IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) 4/14

CRI/T/102/07

HELD IN MASERU

In the Matter Between:

NTHOLENG KEKETSI **1ST APPELLANT**

MABINA MABINA **2ND APPELLANT**

KELEBONE MOKONE **3RD APPELLANT**

MOTSEKI SUTHA **4TH APPELLANT**

And

REX

CORAM: MAJARA CJ, CLEAVER AJA, DR MUSONDA AJA

HEARD: 19 APRIL 2016

DELIVERED: 29 APRIL 2016

Summary

Appeal against conviction and sentence of 12 years imprisonment for murder – whether appellants acted with common purpose – whether the evidence established the cause of death – Defence Counsel choosing not to address the Court a quo in mitigation of sentence – whether this constituted an irregularity – All appellants choosing to remain silent at the close of Crown's case

Factors on which doctrine of common purpose applies successfully established – Facts in the present matter distinguishable from those in Ratalane & Others – No irregularity committed by the court a quo - Appeal dismissed.

JUDGMENT

MAJARA CJ:

[1] This appeal was noted against the judgment of the High Court in which all the four (4) appellants were convicted and sentenced to imprisonment for a period of twelve (12) years each for the murder of one Tanki Morolong whom they allegedly assaulted on or about the 3rd day of December 2006.

[2] Following the conviction and sentence, the appellants approached this Court on the following grounds; that the court a quo incorrectly found the appellants guilty in the absence of the prosecution evidence establishing the participation of each of them; the learned Judge erred in finding that the appellant caused the death of the deceased whereas the evidence led before her was to the effect that the appellants assaulted the deceased with thin sticks on the buttocks but did not establish which appellant inflicted the injuries that caused the deceased's death; the court a quo erred in convicting the appellants on the basis that not a single witness mentioned anyone else taking part in the assault and disregarded the

evidence about the presence of the knife that was found at the scene of crime on the morning of the incident.

[3] Further that no evidence was adduced to the effect that anyone of the appellants was in possession of a knife during the assault; the learned Judge erred in convicting the appellants on the basis that they could not have reported themselves at the police station for something they did not do and in further finding that the appellants assaulted the deceased recklessly to the extent that he sustained fatal injuries that brought about his death. Lastly, that the findings of the court a quo are not consistent with the post mortem examination report which reflected the cause of death being due *"...to a closed head injury, brain concussion and a collapsed upper lobe of the left lung...."* and further reflecting i.e., in the doctor's remarks that "*the deceased had sustained a 4cm stab wound on the left side of the forehead....*"

[4] The appellants contend further that by convicting the four appellants on the basis of circumstantial evidence, the trial Judge made an error in law in not invoking the following two cardinal rules i.e.,

(i) The inference sought to be drawn must be consistent with all the proved facts, otherwise the inference cannot be drawn.

(ii) The proved facts should be such that they exclude every reasonable inference save the one sought to be drawn.

[5] It is also the appellants' contention that the Crown failed to establish a causal connection between the appellants' conduct and the resultant death as the evidence fell short of establishing that 'thin' sticks could cause fatal injuries and that they were indeed responsible for causing the death of the deceased.

[6] In his heads of argument, **Mr. Mosuoe** who appeared on behalf of all the appellants, made the contention that the test to be applied in arriving at a verdict of murder on the basis of *dolus eventualis* is a subjective one and that in the present case, the Crown did not lead any evidence to establish that the appellants foresaw the possibility of death ensuing and reconciled themselves with it. It was his submission that the court a quo misdirected itself in

finding the appellants guilty of murder on the basis of *dolus eventualis* as her finding was not supported by the evidence.

[7] Further that the decision of the court a quo was erroneously based on circumstantial evidence because it was not supported by the evidence nor did it satisfy the basic principles that govern such a finding. In this connection, **Mr. Mosuoe** made the submission that the evidence of the Crown did not exclude other probabilities such as an intervening act by one of the people that were gathered at the scene on the morning of the incident.

[8] Counsel for the appellants added that in order for the Crown to have secured a conviction, it ought to have led independent evidence in respect of each appellant's act and link it to the resultant death of the deceased. It was his submission that the Crown had failed to do so.

[9] Further that the finding of the court was inconsistent with the evidence contained in the post mortem report, **Exhibit A**, which imputed the cause of death to a closed head injury, a brain concussion and a collapsed left upper lobe of the lung with the doctor's additional remarks that:-

"The deceased sustained a 4 cm laceration (L) side of forehead Brain concusion, (sic) Bruises (R) side of the chest, collapsed (L) upper lobe of the lung. Superficial burn wound dorsum (r) foot."

[10] **Mr. Mosuoe** also made the contention that perusal of the record reveals that the appellants were not advised of their rights to remain silent or testify in defence of the case against them. Further that the record does not reflect whether the appellants' personal circumstances were considered by the court a quo in passing sentence.

[11] On sentence, the appellants' Counsel raised the issue that the record does not reveal what happened after the Crown had closed its case with regard to any submissions on mitigating/extenuating factors and aggravating circumstances by Counsel respectively. In this regard, he made the submission that failure by the trial court to advise the appellants about their rights amounts to gross irregularity that vitiated the trial.

[12] In reaction to the appellants' submissions, the Crown, per the written heads of argument of **Ms Motinyane**, argued that the finding of the court that the appellants were all guilty of murder on the basis of *dolus eventualis* was correct. It was her submission that the evidence had established that the appellants should have foreseen that by beating the deceased all over the body and leaving him tied to a tree with his feet dangling in the air, he may die.

[13] The Crown added that the only inference that could be drawn from the evidence before the court a quo was that the deceased died as a result of the assault. That there is no other inference that the court could draw given the following circumstances, that the appellants had beaten the deceased all over the body with sticks which does not exclude his head, the post mortem report revealed that death was due to a closed head injury, brain concussion and a collapsed upper lobe of the lung and all

the appellants chose not to testify and give their explanation.

[14] In connection with the appellants' contention that the court a quo had correctly rejected the Crown's case that they had acted with a common purpose, **Ms Motinyane** made the submission that the evidence led by the Crown had established all the prerequisites of the doctrine *to wit*, in the absence of proof of prior agreement each of the accused must have been present at the scene, he must have been aware of the assault on the deceased, must have intended to make common purpose with those who were actually perpetrating the assault, must have manifested his sharing of the common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others, must have had the requisite *mens rea* and must have intended the result or must have foreseen the possibility of the ensuing result and performed his own act of association with recklessness as to whether or not death would ensue.

[15] To this end, Counsel for the Crown submitted further that in the present matter, there was no need for the appellants to have sat down and pre-discussed the assault of the deceased. That by their conduct in taking part in the assault, all of them formed the intention to kill the deceased.

[16] In dealing with the issues raised in this appeal, I find it convenient to start with the question whether in finding all the appellants guilty of killing the deceased, the decision of the court a quo was correct. Starting with the doctrine of common purpose, it is my view that the individual participation of the appellants in the indiscriminate assault of the deceased in this case as established by the evidence was a clear manifestation of their intent to assault the deceased. It is their intended action that resulted in the ensuing death of the deceased. This fact should have been inferred from the evidence by the trial Judge.

[17] The fact that there was no prior agreement and/or discussion is immaterial as authority is legion that there is no need for the Crown to establish that. All that is required is for the evidence to establish the requirements of common purpose as already mentioned above which were iterated in the case **of S v Mgedezi**[1] and have been subsequently followed and confirmed by our Courts and the Constitutional Court of South Africa in **S v Thebus**[2].

[18] In my opinion, the evidence of the Crown successfully established that unlike the other people that were also present at the scene, the four appellants were not merely present, but through their active conduct, all made common purpose to assault the deceased which resulted in the ensuing death. See in this connection the work of **Burchell and Hunt**.[3]

[1] 1989 (1) SA 687 (A) at 705 I – 706B
[2] 2003(6) SA 505 (CC), 2003 (2) SACR 319
[3] Burchell and Hunt, South African Criminal Law and Procedure; Volume 1 General Principles of Criminal Law

[19] Further, common purpose is inferred from the evidence and is not a basic element of the charge of murder. For this reason, the court a quo's rejection of the Crown's submission that the appellants acted with a common purpose on the basis *"it was only raised during the addresses as though it was an afterthought"* as it was never alluded to during the trial, was incorrect. At any rate, the appellants elected not to take the stand and thus denied the Crown the opportunity to put this to them at the trial stage.

[20] In addition, it is now established law as succinctly articulated by this Court in the case of **Nyatso Ratalane & Others v Rex**[4] that the principles of common purpose, which are well articulated in **Burchell and Hunt** *(supra)* apply where a person:-

> *"although possessing the requisite capacity and* ***mens rea*** *for the crime in question, does not personally comply with all the elements of the unlawful conduct in question, and the conduct of the actual perpetrator is attributed to him by virtue of his prior agreement* ***or***

[4] C of A (CRI) 7/12 p 5 par 8

> ***active association*** *in a common purpose to commit the crime in question. The result is that where two or more persons agree to commit a crime or actively participate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one or other number, which falls within their common design. In these circumstances* ***it is not always necessary to establish which member of the common purpose caused the consequence****, provided that it is established that the group brought about this result.*" (emphasis added)

[21] Bearing the above principles in mind, it stands to reason that that **Mr. Mosuoe**'s submission that in order to secure a conviction the Crown ought to have *"led independent evidence in respect of each Appellant's act and linking* (sic) *it to the resultant death of the deceased"* is incorrect and must be rejected.

[22] On the question whether, the court a quo's finding was erroneously based on circumstantial evidence, it is my

view that though this case was poorly investigated all things considered, the evidence of the eye witnesses, coupled with the fact that not only were all the appellants at the scene of crime on that fateful morning but were seen to have actively participated in the assault of the deceased by some of the witnesses. Further, there is uncontroverted evidence i.e., per PW4's evidence that in the morning, all four (4) of them together with PW2's neighbour and policeman Lenea were present at the scene. PW2 is the owner of the home where the incident took place. There is further evidence that all of them voluntarily surrendered to the police at Morija. All this evidence was not successfully rebutted during the trial.

[23] With respect to the question whether the evidence contained in the post mortem report correlates with that of the witnesses, I am of the opinion that the finding of the court a quo that it does is correct. The evidence of PW1 was that he saw all the appellants assault the deceased. The other witnesses testified to the active participation of one or the others during the assault. PW6, the investigating officer testified that she observed whip marks all over the body of the deceased, all the appellants

surrendered to the police and handed over sticks to her and the post mortem report imputed death to a closed head injury, brain concussion and a collapsed upper lobe of the left lung. In its entirety, this evidence lends credence to the conclusion that the deceased was assaulted by all the four appellants and that some of the injuries he sustained during the assault caused his death.

[24] I might add that the issue of the presence of a knife at the scene does not detract from the evidence contained in the post mortem report that death was to a closed head injury, brain concussion and a collapsed upper lobe of the left lung which in my view correlate with an assault with sticks. Thus, although the Exhibit 1 further reveals that the deceased had also sustained a stab wound, it is clear that the said injury did not cause his death. This is what the Doctor, a medical professional found. In any event, it must be remembered that PW1 also testified that he saw the first appellant holding a 'sword-like weapon' which could be congruent with the presence of the knife, especially considering that the events took place before dawn around 1.00 – 3.00 am.

[25] It is also worthy at this stage to address a point that was raised by Counsel for the appellants in connection with the defence' admission of the post-mortem report. He argued that the admission did not extend to the correctness of its contents. Although **Mr. Mosuoe** was not representing the appellants at the trial, in which case he would not be in a better position to vouch for this contention, and although this is normally presumed to be the case, especially where the admission is made by Counsel, it is important to give a word of caution lest this causes unnecessary hurdles in the future. It might be prudent for trial courts to ascertain this fact first for the avoidance of doubt.

[26] Coming to the submission that there is a possibility that the deceased died as a result of some intervening act, such as the probability that the other people that were present at the scene could have caused his death, my view is that since this was never raised and/or suggested to any of the witnesses during the trial, it is just an afterthought and conjecture on the part of the appellants. I accordingly find **Mr. Mosuoe's** suggestion that the Crown bore the onus to show the absence of a new intervening act, when

same was never suggested and/or established by the defence during the trial to have been incorrectly raised. It cannot be accepted by this Court.

[27] I now turn to deal with the court a quo's verdict of guilty on the basis of *dolus eventualis*. *Dolus eventualis* has been dealt with and applied in many past decisions such as in the case of Humphreys v S[5] in which the Court had this to say:-

"In arriving at the conclusion that he did, the court accepted, rightly in my view, that the appellant had no desire to bring about the death of his passengers. Consequently it found that the appellant did not have dolus directus or direct intent. What the court did find was that he had intent in the form of dolus eventualis or legal intent. In accordance with trite principles, the test for dolus eventualis form is twofold: (a) did the appellant subjectively foresee the possibility of the death of his passengers ensuing from his conduct; and (b) did he reconcile himself with that possibility (see eg S v De Oliveira **1993 (2) SACR 59** *(A) at 65i-j). Sometimes the*

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[5] (424 /2012) [2013] ZASCA 20; 2013 (2) SACR 1 (SCA); 2015 (1) SA 491 (SCA) (22 March 2013)

element in (b) is described as 'recklessness' as to whether or not the subjectively foreseen possibility ensues (see eg S v Sigwahla **1967 (4) SA 566** *(A) at 570)."*

[28] In one of its most recent judgments, **Director of Public Prosecutions, Gauteng v Pistorius**[6] the Supreme Court of Appeal of Court South Africa per Leach JA instructively stated as follows in relevant parts of paragraph 26:-

"In the case of murder, a person acts with dolus directus if he or she committed the offence with the object and purpose of killing the deceased. Dolus eventualis, on the other hand, although a relatively straightforward concept, is somewhat different. In contrast to dolus directus, in a case of murder where the object and purpose of the perpetrator is specifically to cause death, a person's intention in the form of dolus eventualis arises if the perpetrator foresees the risk of death occurring, but nevertheless continues to act appreciating that death might well occur, therefore 'gambling' as it were with the life of the person against whom the act is directed. It therefore consists of two parts:

[6] (96/2015) {2015} ZASCA 204; [2016] 1 All SA 346 (SCA) (3 December 2015) paragraph 26

(1) foresight of the possibility of death occurring, and (2) reconciliation with that foreseen possibility. This second element has been expressed in various ways. For example, it has been said that the person must act 'reckless as to the consequences' (a phrase that has caused some confusion as some have interpreted it to mean with gross negligence) or must have been 'reconciled' with the foreseeable outcome. Terminology aside, it is necessary to stress that the wrongdoer does not have to foresee death as a probable consequence of his or her actions. It is sufficient that the possibility of death is foreseen which, coupled with a disregard of that consequence, is sufficient to constitute the necessary criminal intent."

[28] Coming back to the present case, the reasons for the finding of the court a quo that the four appellants were guilty of murder on the basis of *dolus eventualis* appear at paragraphs 35 to 36 of her judgment. In this connection the Judge stated as follows:-

> *"Unfortunately, the accused fell into the trap of mob psychology. Once A1, tied the deceased, he assaulted him first, then the rest of the accused joined him. The deceased does not seem to have been a danger to anyone, however he was assaulted with sticks while*

his hands were tied to a tree above his head, with his feet in mid-air. It then happens that while all this was going on, one of the accused felt that, the assaults were not enough. The deceased was also stabbed with a knife.

In assaulting the deceased the accused were reckless of the fact that he might die. He was assaulted indiscriminately all over the body including the most vulnerable parts. He sustained inter alia brain concussion, a collapsed upper lobe of the left lung and a 4 cm stab wound on the left side of the forehead. The accused used dangerous weapons such as sticks and a knife to assault the deceased. This in itself showed total disregard for the deceased's life. As already mentioned elsewhere in this judgment, the deceased's hands were tied to a tree. This means he was of no danger to anyone especially in that position."

[29] In my view, the finding of the Court that the appellants are guilty of murder on the basis of *dolus eventualis* is correct and cannot be faulted. While indeed the evidence has not established that they had the direct

intent to cause the death of the deceased, it did successfully establish that they subjectively reconciled themselves with the ensuing death that they must have foreseen.

[30] The next question for consideration is whether as was submitted on behalf of the appellants the court a quo's sentence was irregular when considering that the record does not reflect whether the appellants' personal circumstances were taken into account during the sentence or what happened with regard to mitigation and/or extenuation.

[31] While there is nothing in the record on mitigation, it however reveals that this was a result of the defence Counsel having chosen not to address the court a quo in this connection. This is borne out by the Judge a quo's remarks which appear at p120 of the record under the sub-heading, **Reasons For Sentence**, and are recorded in the following words:-

> *"Counsel for the accused chose not to* (sic) *argue neither extenuating nor mitigating circumstances. I found this*

very strange and sad that Counsel would not even mitigate on behalf of his clients."

[32] I pause here to comment that this was indeed a very odd and rare if not a first occurrence, especially in a case as serious as where the accused are facing a murder charge which is still a capital offence in this jurisdiction. This is especially so considering that the defence lawyer in the court a quo the late Mr. Fosa (may his soul rest in peace) was one of the senior lawyers with the requisite experience to could properly represent his clients.

[33] But be that as it may, I am of the view that in the light of the fact that there is a clear explanation with respect to why there is no record of any addresses to the Court in mitigation and/or aggravation of sentence, it is incorrect for **Mr. Mosuoe** to contend that there was an irregularity on the part of the court a quo with respect to what took place after the court gave its verdict.

[34] It therefore stands to reason that it would be incorrect for the Court to accept the submission that the appellants were not advised of their rights by the court a quo. The quoted remarks from the record belie this suggestion because they reveal that Counsel for the appellants chose to not address the Court in mitigation. Thus, the decision of this Court in the case of **Nyatso Ratalane & Others v Rex (supra)** quoted in support of this submission has no application in the present appeal.

[35] I might also add for the benefit of future appellants that it has generally become accepted that where an accused person(s) is legally represented, especially by experienced and/or senior Counsel, absence of information from the record that he was read his rights cannot per se be taken as constituting an irregularity. The **Ratalane case** was peculiar and must be understood in its proper context in that the trial Judge therein had committed serious irregularities that justified the setting aside of her verdict and sentence. In this connection,

paragraph [10] to [11] at page 6 of my brother Chinhengo JA's judgment, address this issue in the following words:-

"The trial of the appellants was fraught with irregularities. The most glaring irregularity was that the 2nd and 3rd appellants did not give evidence at their trial nor were they called upon to do so. The unusual reason for that appears at paragraph 4(a) of the appellants' supplementary heads of argument:

'Because of the time constraint the Judge had notified all the parties that she was resigning and the defence decided to call appellant No. 1 only, who testified on behalf of himself and the other two appellants.'

Whatever this means, it was wrong. The record of proceedings does not show what happened after the 1st appellant had given evidence. Without any explanation for not calling upon the 2nd and 3rd appellant (sic) *to give evidence, counsel for the appellants closed the defence case after the 1st appellant only had testified. This could only have been in response to the judge's intimation that time was not on her side because she was soon to leave the bench".*

[36] From the above extract, it is an unassailable fact that a serious irregularity was indeed committed on the basis of the Judge's unjustifiable haste to conclude the matter especially in a situation where she was planning to resign of her own volition. As a matter of fact, even if her contract of employment had been terminated due to some other reason such as forced retirement, justice, fairness and common sense dictate that she would have been given reasonable time to properly finish the matter with all due observance of the rules of a fair trial and natural justice. The judgment in the Ratalane case was therefore spot-on by finding that not only did this constitute an irregularity, but that it was of so gross a nature that it vitiated the entire proceedings. I might add that serious cases should never be treated with such nonchalance especially for flimsy reasons.

[37] However, as I have already shown, the same was not the case in the present matter, hence the trial Judge's choice of words that she found the appellants' Counsel's decision to choose to not address the court in mitigation

and/or extenuation a strange and sad fact in her reasons for judgment.

[38] In addition, it is clear from the record that the trial Judge did as a matter of fact consider extenuating factors despite the election by Counsel to not address her on same. This appears at paragraph 34, page 12 of her judgment (page 17 of the transcribed record) as follows:-

> *"it is however already an extenuating factor that the accused were found guilty of murder on the basis of dolus eventualis, see* ***Rex v Montoeli Tlaitlai***[7]*. Is probably is also an extenuation that in the minds of the accused, the deceased had broken unto PW2's shop. I say probably, mindful of the fact that the deceased was suspected of this crime even though there never was any proof that he had actually committed the act he was accused of."*

[7] LLR – LB 1995 -1996 435

[39] All these facts in my view, render this case distinguishable from the **Ratalane** one hence my word of caution that the decision in the latter must be taken and understood in its proper context especially where the accused are legally represented. They cannot elect to not address the court a quo in mitigation and be allowed to turn around and seek to benefit from that before this Court.

[40] It therefore stands to reason that the Judge a quo could only consider what she had before her when passing sentence. Thus, in the light of the fact that this Court has already reached the finding that all the four (4) appellants made common purpose in the commission of the offence for which they were charged, in the absence of any mitigating factors including personal circumstances placed before it, the Court a quo cannot be faulted for having passed the same sentence for all of them.

[41] Consequently the Court makes the following order:-

The appeal is dismissed.

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N. MAJARA

CHIEF JUSTICE OF LESOTHO

I agree

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R.B.CLEAVER

ACTING JUSTICE OF APPEAL

I agree

_____

DR P. MUSONDA

ACTING JUSTICE OF APPEAL

For Appellants: Adv. PM Mosuoe

For Respondents: Adv. H. Motinyane