THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 269/13

In the matter between:

BEENESH DEWNATH **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Dewnath v S* (269/13) [2014] ZASCA 57 (17 April 2014)

Coram: Maya, Willis and Saldulker JJA and Van Zyl and Mocumie AJJA

Heard: **7 March 2014**

Delivered: **17 April 2014**

Summary: Criminal appeal against conviction – appellant convicted of murder by common purpose – requirements of common purpose restated – active association – mens rea – the most critical requirement of active association is to curb too wide a liability.

ORDER

On appeal from: KwaZulu-Natal High Court, Pietermaritzburg (Jappie, Gyanda and Mokgohloa JJ sitting as Full Court):

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The appellant's conviction and the sentence imposed are set aside.'

JUDGMENT

Mocumie AJA (Maya, Willis and Saldulker JJA and Van Zyl AJA concurring):

[1] This appeal arises from a bitter and murderous sibling rivalry. The appellant, together with his parents, Mr Dewnath Ramkisson, Mrs Nirmalah Ramkisson and two co-accused, were arraigned in the Kwazulu Natal High Court, Pietermaritzburg for murder of the deceased, Mr Jairam Ramkisson, and the attempted murder of his wife Mrs Sashika Ramkisson.

[2] The trial court convicted all the accused with murder. They were also convicted of attempted murder, except the appellant. The appellant was sentenced to 15 years' imprisonment. On appeal to the full bench (Jappie, Gyanda and Mokgohloa JJ), the appellant and his parents' convictions and sentences were confirmed. The appeal, in respect of the appellant only, is with special leave of this court.

[3] The State led the evidence of Mr William Themba Sithole (Sithole), who had pleaded guilty to the charges. He testified against the four as an accomplice in terms of s 204 of the Criminal Procedure Act 51 of 1977 (the CPA).

[4] Sithole testified that he was brought into contact with the appellant's father by his co-accused, Jabulani Mkhize (Mkhize), who in turn had been recruited by the appellant's father to kill the deceased. Mkhize took him to the appellant's family business, a fish shop adjacent to the deceased's business, where the proposed murder was discussed. Sithole demanded a fee of R35 000 to carry out the assassination. The appellant's father offered only R15 000. They could not agree on the amount. He left to consider the reduced fee. The next day he returned to the shop, met again with the appellant's father and agreed to a reduced fee of R20 000. He demanded a down payment which was to be made upfront. The two conferred in the back of the shop whilst the appellant's wife, a young woman who served as a shop assistant and the appellant, were in the front of the shop, apparently serving customers. The appellant's father did not agree with Sithole's demand for a down payment and went to call his wife to mediate. He returned with her and the appellant in tow.

[5] According to Sithole, the appellant's mother refused to accede to his demand. She said that in 2005 a person whom they had hired to kill the deceased disappeared with a pistol and R200 they had given him upfront. Sithole further testified that the appellant then uttered the following words: 'But why are you asking for so much money? The person that we are asking you to kill is absolutely worthless. I would understand if he was a member of the taxi business. If I wasn't involved in the police, with the police, I would kill him myself.' After uttering those words, the appellant left the room, leaving Sithole with his parents. They continued with the negotiations.

[6] When he left the Ramkissons on that day there was still no agreement in place. There is no evidence that any further discussions or negotiations took place, or that the appellant was privy to such negotiations, or that he formerly approved what was decided in his absence. Prior to this day, Sithole did not know the appellant nor could he remember if he had seen him before. A few days later, Sithole waited for the deceased as he was closing the shop at around 18h00. As the latter locked the shop door he shot and killed him. When the deceased's wife turned around and attempted to stop him, he shot

her as well. She survived the shooting. The next day, the appellant's parents paid him for having killed the deceased.

[7] The main attack against the judgment of the trial court is that it erred in convicting the appellant of murder based on common purpose. It was contended that the State failed to prove that the words uttered by him were sufficient to form an active association with the common purpose, between his parents and their co-accused, to kill the deceased.

[8] The appellant testified in his own defence and denied any involvement in the commission of the murder or having uttered the words testified to by Sithole. The trial court accepted Sithole's evidence about the involvement of the appellant and that it proved that he had actively associated himself with the commission of the murder of the deceased.

[9] The question is whether the trial court correctly concluded that the evidence implicating the appellant was sufficient to conclude that he acted in common purpose with the conspirators and had the necessary *mens rea* justifying a conviction of murder.

[10] In *S v Mgedezi*[1] this court stated the following:

'In the absence of proof of 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 liable for those events, on the basis of the decision in *S v Safatsa & 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 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

[1] *S v Mgedezi & others* 1989 (1) SA 687 (A) at 705I-706C.

foreseen that the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[11] This court further in *S v Le Roux*[2] stated:

'In *S v Mgedezi & others* 1989 (1) SA 687 (A) this court dealt with a situation where there was no prior plan to commit the offence of public violence. It was stated there that a general and all-embracing approach regarding all those charged is not permissible. It was stated further that the conduct of the individual accused should be individually considered, with a view to determining whether there is a sufficient basis for holding that a particular accused person is liable, on the ground of active participation in the achievement of a common purpose that developed at the scene. In that case the following was stated:

"A view of the totality of the defence cases cannot legitimately be used as a brush with which to tar each accused individually, nor as a means of rejecting the defence versions *en masse."*

And further:

'The trial Court was obliged to consider, in relation to each individual accused whose evidence could properly be rejected as false, the facts found proved by the State evidence against that accused, in order to assess whether there was a sufficient basis for holding that accused liable on the ground of active participation in the achievement of a common purpose. The trial Court's failure to undertake this task again constituted a serious misdirection.' (My emphasis)

[12] In *S v Thebus*[3] the Constitutional Court reiterated the applicability of the doctrine as follows:

'If the prosecution relies on common purpose, it must prove beyond a reasonable doubt that each accused had the requisite mens rea concerning the unlawful outcome at the time the offence was committed. That means that he or she must have intended that criminal result or must have foreseen the possibility of the criminal result ensuing and nonetheless actively associated himself or herself reckless as to whether the result was to ensue.'

---

[2] *S v Le Roux & others* 2010 (2) SACR 11 (SCA) para 17. See also *Scott v S* (473/10) [2011] ZASCA 121 (31 August 2011) para 23; *Azwihangwisi Mmboi v S* (167/12) [2012] ZASCA 142 (28 September 2012).

[3] *S v Thebus* 2003 (2) SACR 319 (CC) para 49; *S v Safatsa above*; *S v Mgedezi & others* above at 705I-706C.

[13] In convicting the appellant, the trial court accepted the appellant's version that he had no prior agreement with Sithole and his parents to kill the deceased. But it reasoned that 'the only inference to be drawn was that when the appellant uttered those words, he did so with the intent to persuade Sithole to carry out the plan and force him to abandon or forgo his demand for a down payment or deposit'. On appeal, the court a quo found that the trial court could not be faulted when it concluded that the conduct of the appellant was consistent with conduct associating himself with the common purpose to have the deceased killed.

[14] Although during the trial the appellant denied having uttered the words Sithole imputed to him, in this court the trial court's acceptance of Sithole's evidence and its rejection of the appellant's evidence on this aspect was, quite correctly in my view, not placed in issue. It was accordingly conceded on his behalf that he did utter those words. However, it was submitted that the words were insufficient for a conclusion that the State had proved that the appellant actively associated himself with the plan by his parents or Sithole to kill the deceased. It was further argued that there was no reliable evidence linking the appellant to any of his parents and Sithole's transgressions prior to and after the commission of the murder. And even if it were accepted that the words uttered by the appellant connected him to the commission of the murder, there was insufficient proximity with the final result to justify a conviction of murder on the basis of common purpose. If anything, so it was argued, the State relied solely on what the trial court stated in its judgment, namely that the only inference that could be drawn from the circumstances was that the appellant, by uttering those vengeful words, wanted to influence Sithole to commit the murder.

[15] In the light of the facts of this case, it is important to note that the common purpose doctrine as espoused in *S v Mgedezi & others* has been pronounced by the Constitutional Court to be constitutional.[4] The most critical requirement of active association is to curb too wide a liability. Current

[4] *S v Thebus* above.

jurisprudence, premised on a proper application of *S v Mgedezi & others*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.

[16] There is no evidence that the appellant actively participated in the murder apart from the fact that he walked in from the front part of the shop to the back where his father was with Sithole and uttered the vengeful words. To my mind, therefore, the State had to prove some form of active participation on the part of the appellant than just the words he uttered. Mere approval of the commission of the murder sought by the perpetrators does not suffice.[5] As morally reprehensible as it is that the appellant wished his uncle dead or even thought of killing him himself, what he said does not amount to active association with the common purpose of his parents and Sithole. On the accepted evidence his 'participation' was insignificant. It was limited and removed from the actual executive action. It can best be regarded as evidence that he had some knowledge of the plan that was in the process of being hatched to kill the deceased.

[17] A conviction on murder on this set of facts would not withstand the ordinary principles of criminal liability, let alone the principles of causation. This is so because, generally speaking, in our law, the guilt of an accused falls to be decided with reference to his own acts and his own state of mind.[6] There is simply no basis to conclude that the appellant intended to kill the deceased. Furthermore, the inference that the trial court sought to draw was not the only inference to be drawn from the proven facts.[7]

[18] Although the appellant was embroiled in the bitter rivalry between the two families and there may be a suspicion that he was in cahoots with his parents to kill the deceased, he cannot be convicted on suspicion alone. The

---

[5] *S v Khumalo & andere* 1991 (4) SA 310 (A) at 351E-F.
[6] See *S v Thomo & others* 1969 (1) SA 385 (A) at 394B-C.
[7] *R v Blom* 1939 AD 188 at 202-203.

State must prove its case beyond reasonable doubt and an accused does not bear any onus to prove his innocence. Whether one subjectively believes him or her is not the test. The test is whether there is a reasonable possibility that his evidence may be true.[8] For these reasons, the appeal must succeed.

[19] In the result, the following order is granted.

1 The appeal is upheld.

2 The order of the court a quo is set aside and replaced with the following:

'The appellant's conviction and the sentence imposed are set aside.'

_____

B C MOCUMIE

ACTING JUDGE OF APPEAL

[8] *S v Shackell* 2001 (2) SACR 185 (SCA) at 194H-H; *S v V* 2000 (1) SACR 453 (SCA) at 455A-B.

APPEARANCES:

For Appellant...	K J Kemp Instructed by: Anand-Nepaul Attorneys, Durban Phatshoane Henney Inc, Bloemfontein
For Respondent...	H M Zulu Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Director of Public Prosecutions, Bloemfontein