SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 575/2011

Not Reportable

In the matter between:

TOYA-LEE VAN WYK **FIRST APPELLANT**

ENVOR HAGAN **SECOND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Toya-Lee van Wyk v The State* (575/11) [2012] ZASCA 47 (28 March 2013).

Coram: Mpati P, Pillay JA et Mbha AJA

Heard: **20 February 2013**

Delivered: **28 March 2013**

Summary: Murder – mens rea – doctrine of common purpose – act of another imputed to appellant – insufficient evidence to satisfy requirements to found common purpose and therefore criminal liability – conviction and sentence set aside.

ORDER

On appeal from: Western Cape High Court, Cape Town (Moosa J sitting as court of first instance):

1 The appeal is upheld and the conviction and sentence are set aside.

JUDGMENT

PILLAY JA (MPATI P ET MBHA AJA CONCURRING)

[1] Leave to appeal having been granted by the Western Cape High Court, Cape Town, the appellants appeal against their convictions on a count of murder. Prior to this hearing, we were informed that first appellant has since passed on and that it is therefore not necessary to deal with his appeal. The second appellant (hereinafter referred to as 'the appellant') who at the time of this appeal had already served his sentence, sought nevertheless to continue with his appeal. He was accused no 3 in the trial court.

[2] The appellant appeared in the high court with six others on one count of murder, one count of kidnapping and one count of robbery with aggravating circumstances as envisaged in s1 of the Criminal Procedure Act 51 of 1977. He was acquitted of kidnapping and robbery but convicted of murder on the basis that he had acted in concert with a group of persons who had actually caused the death of Carmen Charmaine Kamies ('the deceased') on 6 July 2002. He was sentenced to seven years' imprisonment of which two years were conditionally suspended for five years.

[3] This appeal concerns the application of the doctrine of common purpose and whether it was properly applied in convicting the appellant.

[4] At the commencement of proceedings in the high court, all charges against Anthony Koordom, who was accused no 2 in the trial court, were withdrawn. He later testified on behalf of the State and was warned in terms of s 204 of the Criminal Procedure Act 51 of 1977.

[5] The following material facts are either common cause or undisputed:

5.1 During the evening of 6 July 2002 at approximately 20h00, the deceased, her sister, Lee-Ann Kamies and their friend, Shireen Kriel, were walking along Mangold Street, Westbank, Kuils River.

5.2 In the vicinity of a tavern, referred to as Ricky's Games, they were joined by two male persons who exchanged pleasantries with them opposite the tavern. The two males asked them to wait in the street while they went into Ricky's Games. Shortly thereafter they were rejoined by the same two males and yet another male person. The three males then somehow managed to separate the deceased from her sister and their friend and were then joined by two other male persons.

5.3 According to Lee-Ann, at some stage as the events unfolded, the appellant appeared in the street. It appeared to her as if he had been to some sports practise. He approached the group that had by then surrounded the deceased and said: 'My broer, los die kinders, want die kinders het niks gemaak nie.' Lee-Ann and Shireen then left the scene to seek help when the deceased asked them to do so.

5.4 The appellant, upon invitation, ostensibly to take the deceased to her home in Brentwood Park, then walked with the group and the deceased. The deceased had curled her one arm around the waist of one of the males, who later turned out to be Marcelino Van Wyk (Marcenlino) who was accused no 7 in the trial court. Marcelino, had in turn, put his arm around the neck of the deceased. On the way, the group branched into some thicket. When they reached the inside of the thicket which was located near Brentwood Park, Marcelino invited the rest of the group to have sex with her. The deceased said that she was sick. No one took up the offer. Marcelino said that they ought to then take her home.

5.5 No sooner were they out of the thicket and before they could disperse, Franklin

Meyer (Franklin), who was accused no 6, warned Marcelino that they could not simply let the deceased go as she would tell her people what had happened and might lay a charge against members of the group since she was connected to the rival 28 gang. (It appears that at least Marcelino was a member of the 26 gang.) They all then went back into the thicket.

5.6 At some spot in the thicket, the deceased was ordered to sit on a tree stump. Thereafter Marcelino asked her if she was associated with the 28 gang. When she denied any association, he slapped her more than once. She started to cry. When asked for the third time if she had such an association, she admitted it.

5.7 The deceased was then hit on the back of her head with a pole that was about ten centimeters thick and a meter long. As a result she fell on her stomach. She was made to sit on the stump again and once again hit on the back of her head with the pole, with the same result, except that this time she landed on her back. Marcelino then picked up a loose tree stump which weighed approximately 10.5 kg, and threw the stump onto her face. He then ordered some of the others to do the same.

[6] What actually happened in the thicket where the deceased was killed, is within the knowledge of those who were present when the assault occurred. Only Koordom and Toya-Lee Van Wyk, who was accused No 1, testified about the events in the thicket.

[7] Koordom testified that after Marcelino threw the tree stump onto the deceased's face, Franklin did the same, followed by Ralph Persent (Ralph), who was accused no 5 in the trial court. Koordom further described how Marcelino thereafter aggressively compelled a reluctant Daniel Louw (Daniel), who was accused no 4, to do the same. An argument between the two then ensued. Franklin intervened and told Daniel, in no uncertain terms, that he should do as he was being told. Daniel finally threw the stump onto the face of the deceased. Koordom described how he himself was ordered to also throw the stump onto the deceased. He said that he picked up the stump but threw it next to the head of the deceased.

[8] Koordom then proceeded to describe how Ralph, Franklin and Marcelino took turns to stab the deceased as she lay on the ground. He further said that Marcelino then

gave the knife to the appellant and ordered him to stab the deceased in the heart. The appellant took the knife but asked where the heart was located. Koordom explained that in an apparent fit of impatience, Marcelino took the knife back saying that he would show the appellant how to stab and then resumed stabbing the deceased. Marcelino then compelled Toya-Lee to stab the deceased. Being scared, Toya-Lee took the knife and feigned stabbing, but in fact did not. The group then departed from the scene, leaving the deceased behind in the bush. Koordom's evidence was not rejected out of hand but was found to require corroboration in order to be relied upon.

[9] Toya-Lee broadly confirmed Koordom's testimony of the events that occurred in the thicket where the deceased was assaulted. There were, however, some inconsistencies between their respective testimonies, notably Toya-Lee stated that it was in fact Franklin who had assaulted the deceased with the pole while Koordom said it was Marcelino. For purposes of this appeal, nothing turns on this discrepancy as both Marcelino and Franklin clearly acted in concert with each other at the material time. When the group left the thicket, the appellant and Koordom separated from the group and went home on their separate ways.

[10] The court below found that Toya-Lee's evidence could not 'per se' be rejected. Of importance, Toya-Lee confirmed in all material respects, the evidence of Koordom regarding what occurred when Marcelino ordered the appellant to stab the deceased, the appellant's response thereto and, in particular, that he did not stab the deceased.

[11] According to Dr Dempers, who performed the post mortem examination on the body of the deceased, approximately 50 stab wounds were inflicted on the deceased. His finding as to the cause of death is: `nie teenstrydig met hoofbesering nie'. (Not inconsistent with head injury. In his evidence he described the injury to the head as having been inflicted with blunt force. It follows therefore that the deceased died as a result of being hit with the pole or the injuries caused by the tree stump when it was thrown onto her head. Dr Dempers further found that the stab wounds were inflicted after the deceased had already died.

[12] The appellant did not testify. It is, however, clear from the evidence that the appellant did nothing that can be causally connected to the deceased's death and his

conviction was based on the doctrine of common purpose. In arriving at the conclusion that he had made common cause with those responsible for the death of the deceased, the learned judge in the court below reasoned as follows:

‘Op die stadium nadat beskuldigde 6 gesê het dat hulle nie die oorledene kon laat gaan nie en hulle daarop almal sonder enige gesprek of bespreking weer teruggedraai het in die bosse in, toon dit aan dat al sewe van hulle op daardie tydstip `n gemeenskaplike oogmerk gevorm het om die oorledene te dood. Na aanleiding van beskuldigde 6 se waarskuwing sou geen redelike person kon glo dat die oorledene die bos lewendig sou verlaat nie. Tot tyd en wyl hulle die bos weer as `n groep verlaat, het nie een van hulle `n handeling van disassosiasie verrig nie. (Sien S v MUSINGADI, `n ongerapporteerde beslissing van die Hoogste Hof van Appèl, saaknommer 22/95, gelewer op 23 September 2004.)

Nie een van die beskuldigdes het op enige stadium probeer keer dat daar met hierdie wrede moord voortgegaan word of homself met die optrede disassosieer nie. Na afloop van die aanval op die oorledene toon almal van hulle, hulle aanvaarding van wat gebeur het, en bevestig daardeur dat hulle wel `n gemeenskaplike doel gehad het, deur saam die toneel te verlaat en nog `n tyd lank op vriendskaplike voet bymekaar te verkeer totdat sommige van hulle gaan slaap het. Dat sommige van hulle `n mindere rol gespeel het val nie te betwyfel nie, maar dat die doodmaak van die oorledene almal se goedkeuring weggedra het, word deur hulle optrede bo enige redelike twyfel bewys.

Beskuldigdes 1 en 4 se weergawe dat hulle bang was vir beskuldigde 7 tydens die voorval, gaan nie op nie. Niks het hulle verhoed om weg te kom van die toneel af nie. Beskuldigde 1 was `n familielid van beskuldigde 7 wie gereeld gekuier het by sy familiehuis. Na die voorval het hulle teruggekeer na die huis van beskuldigde 1. Sy ma was teenwoordig en het vir beskuldigde 7 gevra waar die bloed op sy hemp vandaan kom. Dit was `n gulde geleentheid vir beskuldigde 1, asook vir beskuldigde 4, om te kla by beskuldigde 1 se ma. Hulle doen dit nie. Hulle gaan saam met beskuldigde 7 na Ricky’s Games waar hulle saam verkeer en saam drink totdat beskuldigde 1 se ma hulle kom roep. Op daardie stadium daag die polisie op om die smokkelhuis toe te maak. Indien hulle hul wou distansieer van die voorval, kon hulle die voorval aan die polisie gerapporteer het. Dit is duidelik uit hulle optrede voor, gedurende en na die voorval dat hulle saamgespan het om die oorledene te dood. Die Hof verwerp hulle weergawe dat tydens die pleging van die moord, hulle vir beskuldigde 7 gevrees het.

Beskuldigde 3 het besluit om nie te getuig of enige getuienis aan te bied tot sy verdediging nie. Sy optrede voor, gedurende en na die voorval dui daarop dat hy hom vereenselwig het met die

optrede van die res van die beskuldigdes om die oorledene te dood. Die stellings wat gemaak is deur adv Losch, namens hom, dra baie min gewig, want dit is nie getuienis wat getoets kan word nie.

In die lig van die totaliteit van die getuienis, verwerp die Hof die weergawe van al die beskuldigdes waar dit teenstrydig is met die bewese feite en waarskynlikhede. Die Hof bevind dat al die beskuldigdes aktief deel gehad het om die oorledene te dood.'[1]

[13] Briefly and simply put, common purpose is the imputing of the act of one member of a group to other members of the same group or vice versa, provided of course that some form of intention is proved against each of them. The development of the jurisprudence in regard to the doctrine of common purpose had raised many questions, with the result that a detailed analysis of the legal position of the doctrine had to be undertaken. This was, with respect, ably done by Botha JA in *S v Safatsa* 1988 (1) SA 868 (A). For purposes of this judgment, it need only be stated that according to *Safatsa*, in cases where there is no causal connection between the conduct of the accused and the offence in question, it is sufficient that some act of association with the actions of the group is proved against the accused in order to found common purpose.

[14] The requirements to hold a person criminally liable on the basis of the approach adopted in *Safatsa* were set out in *S v Mgedezi* 1989 (1) SA 687 (A) at 705I – 706C where it is stated as follows:

'In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988(1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with

[1] Paras 64 – 67 and 71 of the judgment.

recklessness as to whether or not death was to ensue.'

[15] Mr Badenhorst for the State conceded that the present case was an instance where there was no prior agreement between the members of the group that the deceased should be killed. It follows therefore that the appellant's guilt must be considered, on the basis of the requirements as set out in *S v Mgedezi*, supra. In support of the conviction, Mr Badenhorst contended that the appellant clearly associated himself with the actions of the group by (a) returning to the bush with the group; (b) receiving the knife; (c) asking where the deceased's heart was and (d) leaving together with the group. He submitted that his association with the group and its activities was cemented by his failure to disassociate himself from the group's actions at any stage.

[16] While the inference of such an association can sometimes be drawn from what occurred or was said during or after the event, care needs to be taken to avoid lightly inferring an association with a group activity from the mere presence of the person who is sought to be held criminally liable for the actions of some of the others in the group.

[17] The learned judge concluded that the appellant's conduct before, during and after the incident was indicative of him having associated himself with the actions of the rest of the group in killing the deceased. He did not specify which actions of the appellant led him to that conclusion. I can only assume that the actions he must have been referring to were the appellant's return into the bush with the group, the receiving of the knife, asking where the deceased's heart was and the failure to disassociate himself from the group and its actions at the material time. In light of the absence of evidence to indicate that the appellant had associated himself with the actions of those in the group who had intended to assault and kill the deceased, the trial court's conclusion does not follow logically and its approach constitutes a misdirection. The evidence regarding the appellant's return into the thicket with the rest of the group merely proves his presence at the scene of the killing. But his mere presence cannot serve as proof of any one, or more, of the rest of the requirements set out in *Mgedezi* and which have to be established to hold an accused criminally liable for the actions of a group in the absence of an agreement. See*: S v Jama* 1989 (3) SA 427 (A) at 436E-J.

[18] Even if the appellant had realized that the deceased was about to be killed when

he returned into the thicket with the rest of the group, that does not justify an inference that he was in agreement with, or approved of, the crime which was about to be perpetrated, nor that he thereby manifested his association with the group's criminal purpose. The fact that he did not participate in the murderous assault on the deceased illustrates this. There is no evidence of any act of association by the appellant with the actions of those who assaulted and murdered the deceased. When he took the knife from Marcelino, he did so because he was ordered by Marcelino to stab the deceased in the heart. His act of taking the knife and asking where the heart was located in those circumstances, is, in my view, not sufficient to prove that the appellant intended to make common cause with those who actually perpetrated the assault (third requisite as set out in *Mgedezi*), nor is it sufficient to prove a manifestation of his sharing of a common purpose with the perpetrators of the assault, by himself performing some act of association with the conduct of the others (fourth requisite as set out in *Mgedezi*). After all, the appellant did not stab the deceased. It is not necessary to consider the question whether, in any event, he could have been found guilty of murder had he done so, in view of the medical evidence that the deceased was already dead when she was stabbed.

[19] The court below accordingly erred in holding that the appellant and his co-accused '`n gemeenskaplike oogmerk gevorm het om die oorledene te dood' when they turned back into the thicket after Franklin had said they could not allow the deceased to go. There was absolutely no evidence of an agreement between them to kill her. The court a quo clearly drew an inference of such an agreement from the fact that the appellant and the others returned to the bush without demur. That, however, is not the only reasonable inference that can be drawn from the facts. Some might have been curious to see what was going to happen while others might have been afraid to object or disagree, given that both Marcelino and Franklin seemed to have been conducting affairs at the time. There was indeed evidence that both of them put pressure on others, eg. Daniel and Koordom, to become complicit in the assault on the deceased.

[20] In the circumstances, the court below should have found that the State had failed to discharge the onus of proving the guilt of the appellant beyond reasonable doubt. The appellant's appeal must accordingly succeed.

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

1 The appeal is upheld and the conviction and sentence are set aside.

R. PILLAY

JUDGE OF APPEAL

APEARANCES:

FOR APPELLANT :	MR J MIHALIK Instructed by: Legal Aid South Africa, Cape Town; Legal Aid South Africa, Bloemfontein
FOR RESPONDENT:	MR L J BADENHORST Instructed by: The National Director of Public Prosecutions, Cape Town The National Director of Public Prosecutions, Bloemfontein