

IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CRI) NO 05/20

In the matter between:

**LIBOCHE
APPELLANT**

LESENYA

AND

**REX
RESPONDENT**

CORAM: PT DAMASEB AJA
MH CHINHENGO AJA
NT MSTHIYA AJA

HEARD: 12 APRIL 2021

DELIVERED: 14 MAY 2021

Summary

Appellant's younger brother, accused 2, was charged with the murder of appellant's wife - Common cause that killing perpetrated only by accused 2 who pleaded guilty at trial - Appellant pleading not guilty but convicted on basis of common purpose and sentenced to 18 years imprisonment;

Appeal against conviction and sentence - Indictment not sufficiently informative that Crown relied for criminal liability on common purpose;

Held: failure of indictment to make any reference to reliance on common purpose by Crown in violation of appellant's right to a fair trial and prejudicial to him- Conviction quashed and sentence set aside - Director of Public Prosecutions left to decide whether to re-institute prosecution - in event of prosecution de novo trial to be before a different judge.

CHINHENGO AJA

JUDGMENT

[1] This is an appeal against the decision of the High Court convicting the appellant (Liboche Lesenya) of the murder of his wife, 'Mantai Lesenya, and sentencing him to 18 years imprisonment. He was charged together with his younger brother, Tsoanelo Letsenya ("Tsoanelo" or "accused 2"). The brother pleaded guilty to the charge and was sentenced to 12 years imprisonment. In light of Tsoanelo's guilty plea the trial consequently focussed on the appellant. The appellant is aggrieved by the decision of the High Court and against both conviction and sentence.

Brief facts of case

[2] It is common cause that after 12.00 midnight or in the early hours of 22 November 2008, accused 2, armed with the appellant's service pistol shot and killed appellant's wife 'Mantai at the appellant's matrimonial home at Mazenod in Maseru. Appellant's wife and young children reside there while he, as a police officer based at Mafeteng, resided in

government accommodation at the workplace but maintained the home at Mazenod. Accused 2 had travelled from Mafeteng to Mazenod in the evening of 21 November 2008 with the sole purpose of committing the offence of which he was convicted.

[3] The evidence indicates that the appellant had an altercation with his wife over a motor vehicle that they had recently purchased. The altercation resulted in the wife boiling some oil and scalding the appellant with it, thereby causing him serious burns on the face and hands.

[4] The appellant, accused 2 and several of appellants' friends were very distressed and angry about what 'Mantai' had done to the appellant. They talked about what appropriate reaction the appellant could take, including some revenge action. His best friend also a police officer at Mafeteng, one Mokotjo, who testified at the trial as PW1 and accused 2 became much more involved in what later happened resulting in the death of Mantai. On his part, the appellant consulted a lawyer and instructed him to file for divorce. However, he, accused 2 and PW1 also discussed the killing of Mantai, apparently. The evidence seems to indicate, that PW1 discouraged the appellant from taking that course of action but it also indicates that PW1 participated to an appreciable extent in what happened before and after the fatal shooting of the appellant's wife by accused 2. He was treated as an accomplice witness at the trial although he had not been specifically charged with the

murder. For instance, it is common cause that PW1 participated in the discussions about killing Mantai. After the killing, and after receiving a message from accused 2 that he had shot and killed Mantai, he drove to Maseru at night and picked up accused 2 and drove with him back to Mafeteng. According to accused 2, PW1 had also advised him that after the shooting the target it was necessary for him (accused 2) to retrieve all the spent cartridges or shells. That accused 2 did and showed the shells to PW1 on their way to Mafeteng.

[5] The evidence of PW1 and accused 2 implicated the appellant in the commission of the offence. It points to the appellant as having agreed that Mantai should be killed. It is in evidence that accused 2 used appellant's service pistol and ammunition either then in the magazine or provided by PW1. It is clear and undisputed that the actual killing of Mantai was done by accused 2 alone.

Indictment - lack of mention of common purpose as possible basis of conviction

[6] At the hearing of the appeal, the Court raised the propriety of the indictment and invited counsel to make submissions thereon. In making that invitation, the Court was concerned that the indictment did not sufficiently inform the appellant that he could be convicted of the murder of 'Mantai on the basis of common purpose, which, as it was, was the basis of the court *a quo's* decision. The Court's preliminary view

was that the failure of the indictment to allege common purpose was potentially fatal to appellant's conviction.

[7] It is important to set out the indictment as put to the appellant and accused 2 and the basis of appellant's conviction as found by the trial court. If the Court's inclination as expressed in the invitation to counsel is correct, then that, in my opinion, on its own is dispositive of this appeal.

[8] An indictment or charge is intended to tell the accused person in clear and unmistakable language what the charge is that he has to meet. The Criminal Procedure and Evidence Act requires that a charge must set forth the offence with which the accused is charged in such manner, and with such particulars as to the alleged time and place of committing the offence and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed as may be reasonably sufficient to inform the accused person of the nature of the charge.

[9] The indictment in this case reads:

"The Director of Public Prosecution who as such prosecutes on behalf of The King, presents and informs the court,

That:

1. **Liboche Lesenya** a m/m adult of h/m Lefu of Lekhobanyane u/c Masupha Seeiso at Mazenod Ha-Lekhobanyane,

2. **Ts'oanelo Lesenya** a m/m adult of h/m Joel Seeiso u/c at Ha-Makhakhe

**(HEREINAFTER CALLED THE ACCUSED
ARE GUILTY OF THE CRIME OF MURDER)**

In that upon or about the 22nd day of November 2008 at or near Ha-Lekhobanyane in the district of Maseru, the said accused did one, the other or both of them unlawfully and intentionally kill one **'Mantai Lesenya.'**

[10] The importance of the indictment as framed derives from the fact, as earlier stated, that accused 2 alone committed the *actus reus* of the offence. Accordingly, if the appellant was to be found guilty of murder that could only be on some other basis proving his participation in the commission of the offence. It occurred to the Court that the omission from the indictment of any reference to the appellant acting in common purpose with his accomplices to kill 'Mantai implicated his rights to a fair trial guaranteed by section 12 of the Constitution.¹ The omission received no attention whatsoever at the trial and was not canvassed in the heads of argument on appeal. The conviction of the appellant thus had, unquestionably, to depend on whether the Crown proved that he had associated with accused 2 and PW1 in committing the offence charged.

¹ Section 12 (1) of Constitution provides that -

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law",

and in other subsections, the section sets out specific rights associated with a fair trial.

[11] The learned judge *a quo*, based appellant's conviction on common purpose. He said the following in convicting the appellant:

"[21] The case against A1 (appellant) is circumstantial, in terms of which the inferential rules as developed in *R v Blom* 1939 AD 288 at 202-3, must apply. The two rules are stated as follows:

'(1) The inference sought to be drawn must be consistent with all the proved facts. If not, then the inference cannot be drawn.

(2) The proved facts must be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct.'

[22] The inference sought to be drawn in this case that A1 is complicit in his wife's murder is consistent with proven facts: it is a proven fact that A2 used A1's cell phone which he used to flag that he be fetched after killing the deceased. His defence that A2 used his firearm without his permission is rejected as false beyond a reasonable doubt. Curiously, A1 has not at all sought to explain why his cell phone got to be in the hands of A2 on that day; was it taken without his consent as well, we do not know what his explanation is regarding it, but, what is clear as it emerged during cross-examination, is that A1 was fully aware and was part of the plot to murder his wife in revenge for scalding him with hot oil. I am convinced that the State has proved its case against A1 beyond a reasonable doubt that he acted with common purpose to murder his wife. A1's version that he was not part to the plot to kill the deceased is rejected on the score that it is false beyond any reasonable doubt."

[12] It may be argued that this Court should look beyond the omission to the evidence and determine whether or not substantive justice has been done. I do not think that such an argument can hold true in this case because the correct framing of the charge was such a fundamental matter of procedure and substance that it cannot be ignored unless the

proper preparation of indictments and the making of any necessary amendments thereto are no longer a vital part of our criminal justice system. Counsel's broad submissions on the omission was no more than that that is how an indictment for murder is framed and has always been formulated in this jurisdiction. That, to me, cannot be sufficient justification for adopting an approach potentially prejudicial to an accused person's fair trial rights especially when such person is charged with so serious an offence as murder.

Necessity of disclosing reliance on common purpose

[13] The right to a fair trial necessarily includes the right to be informed of the charge with sufficient detail to answer it. Where therefore the Crown intends to rely on common purpose, it must communicate its intention in the indictment clearly and unambiguously. If the evidence of the Crown proves common purpose, the Crown can even amend the indictment after all the evidence has been led. Generally speaking, a trial court has the power to amend the indictment at any stage before judgment is delivered regard being had to prejudice to the accused. In this case the Crown did not allege common purpose, as it should have or amended the indictment before judgment. It can be assumed that the appellant must have been shocked to learn, as the judgment was read out to him that, although he did not himself physically kill his wife, he was guilty of her murder based on the doctrine of common purpose.

[14] In *Ntuli & another v S*², a judgment that has persuasive value in this country, the court said that whether or not reference to reliance on common purpose in an indictment should be made turns on whether an accused has a fair trial or is prejudiced, especially where the defence would have been different or differently structured if the allegation of common purpose had been made in the indictment or as amended.

[15] Every case has to be examined on its own facts. The omission of a mention of common purpose may not cause prejudice in one case but may do so in another. So, the peculiar circumstances of a case must invariably be examined: it may emerge that the accused's rights to a fair trial are compromised by a failure to make reference in the indictment to common purpose when the Crown actually relies on it for securing a conviction. In my view, the omission in an indictment about any reliance on common purpose or the failure to amend the indictment to reflect such reliance can be fatal to a conviction if it can be shown that the accused person was prejudiced. And that is the case here.

[16] Common purpose is resorted to where the evidence is insufficient to link offenders to each other and to the crime alleged. In this case the Crown had to allege from the outset that it was relying on common purpose. Many lay people know that punishment of any sort is associated with the individual

² [2018] All SA 780 (GJ) at paras 41-52.

accused's own criminal acts. It is not within lay people's contemplation or understanding that criminal liability may be founded on a legal conceptual or construct such as common purpose. The Crown therefore had to inform the appellant in the indictment of the basis on which he was being charged for murder. This way the appellant would have been warned in advance and would have anticipated the case against him fully and defended himself effectively. The intention to murder was in this case inferred from common purpose and the circumstantial evidence in support thereof. Informing the appellant that the Crown was relying on common purpose would have properly balanced the fairness of the trial. Knowing that he was not the one who killed 'Mantai, I have no doubt that the appellant would have been unaware that criminal liability would be imputed to him on the basis of common purpose.

[17] The confusion that arose to the prejudice of the appellant is all the more apparent when the conduct of his defence counsel is examined. In leading appellant defence counsel stated the approach he and the appellant were to take. *Vide* what transpired between appellant and his counsel:

"DC: Tell my lord and gentlemen assessors because indeed one way or the other, you have to answer before my lord for that incident and tell my lord and gentlemen assessors your version of the story and your involvement, because the evidence before my lord taints you. It is your time to put yourself in or out, what transpired, what did you do?

DW1 (appellant): I wasn't involved in any of what happened.

DC: I will guide you. I think your answer is rather absurd. Do you remember that the murder weapon utilised in this incident, I told you that there had been admissions, murder weapon in this incident is your issue part of your uniform from the Lesotho Mounted Police?

DW1: Yes, I am aware.

DC: Surely if that was the weapon which we have admitted before my lord you have to say something about it, because you are not 100% innocent. I am saying it's [pistol] an issue from your work, and it has been used. Surely you must tell my Lord, you must explain some sort. I need not spoon feed you. You are a member of the force help this court."³

[18] Appellants own counsel was trying very hard to get the appellant to admit things that he did not wish to admit. The same goes for alleged confessions by appellant to a pastor and to a magistrate in regard which, again, counsel wanted the appellant to admit when he was not so inclined. Notably the alleged confessions were, rather curiously only brought to the attention of the court but not produced in evidence. This and other possible irregularities, including a failure by the prosecution to apply for a separation of trials when the circumstances appear to have called for such separation are no longer issues upon which this Court needs to pronounce itself. The decision on the insufficiency or inadequacy of the indictment suffices for all practical purposes.

[19] The exchange between appellant's counsel and appellant himself is significant. It demonstrates that the omission to indicate in the indictment that appellant's criminal liability would be based on common purpose put not only the appellant

³ Page 83 of record ff.

but also his counsel at a tangent as to the handling of the defence. That omission impacted quite negatively on the appellant's defence.

[20] The appellant testified that, at first, he did not know that his brother had used his service pistol to commit the offence. There is evidence that when accused 2 returned with the spent cartridges, he did not give them to his brother to dispose of them but first hid them in a stove in the house and later threw them into a toilet pit used by the appellant. When he returned with the murder weapon, he placed it where he had picked it up so that, according to him, if the police looked for it, it would be found in the possession of the rightful possessor, the appellant and not him. Not much evidence was led as to the interaction between the appellant and accused 2 after the killing. That somewhat suggests that the plan to kill "Mantai may not have been hatched jointly to the extent that PW1 and accused 2 want the court to believe. If the defence had been put on notice in regard to common purpose, they would have had the option to give a more detailed, focussed and possibly exculpatory account of the alleged discussions and agreement to kill the deceased.

[21] From the above discussion some doubt is cast on the finding, based on circumstantial evidence that the only reasonable inference to draw from the facts is that the appellant acted in common purpose to commit the murder

when he discussed the matter with PW1 and accused 2. The Crown had the duty to forewarn the appellant about invoking common purpose and should not have simply assumed that it was proper to associate him with the conduct of his accomplices without that advance warning.

[22] The law is generally that all the essential elements and facts that make up an indictment must be known to an accused person early on in order to avert prejudice and also to ensure he is best informed about the conduct of his defence. As stated in *S v Alexander & Others*⁴, referred to with approval in *Nthuli* (supra):

“It has been authoritatively laid down by the Appellate Division in the case of *Rex v Heyne and Others*, 1956 (3) SA 604 (AD), that when there is a series of acts done in pursuance of one criminal design the law recognises the practical necessity of allowing the State, with due regard to what is fair to the accused, to charge the series as a criminal course of conduct, i.e. as a single crime. It was further held in the same case that collaborators participating in such a course of criminal conduct may be joined in one indictment even if they participated therein at different times. It remains therefore to be seen whether the State has in fact alleged in its indictment a criminal course of conduct. To my mind, it not essential for the State to allege in an indictment in so many words that the accused acted in concert or with a common purpose or in a criminal course of conduct. It will be sufficient if the State alleges in its indictment sufficient particulars to show that the accused in doing that they allege to have done became associated with one another in an unlawful purpose or scheme and that the series of acts done by them was done in connection with and in the furtherance of that unlawful purpose.”⁵

⁴ 1964 (1) SA 249 (C).

⁵ At 454A-D.

[23] The position of the law, which I embrace, is summarised in another South African case, *Mahlangu & Others v State*.⁶ I quote from it extensively:

“[6] ... the crisp issue in this appeal is whether the State is obliged, where it intends to secure the conviction of the accused relying on common purpose, to disclose this intent in the indictment. ...

[9] Burchell and Milton⁷ define the doctrine of common purpose in the following terms:

‘Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which fall within their common design. Liability arises from their ‘common purpose’ to commit the crime.’

[10] It is trite that the *onus* of establishing common purpose rests on the State. In the matter of *S v Mgedezi and Others*⁸ the Appellate Court held that ‘the prerequisites for common purpose are ‘firstly he must have been present at the scene where the violence was committed. Secondly, he must have been aware of the assault on the victim; 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 the common purposes 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 the victim to be killed, or he must have foreseen the possibility of the killing and performed his own act of association with recklessness as to whether or not death was to ensue.’

[11] ... the Criminal Procedure Act provides in peremptory terms that the accused shall be provided with an indictment which shall be accompanied by a summary of substantial facts of the case, which in the opinion of the attorney general, are necessary to inform the accused of the allegations against him.

[12] The above must be read together ... with the Constitution... which provides that every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it. ...

⁶ (CC 317/2004) [2018] ZAGPPHC 697.

⁷ *Id* Burchell and Milton p 393.

⁸ 1989 (1) SA 687 (SA) at 705I – 706C.

[14] In *S v National High Command*⁹ at para 464 the court held that:

‘Now it is clear that where a common purpose is alleged, the State has to supply particulars on which it will rely to ask the court to draw the inference that each and every one of the accused was a participant in the conspiracy, or a party to the alleged common purpose.’

[15] When one has regard to the doctrine of common purpose, it is clear that it is wide enough to be regarded as a dragnet, catching anyone in its ambit. ... The stage of informing the accused what the charge he is to meet, is through the indictment and the summary of facts. The right of an accused to a fair trial does not commence at the plea stage, or at the commencement of leading evidence, but when he is served with the indictment or charge sheet. It can hardly be said that a charge sheet or indictment which does not spell out that reliance on common purpose will be made to secure a conviction, does not prejudice the accused in preparing for his trial. The failure to specify the common purpose simply means the State has not provided the accused with sufficient detail in breach [of the Constitution]

[17] In the matter of *S v Ndaba*¹⁰ where the State relied on common purpose, which it had not alleged in the charge sheet, or summary of substantial facts... or in the opening address ... the Court held that:

‘(102) I am satisfied that the allegations of common purpose has to be made by the State in the indictment, or at least in the summary of substantial facts....’.

[18] It is common cause that the indictment and the summary of facts, *in casu*, did not indicate that the State would rely on common purpose to secure their conviction. It is also common cause that the State neither applied for the amendment of the charge..., during the trial nor before judgment was handed down. ... The very fact that the appellants were not duly informed prejudiced them in preparing their defence. In my view, prejudice set in at the very moment they were presented with the indictment and summary of substantial facts, thus tainting the entire process of a fair trial....

[19] In my view, and in the light of the above authorities, the nature of the prejudice is such that it deprived the appellants of a fair trial, thus warranting that their conviction should be set aside....”.

⁹ 1963 (3) SA 462 (T).

¹⁰ 2003 (1) SACR 364 (WLD) at 381h-i.

[24] The law as widely applied and accepted in South Africa and other jurisdictions must surely be the same in this country.

Grounds of appeal and court's invitation to counsel

[25] The appellant's grounds are that the court erred and misdirected itself -

- (a) in finding that the Crown proved the appellant's guilt beyond a reasonable doubt;
- (b) in finding that there was evidence of appellant's complicity in the murder of his wife;
- (c) in making an inference that the appellant participated in the murder of his wife;
- (d) in relying on the appellant's alleged confession when the said confession was not an unequivocal admission of guilt;
- (e) in not finding that the appellant's evidence was reasonably possibly true to justify a verdict of not guilty;
- (f) in imposing a sentence of 15 years imprisonment which was "too excessive and harsh in all the circumstances".

[26] The grounds of appeal which were formulated without regard to the issue raised with counsel by the Court to a large extent revolve around the omission to make reference to common purpose in the indictment and its consequences. In the grounds of appeal, the appellant complains that the Crown did not prove the appellant's guilt beyond a reasonable doubt; that the finding that there was evidence of appellant's complicity in the murder was wrong, and that making the inference that the appellant participated in the murder of his wife was also wrong. In my view the genesis of the complaints lies in the

failure by the Crown to aver common purpose in the indictment.

[27] In conclusion, I consider that the participation of the appellant in the murder of his wife would have been better handled by the Crown and the defence had common purpose as the basis of criminal liability of the appellant been stated in the indictment. The proper route to take in this case, I think, is to set aside or quash the conviction and leave it to the discretion of the prosecuting authorities to decide whether to embark on a second prosecution. It is inappropriate, in my view, for a court of appeal to enter into matters which should properly be reserved to prosecutorial discretion. While a court of appeal should permit a re-trial after quashing a conviction unless insufficient evidence has been led at the trial or a second prosecution would be an abuse of process, the final decision whether or not to prosecute the accused again should be left to the discretion of the prosecuting authority. The Director of Public Prosecutions may, in this case, re-institute the prosecution, if she so sees fit. In that event the trial should be before a different judge.

[28] The order of this Court is accordingly the following-

1. The appeal succeeds.

2. The conviction of the appellant on the charge of murder is quashed and the sentence is set aside.

3. The Director of Public Prosecutions may, in her discretion, institute a second prosecution and, if she so decides, the trial *de novo* must be before a different judge.



**MH CHINHENGO
ACTING JUSTICE OF APPEAL**

I agree



**PT DAMASEB
ACTING JUSTICE OF APPEAL**

I agree



**NT MTSHIYA
ACTING JUSTICE OF APPEAL**

FOR APPELLANT: ADVOCATE M E TEELE KC

FOR RESPONDENT: ADVOCATE T TLALI

