THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 377/2021

In the matter between:

CONDY MAWELA **FIRST APPELLANT**

PAULOS MATHIBELA **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral Citation: *Condy Mawela & Another v The State* (377/2021) [2022] ZASCA 18 (16 February 2022)

Coram: MATHOPO, MBATHA and MOTHLE JJA and KGOELE and PHATSHOANE AJJA

Heard: 11 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the website of the Supreme Court of Appeal and release to SAFLII. The date and time for hand-down are deemed to be 10h00 on 16 February 2022.

Summary: Criminal law and procedure – murder – common purpose – whether the court correctly applied the legal principle of *dolus eventualis* – correct approach to s 204 witnesses – whether the State had proven common purpose against appellants – whether the State discharged onus of proving its case beyond

reasonable doubt – Appeal against both convictions and sentences upheld – State's cross-appeal dismissed.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Kganyago J sitting as court of first instance):

1 The appeal against the conviction of both Mr Mawela and Mr Mathibela on counts 1 and 5 is upheld.
2 The appeal by Mr Mathibela on count 3 is upheld to the limited extent set out below.
3 The appeal by Mr Mathibela against the sentence on count 3 succeeds.
4 The cross-appeal by the respondent is dismissed.
5 The order of the high court is set aside and is substituted with the following:
'1 Accused no 2 and 3 are found not guilty on counts 1 and 5 and are discharged.
2 Accused no 3 is found guilty of common assault on count 3.
3 Accused no 3 is sentenced to 12 months' imprisonment wholly suspended for a period of three (3) years on condition that he is not convicted of any offence involving violence during the period of suspension.'

JUDGMENT

Mothle JA (Mathopo and Mbatha JJA and Kgoele and Phatshoane AJJA concurring)

[1] What started off as an enraged mob hunting an alleged rapist by some community members in Limpopo, ended tragically, with two brothers having lost their lives in the Mashiyane family. One brother, Kleinbooi Mashiyane, was killed by the

community members and the other, Jackie Mashiyane (Jackie), who was the alleged rapist, committed suicide. The rape allegation was not supported by the DNA evidence of the suspect and any semblance of justice seems to have eluded the families.

[2] The narrative that emerge from the evidence in the high court trial is that on the evening of 9 May 2017 at Magukubjane village, Hlogotlou, Limpopo, some community members, a group of approximately 100 people, held a public meeting at a football field. The purpose of the meeting was to discuss an incident of rape allegedly committed by Jackie from Talane village nearby. The group then went to the Mashiyanes' homestead[1] in Talane village to look for the suspect in order to bring him back to their village and summon the police. It was on the group's arrival at the Mashiyanes' homestead, that the events took a violent turn, which resulted in some persons being assaulted, Jackie's personal property burned, a BMW motor vehicle's windscreen damaged and one member of the family being killed.

[3] Mr Gijimani Andries Mgidi (Mr Mgidi),[2] the father to both the deceased brothers, testified that while at the police station with Jackie, he received a call from the group, who summoned him back to the homestead. He left Jackie at the police station. On his arrival at the homestead, accompanied by his other son, Mr Kleinbooi Mashiyane (the deceased), and another relative, Mr Sergeant Masilela (Mr Masilela), he encountered the group who had barricaded the road, and had lit a fire just outside the homestead. The group surrounded the BMW vehicle and hit it with various objects, damaging the windscreen. He got out of the vehicle and so did the deceased, who ran away but was struck with a stone and fell. He later saw the deceased lying on the ground bleeding. He took the deceased to a clinic, found it closed and went to the police, where the deceased was later certified dead by the paramedics. Mr Masilela testified that as he alighted from the vehicle, he was assaulted by the second appellant with a knobkerrie which broke.

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[1] The group had earlier in the day went to look for Jackie at his homestead, to no avail. At the evening meeting preceded the second attempt to locate him.

[2] Mr Mgidi is referred to in the high court judgment as 'Mr Mogithe'. In the indictment, he is referred to as 'Gijimani Andries Mgidi'. The names of various witnesses are also incorrectly spelt in the trial court's judgment and the record, compared to the names set out in the list of witnesses filed in terms of s 144 (3)*(a)* of the Criminal Procedure Act 51 of 1977.

[4] At the end of the trial held at Limpopo Division of the High Court, Polokwane (the high court) on 22 November 2018, the first and second appellants, Mr Mawela and Mr Mathibela,[3] were convicted of various counts, including murder. Mr Mawela was convicted of count 1, murder and count 5, malicious injury to property. He was sentenced to 12 years' imprisonment for murder and 5 years imprisonment for malicious damage to property. The high court ordered that the 5-year sentence should run concurrently with the 12 years' sentence.

[5] Mr Mathibela was convicted on count 1, murder; count 3. Assault with intent to cause grievous bodily harm; and count 5, malicious injury to property. He was sentenced to 12 years' imprisonment for murder; 5 years for malicious injury to property and 3 years for assault with intent to cause grievous bodily harm. Also in his case, the high court ordered that the two sentences of 3- and 5-years' imprisonment should run concurrently with the 12-year sentence.

[6] The appellants appeal to this Court is with leave of the high court. Mr Mawela appeals against the conviction and sentences of imprisonment on both counts, while Mr Mathibela was granted leave to appeal against conviction only on the count of murder, and against both conviction and sentence on the counts of assault and malicious injury to property. The high court also granted the State leave to appeal on a question of the applicability of the Criminal Law Amendment Act 105 of 1997 (the CLAA), concerning the sentence imposed on count 1, murder.

[7] Mr Mawela and Mr Mathibela contended before us that the high court erred in its approach in dealing with three parts of the State's evidence. First, the evidence of State witnesses, mainly the accomplices, was contradictory in material respects. Second, the trial was preceded by a conspiracy of the group to falsely implicate Mr Mawela. Third, the failure by the accomplices as s 204 witnesses to answer all questions, which implicated them, frankly and honestly as required by s 204 (1) of the Criminal Procedure Act 51 of 1977 (the Act). I turn to deal briefly with these aspects of the case in that order.

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[3] At the trial, Mr Mawela was accused no 2 and Mr Mathibela was accused no 3. Accused no 4 was discharged at the end of the State's case and accused no 1 was discharged at the end of the trial.

[8] The State's case was essentially based on the evidence of three members of the group, Ms Segopotso Mnguni (Ms Mnguni), Ms Patricia Mogoto (Ms Mogoto) and Mr Paris Matladi (Mr Matladi), who were State witness in terms of s 204 of the Act in return for immunity from prosecution. Ms Mnguni testified that on 9 May 2017 she was part of the group that went to the Mashiyanes' homestead at Talane village. In response to no question at all, she significantly added in her evidence-in-chief that she arrived at the homestead after the other members of the community, as she had walked slowly. On arrival she saw Mr Mawela and Mr Mathibela questioning and dragging an elderly woman, Ms Belinda Mahlangu (Ms Mahlangu), and later put her in a wheelbarrow. Ms Mnguni further testified that she heard the two appellants speak to Mr Mgidi on the phone and later noticed them coming out of the Mashiyanes' residence carrying some clothing and other personal items which belonged to Jackie, which they burned. Subsequently, she witnessed how some members of the group attacked and damaged Mr Mgidi's vehicle upon its arrival at the scene. Ms Mnguni further saw a person running, after alighting from the vehicle and was struck by a stone that came from the crowd. She saw Mr Mawela, in possession of a golf stick, chasing the deceased and striking him with it. Ms Mnguni further added that she saw Mr Mathibela also running towards the deceased armed with a knobkerrie. She could not see if Mr Mathibela used the knobkerrie to hit anyone.

[9] The evidence of Ms Mnguni was materially contradicted by the other two s 204 witnesses. Ms Mogoto and Mr Matladi, who both testified that Ms Mnguni was not the innocent bystander but was the leader of the group and actively participated in giving instructions. Ms Mogoto further testified that, contrary to the allegation that it was the appellants who spoke on the phone, she saw and heard how Ms Mnguni, speaking on the phone, demanding Mr Mgidi to return to the homestead with Jackie and insulted him. Ms Mogoto further testified that she saw Mr Mathibela burn some clothes contrary to what Ms Mnguni had alleged. There were also some discrepancies on the evidence of the questioning and assault of the old lady, Ms Mahlangu. Ms Masesi Raselomane (Ms Raselomane), lived in the Mashiyanes' homestead with her grandmother, Ms Mahlangu. She testified that it was a lady with a panga, Ms Mnguni, who took her phone to talk to Mr Mgidi.

[10] Ms Mnguni was the only witness who testified that she saw Mr Mawela chase after the deceased and assault him with a golf stick. This evidence is at odds with the evidence of Mr Matladi who testified that, when the deceased alighted from the vehicle, Mr Mawela, who was near the door of the vehicle, hit the deceased once with an open hand and the deceased ran into the darkness. Mr Matladi was nearer the vehicle but his evidence does not corroborate that of Ms Mnguni. The third version of the State came from Ms Mogoto who testified that she was standing next to the vehicle with Mr Mgidi and Mr Mawela when an altercation ensued between Mr Mgidi and the Mr Mawela. She intervened to avoid the confrontation. Other members of the group had at that time gathered where the deceased had fallen.

[11] With regard to Mr Mathibela, there are further contradictions. Mr Matladi testified that he was next to the vehicle when he witnessed Mr Mathibela strike Mr Masilela with a knobkerrie on his arm as he alighted from the vehicle. The knobkerrie broke. This version was confirmed by Mr Masilela that it took place by the vehicle as he attempted to alight. However, this is a version that contradicts Ms Mnguni's evidence that she also saw Mr Mathibela chase after the deceased with a knobkerrie, when the latter alighted from the vehicle, even though she could not see what Mr Mathibela did with it. In essence, the evidence of the State through Ms Mnguni places the two appellants away from the vehicle, chasing the deceased, while the other evidence of the State, through Mr Matladi and Ms Mogoto locates both appellants by the motor vehicle at the time the deceased was running away.

[12] Having regard to what is stated in the preceding paragraphs, I am of the view that the material contradictions and various versions present in the State's case cannot sustain a conviction for murder. The finding of this Court in a similar matter in *Jansen v The State*[4] is apposite. The Court expressed the following view:

'These are serious contradictions which go to the heart of her case. In my view, they have rendered her evidence untrustworthy, less credible and unreliable. It cannot be said that her evidence is satisfactory in all material respects.'

[13] After the incident at the Mashiyanes' homestead, it became known that some of the group members, including Mr Mawela, who was the first to be arrested, had

[4] *Jansen v The State* [2016] ZASCA para 32.

made statements to the police. As a result, another community meeting was called, where the group members forced him to tell them what he told the police. He told the community that Mr Tumelo Chego[5] threw the stone that fell the deceased and that Mr Matladi hit the deceased with a knobkerrie. The community in turn conspired that whoever is called as witness must implicate those who made statements to the police for the commission of the offences.

[14] The high court downplayed the significance of the community's conspiracy to implicate those who had made statements to the police, including Mr Mawela. The contradictory evidence was also tainted by the conspiracy. It is trite that the courts must approach the evidence of the accomplices with caution, it even becomes more so with the evidence of a conspiracy to falsely implicate others. This Court in *Mojapelo v S*[6] stated thus:

'It is trite that a court should approach the evidence of an accomplice with caution, and courts are repeatedly warned of the "special danger" of convicting on the evidence of an accomplice. In *R v Ncanana* 1948 (4) SA 399, this court said:

"The cautious Court will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so."'

[15] At the commencement of their evidence, the high court warned the s 204 witnesses that as accomplices, each would be implicated in the commission of the crimes. Consequently, they had to answer questions posed to them frankly and honestly. Each of the s 204 witnesses, however, sought to exculpate themselves when testifying. They sought to minimise their role to the point of distancing themselves from the mob as bystanders and in doing so, attempted to cast the blame on the appellants. Not one of them admitted the questions under cross-examination as to their roles in the commission of the offences at the Mashiyanes' homestead. The three witnesses inexplicably appeared to have directed their focus on the conduct of the two appellants out of more than 100 people present that evening.

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[5] Mr Tumelo Chego was accused no. 1 in the trial and was acquitted.

[6] *Mojapelo v S* [2016] ZASCA 22 para 16.

[16] Thus, even in instances where it appears there was corroboration, the spectre of the tainted evidence of conspiracy to falsely implicate others, detracts from its credibility and reliability. It should not be left to the courts to sift through the evidence of a witness to determine which part thereof might or might not be affected by the conspiracy. That said the high court's finding of murder on the basis of *dolus eventualis* is not only tenuous but not borne out by the evidence.

[17] There is another matter which concerns the high court's finding in the penultimate paragraph of its judgment. The high court judgment concluded thus:

'In this case when a stone was thrown to [Kleinbooi], it cannot be said that the intention was to kill him. The intention was to stop him from fleeing, but by stopping him from fleeing with a stone, they were gambling with his life, and they should have foreseen that it might struck a fatal blow. In my view, the two accused are guilty of murder in [the form] of *dolus eventualis*.'

[18] Contrary to the high court's finding, first, the State failed to prove that the said stone struck a fatal blow or was actually the cause of the blunt force trauma. Second, there was no evidence by the State that either Mr Mawela or Mr Mathibela threw the stone at the deceased. Third, the high court's finding that the fatal blow came from the stone negates or excludes any evidence of the State, which sought to prove that the fatal blow could have resulted from some other object such as a golf stick or knobkerrie. The absence of that critical causal nexus between the appellants' alleged conduct and the eventual demise of the deceased, had not been proved.

[19] Another disconcerting feature of the judgment of the high court is that according to the uncontested report on the Medical Legal Post Mortem Examination (the autopsy report), conducted on the body of the deceased, the cause of death was ruled as 'blunt force trauma to the head'. The deceased was found to have sustained scalp injuries; facial and neck surface injuries; fractured skull and associated brain tissue injuries and intracranial haemorrhages. The high court erroneously found, contrary to the autopsy report and without any evidence, that the deceased died, consequent to being hit *by a stone* when running from the vehicle. The evidence, which the State failed to present, was that there were about 50 people from the group who descended on the area where the deceased fell and also stoned him. Ms Mogoto observed, at the spot where the deceased had slumped, that he

was bleeding and there were stones around him. Mr Mawela also claimed that other members of the community threw stones towards where the deceased was running. The question which arises is whether the deceased sustained additional injuries from the group, apart from the stone that made him slump. On this ground alone, the conviction for murder falls to be set aside.

[20] It has become prevalent practice to simply submit the autopsy report as an admission in terms of section 220 of the Act, with no further attention paid to it. In this matter, the autopsy report was admitted at the end of the State's case as exhibit C. None of the parties made an attempt to make reference to the autopsy report in their submissions (address on the merits) to court. Further, except to state in the judgment that the autopsy report was admitted as evidence and marked exhibit C, the high court did not deal with it either. Failure to deal with the autopsy report as evidence suggests that a critical piece of evidence that could prove or corroborate the cause of death, was ignored.

[21] On count 5 it was contended by the State that Mr Mawela and Mr Mathibela burnt Jackie's clothes. The State's evidence on this count is riddled with contradictions of such a nature that the convictions cannot stand and must suffer the same fate as their conviction on the count of murder. In respect of count 3, relating to the assault of Mr Masilela by Mr Mathibela, Mr Masilela's evidence was that Mr Mathibela accused him of hiding the rape suspect at his house and smote him mightily with a knobkerrie on his hand. He retreated into Mgidi's vehicle; crawled from the rear passenger seat to the driver's seat and drove off from the scene to the police station. He was able to identify Mr Mathibela. Nothing obstructed his view. The high court accepted the evidence of the State's witnesses as credible and reliable on this score. This was not seriously disputed on appeal. That finding cannot be faulted.

[22] In this Court, counsel submitted that, at the very least, Mr Mathibela ought to have been convicted of common assault because the State failed to prove that he caused Mr Masilela grievous bodily harm. Save for the fact that Mr Masilela's hand was swollen the next day and he used warm water to reduce the inflammation, he did not seek medical attention. It follows that the conviction of assault with intent to

do grievous bodily harm ought to be set aside and replaced with common assault. As to sentence it ineluctably follows that the sentence of 3 years imprisonment must also be set aside. In my view, a wholly suspended sentence would be suitable.

[23] The cross-appeal lodged by the State can be disposed of very briefly. It collapsed when the State conceded that the high court had erred in convicting the appellants. Count 1 was murder read with section 51(1) of the CLAA. It included premeditation and the applicability of the common purpose doctrine. The high court reasoned that it was '. . . satisfied that the State has proved common purpose against [Mr Mawela] and [Mr Mathibela] and are therefore responsible for the death of [Kleinbooi Mashiyane]'. As a result, the State contended that the high court was bound to convict the appellants of premeditated murder. In addition, it ought to have found that they acted with common purpose. This, it further argued, would attract life imprisonment in terms of s 51(1) of the CLAA.

[24] As already said, the State's case was that the group went to Mashiyane's homestead to apprehend Jackie, take him to their village, and to hand him over to the police. There was no evidence presented that Mr Mawela and Mr Mathibela or the group conspired to commit premeditated murder or had the *mens rea* to act with common purpose to commit any offence, least of all, against the deceased. The evidence in this case does not remotely meet the requirements that should be present to sustain a conviction on common purpose, as determined in *S v Mgedezi and Others*;[7] and *S v Thebus*.[8] The cross appeal should therefore fail.

[25] In the result, I make the following order:

1 The appeal against the conviction of both Mr Mawela and Mr Mathibela on counts 1 and 5 is upheld.

2 The appeal by Mr Mathibela on count 3 is upheld to the limited extent set out below.

3 The appeal by Mr Mathibela against the sentence on count 3 succeeds.

4 The cross-appeal by the respondent is dismissed.

5 The order of the high court is set aside and is substituted with the following:

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[7] *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I-706B.
[8] *S v Thebus and Another* 2003 (2) SACR 319 (CC) para 49.

‘1 Accused no 2 and 3 are found not guilty on counts 1 and 5 and are discharged.

2 Accused no 3 is found guilty of common assault on count 3.

3 Accused no 3 is sentenced to 12 months’ imprisonment wholly suspended for a period of three (3) years on condition that he is not convicted of any offence involving violence during the period of suspension.’

pp_____

SP MOTHLE

JUDGE OF APPEAL

APPEARANCES:

For first appellant:	D J Nonyane
Instructed by:	Polokwane Justice Centre, Polokwane Bloemfontein Justice Centre, Bloemfontein
For second appellant:	L M Manzini
Instructed by:	Polokwane Justice Centre, Polokwane Bloemfontein Justice Centre, Bloemfontein
For the respondent:	N G Munyai
Instructed by:	Director of Public Prosecutions, Polokwane Director of Public Prosecutions, Bloemfontein.