent to associate themselves with the stabbings. They did not approach the victims and fled the scene immediately after the assault. To my mind, it is not at all far-fetched

that they envisaged nothing more than a continuation of the fist fight. There is simply no basis to conclude that they intended the stabbing of Conrad and the deceased and made common cause therewith. And, in that case, they had no evidentiary burden to discharge ie that they dissociated themselves from the commission of the offences and they certainly did not have to testify. They should, therefore, not have been convicted for these offences.

[27] It remains to determine whether the sentences imposed by the magistrate on the first appellant are appropriate. The record shows that his youthful age – he was 20 years old at the material time – and clean record were taken into account and that the magistrate cautioned himself against ever-emphasizing the sentencing element of deterrence. The magistrate, however, determined that the seriousness of the offences perpetrated against unarmed victims who did not provoke the assailants and posed no threat to them justified the custodial sentences he imposed. It is so that the first appellant was convicted of very grave offences which warranted the imposition of substantial custodial sentences. A young man with a bright future ahead of him – the deceased’s father described him as a well-loved, very good rugby player with a real prospect at joining the sport at provincial level, who had just turned 21 and was due to start a new job – lost his life in a senseless crime and it is a miracle that Conrad survived. In cases of this nature society demands punishment that reflects its outrage at the intolerable level of violence which is ravaging our country.

[28] Be that as it may however, mindful also that sentencing is pre-eminently a matter for the trial court’s discretion which is not to be interfered with by a court of appeal unless unreasonably exercised, I consider the cumulative effect of the

sentences imposed by the magistrate, which add up to 22 years imprisonment, disturbingly inappropriate and unduly severe in the circumstances. It does not appear to me that the magistrate took proper account of the first appellant's youth and capacity for reform. Ordering the sentences to run concurrently would, in my opinion, adequately serve the objects of sentencing by addressing the elements of retribution and deterrence whilst affording the first appellant some modicum of mercy and an opportunity for rehabilitation. This court is entitled to interfere in the circumstances and the sentences should run concurrently.

[29] In the result, the following order is made:

- 1 The first appellant's appeal against his convictions is dismissed.
- 2 Save as set out below, the first appellant's appeal against sentence is refused.
- 3 The second and third appellants' appeals against their convictions and sentences are upheld.
- 4 The order of the court below is varied as follows:
'1 The sentences imposed against accused number 1 shall run concurrently.
2 Accused numbers 3 and 4 are found not guilty on all counts.'

MML MAYA
Judge of Appeal

APPEARANCES

FOR FIRST APPELLANT: Van Vuuren

Instructed by: Mthembu & Van Vuuren Attorneys
Bloemfontein.

FOR SECOND AND THIRD

APPELLANTS: SB Mngadi

Instructed by: Durban Justice Centre, Durban
Bloemfontein Justice Centre, Bloemfontein

FOR RESPONDENT:

N Moosa

Director of Public Prosecutions, Pietermaritzburg

Director of Public Prosecutions, Bloemfontein