IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – GRAHAMSTOWN)

Case no. CA316/13
Date heard: 22/4/14
Date delivered: 22/5/14
Not reportable

In the matter between:

MASIBULELE DYANTYI **Appellant**

and

THE STATE **Respondent**

Appeal against conviction of murder – whether vigilantes forcing witness to make false statement which was later retracted rendered the trial unfair – whether common purpose to murder established.

JUDGMENT

PLASKET, J

[1] The appellant was tried before Schoeman J and was convicted, along with a co-accused, of housebreaking with intent to commit a crime to the State unknown and murder. He was sentenced to an effective term of 20 years imprisonment. He appeals against the murder conviction only and he does so with the leave of the Supreme Court of Appeal.

[2] The principal issues that arise in this appeal are twofold. The first is whether the appellant's conviction should be set aside on account of the brutal and unlawful attempts of a group of vigilantes to manipulate the trial by forcing witnesses to give

false evidence. The second is whether the only reasonable inference to be drawn from the circumstantial evidence against the appellant is that he acted with a common purpose with his co-accused in the murder of the deceased.

Background

[3] The appellant and his co-accused were charged with housebreaking with intent to rob, robbery with aggravating circumstances and murder. They both pleaded not guilty to all three charges. In his plea explanation, however, the appellant admitted being present at the deceased's house on 1 March 2008 but he said that when his co-accused entered the house he remained outside, and he did not know that his co-accused was going to rob and murder the deceased.

[4] The State relied, in the main, on the evidence of two women who were in the company of the appellant and his co-accused on the night of 1 March 2008. They were Ms Sinakuna Busakwe and Ms Andiswa Mbushe, the latter being the appellant's girlfriend and the mother of his child. Neither the appellant nor his co-accused testified in their own defence.[1]

[5] The evidence of Busakwe, who testified before Mbushe, was that she and Mbushe accompanied the appellant and his co-accused to the house of the deceased on 1 March 2008 after they had been drinking in a tavern. The co-accused kicked the door open and he and the appellant entered. Busakwe followed them into the house. She saw them assaulting the deceased by kicking him and strangling him.

[6] Mbushe confirmed that she was in the company of the appellant, his co-accused and Busakwe on the night of 1 March 2008. She testified that after leaving the tavern they went to the house of the deceased. The appellant and his co-accused kicked open the door and entered the house. She went to a toilet in the yard. When she returned, she heard noises emanating from inside the house that

[1] As to the effect of an accused opting not to testify see *S v Boesak* 2001 (1) SACR 1 (CC) para 24.

sounded like people fighting. After a while the appellant and his co-accused exited the house. She heard a few days later that the deceased had died.

[7] It would appear that not much was done to ascertain who may have been responsible for the murder of the deceased. Some 20 months after his death, in November 2009, a group of vigilantes, who called themselves a street committee, took Busakwe and Mbushe to the police station to make statements. These statements implicated the appellant and his co-accused in the murder of the deceased and said that they had been armed with a knife (described as a 'Rambo knife') and an iron rod.

[8] About two months later they made statements in which they retracted their statements to the effect that the appellant and his co-accused were armed with a knife and an iron rod. They said that they had been assaulted by the vigilantes and had been forced to make the allegations that the two men were armed with the knife and the iron rod.

[9] Mbushe testified that Busakwe had been paid by the vigilantes to testify against the appellant and his co-accused. This necessitated Busakwe being recalled. She initially said that she did not want to be sworn in but when she was told that she had no choice, she relented. Her evidence was so unsatisfactory that Schoeman J disregarded it entirely. She said:

'When evaluating the evidence it is clear that no cognizance can be taken of the evidence of Busakwe. She lied under oath and continued lying. She continued branding Mbushe as a liar while it was clear that her own game was up. I reject her evidence in toto.'

The effect of the vigilantes' manipulation of the investigation

[10] It was argued by Ms Crouse, who appeared for the appellant, that the conviction should be set aside because, as a result of the manipulation of the investigation by the vigilantes, the appellant's trial was unfair. She relies on the authority of *Zuko v S*,[2] a decision of this court. Before dealing with that case, it is

[2] *Zuko v S* [2009] 4 All SA 89 (E).

necessary to detail what the vigilantes did and how the evidence concerning their activities came to be led.

[11] After counsel for the State, Mr Obermeyer (who also appears for the State in this appeal) had led Mbushe on what had occurred on the evening of 1 March 2008, he led her on how it had come about that she had made two statements that were at odds with each other in certain respects. That is when the involvement of the vigilantes in the investigation came to light.

[12] As stated, the vigilantes took Busakwe and Mbushe to the police station to make statements. Before that, however, some of them came to her house and took her to another house where she found more vigilantes present. Busakwe was also there. She was locked in a room.

[13] The vigilantes, who were armed with sjamboks asked Mbushe whether she wanted a beating. When she gave the unsurprising answer that she did not, she was asked to tell them what she had witnessed at the house of the deceased. She gave an account that was consistent with the evidence she gave in the trial. This was not acceptable to the vigilantes as the following passage from her evidence attests:

'Did they have any reaction to what you told them? – They told us that they had gone to the police station and that they were sure that the deceased was killed with a Rambo knife as well as a sharp iron rod.

Yes? – They then told us to say that it was Masibulele and Simphiwe who were carrying those weapons.

And did they tell you to say anything else about what happened with these weapons? – Yes.

What did they tell you? – They told us to report at the police station that they were the ones who stabbed the deceased with those weapons.

And did you follow their instructions when you got to the police? – M'Lady they took us to the police station and they had sjamboks with them.'

[14] While her statement was being taken at the police station, the vigilantes waited in the yard of the police station. Some of them, from time to time, looked into the office where the statements were being taken. She made a statement that included the falsehoods that the vigilantes had instructed her to make. She

confirmed that Busakwe was present when the instruction to include the falsehoods in their statements was given by the vigilantes.

[15] She later made a second statement in which she retracted the false allegations and explained why she had made them in the first statement.

[16] While her evidence in chief is perhaps a bit coy as to whether she was assaulted by the vigilantes, it became clear when she was cross-examined that she was indeed assaulted. She said that '[w]e were assaulted by the street committee members and we were then told to say so' and that she still had marks on her body from the assault. Later she said that three of the vigilantes assaulted her while others watched them.

[17] When she was referred to a passage in her first statement that spoke of seeing the deceased's legs protruding from the bedroom, she said that this too was something that the vigilantes had told her to say. She explained how this had come about:

'The street committee members told us that they had gone to the police station, they told us that they saw the photographs and they said one of us must have seen the leg of the deceased protruding from the bedroom. When we said "no" we were assaulted and told to say so.'

[18] It would appear that the vigilantes believed they could act with impunity. Mbushe testified that a policeman spoke to the 'sector head' of the vigilantes about them interfering in the work of the police but was told that the police should let them get on with their work.

[19] She also spoke of an incident in which the appellant was assaulted by the vigilantes and forced to confess to murdering the deceased. When his mother intervened on his behalf, the vigilantes insulted her and swore at her. Worse still, both the appellant and his mother were then loaded into a van and locked up in the Indwe prison, obviously with the active collaboration of the police.

[20] Finally, she testified that Busakwe had been paid by the vigilantes for her testimony: she had been, in Mbushe's words, 'bribed and told that she had to implicate' the appellant and his co-accused. She explained that Busakwe had been given R200 at about the time of the arrest of the appellant and his co-accused and a further R900 a few weeks before the trial started.

[21] Ms Crouse argued that the appellant's fundamental right to a fair trial had been violated by the conduct of the vigilantes in relation to the witnesses and in relation to the assault on him.

[22] Section 35(5) of the Constitution provides that evidence that is obtained 'in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice' The obvious first question to ask is what evidence should be excluded.

[23] I have difficulty with Ms Crouse's argument. In the first place, there is no nexus between the assault on the appellant and the fairness of his trial because the State did not, quite understandably, seek to rely on the confession that was forced out of him by the vigilantes. Without wishing to downplay the seriousness of the treatment that he and his mother received at the hands of the vigilantes, it has no bearing on his trial and his remedy lies elsewhere.

[24] I turn now to the second issue – the effect on the trial of the vigilantes forcing Mbushe and Busakwe to make statements containing falsehoods. Once again, I am unable to see a connection between the conduct of the vigilantes and the fairness of the trial because Mbushe recanted and explained why she had made false allegations – and her evidence was less damning of the appellant as a result: the unconstitutionally obtained evidence was expressly disavowed and was never tendered against the appellant. Whatever the intentions of the vigilantes, their plan to manipulate the outcome of the trial came to naught precisely because it was brought into the open. Stated differently, the evidence that Mbushe gave in the trial was not obtained in a manner that violated a fundamental right: only the allegations that she

retracted were obtained in this way and the State never sought to have them admitted as evidence.

[25] Thirdly, *Zuko's* case is distinguishable from this case. In that case, a group of men, one of whom was armed with an R5 rifle, had entered the complainant's tavern and had robbed him of money and his firearm. Having reported the matter to the police, he called together a group of vigilantes, of which he was part, and having compiled a list of 'suspects' the vigilantes raided the home of the appellant. They assaulted him and searched his home. They found the complainant's firearm. They then forced the appellant to lead them to the others who were supposedly involved in the robbery with him. They rounded them up, searched their homes, where they found one R5 rifle, and assaulted them severely before handing them and the firearms they had found to the police.

[26] The central issue in *Zuko* was the admissibility of the evidence concerning the appellant's possession of the firearm and the subsequent discovery of the R5 rifle. The magistrate had accepted that the evidence was obtained unconstitutionally but nonetheless admitted the evidence of the appellant's possession of the complainant's firearm. This was pivotal to his conviction as the magistrate made it clear that the identification evidence that had been tendered would not, on its own, have sufficed. I held that the magistrate had erred in admitting this evidence because certain of the appellant's fundamental rights had been infringed by the vigilantes and there was a nexus between these infringements and the discovery of the incriminating evidence because 'if the vigilantes had not entered the appellant's home unlawfully and assaulted him, they would not have found the firearm and been led to accused numbers 2 and 3'.[3] I also found that the admission of the unconstitutionally obtained evidence would have been detrimental to the administration of justice.[4]

[27] As I have shown, in this case, the conduct of the vigilantes had no impact on the fairness of the trial. To the extent that Schoeman J was concerned that Busakwe's evidence was tainted, particularly as a result of her lying about her

[3] Para 19.
[4] Para 30.

involvement with the vigilantes, she did not rely on her evidence at all. For the rest, she had Mbushe's evidence which was purged of the falsehoods that the vigilantes had forced upon her when she made her first statement, and she had a full explanation as to why her first statement had been made.

[28] I agree with Mr Obermeyer that the issue is one of credibility, rather than fair trial. That too is how Schoeman J dealt with the matter. She stated during the course of her judgment:

'Therefore it is my task to weigh the value of the previous inconsistent statement against the *viva voce* evidence and then to decide whether Mbushe is trustworthy and determine whether I am satisfied that the truth has been told. What is of real importance is Mbushe's evidence in court. Contrary to the attitude of Busakwe, Mbushe was not hesitant in disclosing the assaults on her and Busakwe. She did not hesitate to disclose that Busakwe was bribed and she did not hide that she did not want accused no. 1 to be convicted as he is the father of her child. She made a good impression when testifying and she did not contradict herself during her evidence in chief or cross-examination. Furthermore there was nothing improbable about her testimony. Her evidence differs from the final evidence of Busakwe where the latter stated that she was not at the home of the deceased at all that night, but Busakwe is a liar and she lied in her evidence in chief, during cross-examination and when she was recalled to question her about the allegations of bribery. As Busakwe's evidence was rejected in its totality I am of the opinion that Mbushe's evidence cannot be rejected for the only reason that it differs from the evidence of Busakwe.'

[29] Having rejected the evidence of Busakwe in its totality, Schoeman J treated Mbushe as a single witness. She found her to have been a good witness and that the cautionary rule had been satisfied. In all of this, I am satisfied that she was correct. At this stage, Mbushe's evidence that the appellant entered the deceased's house must be accepted as correct because the appellant did not appeal against his conviction of housebreaking with intent to commit a crime to the State unknown.

[30] One further fair trial point was raised and must be dealt with briefly. The appellant made the usual admissions in terms of s 220 of the Criminal Procedure Act 51 of 1977, including that the deceased died on 1 March 2008. It was argued by Ms Crouse that 'it was impermissible for the Appellant to make a section 220 admission as to the time of injury which led to the death of the deceased and the Court *a quo*

should have found that this admission was not reliable in the light of the evidence presented by the State'.

[31] In my view, Ms Crouse reads far too much into the effect of the admission. It is not necessarily an admission that the appellant had knowledge that the deceased died on that day. Rather it is an acceptance that the date of death of the deceased is not an issue between him and the State requiring proof by the State:[5] an admission 'is an acknowledgement of a fact' and it simply dispenses with the need for proof of the fact admitted.[6] In any event, the admission played no significant part in Schoeman J's reasoning, and the same result would have been achieved whether the admission was made or not.

The circumstantial evidence and the doctrine of common purpose

[32] The evidence against the appellant is that on the evening of 1 March 2008 he, together with his co-accused, kicked open the door to the deceased's house and entered the house, that there were sounds of violence that emanated from inside the house while both were inside, that the deceased was found dead in his house two days later, having been subjected to blunt force trauma and strangulation and that the 'state of the body was in accordance with death having occurred on the 1st of March 2008' according to the evidence of the doctor who performed the post-mortem examination.

[33] The issues that Schoeman J had to decide were whether, on these facts, the only reasonable inference to be drawn was that, after the appellant and his co-accused entered the deceased's house, they together assaulted him so viciously that he died.[7]

[34] Schoeman J found that, in the absence of an explanation, the only reasonable inference to be drawn from the fact that after the appellant and his co-accused broke into the deceased's house, sounds of violence were heard and the deceased died

[5] *S v Seleke & 'n ander* 1980 (3) SA 745 (A) at 754A-B.
[6] *S v Groenewald* 2005 (2) SA 597 (SCA) para 33; *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA) para 32.
[7] See *R v Blom* 1939 AD 188 at 202-203.

either while they were in his house or shortly thereafter, was that they had killed him. She rejected as a 'remote and fantastic' possibility the suggestion that after the appellant and his co-accused had left the deceased's house someone else entered it and killed him. I can find no fault with Schoeman J's reasoning and agree specifically that it is not a reasonable inference to draw that someone else might have entered his home after the appellant and his co-accused had left, and had then killed him.

[35] Even though, their intention in entering the deceased's home was not proved, it is clear that they acted in the furtherance of a common purpose in forcing their way in and that their common intention was criminal in nature. Whether they had the common purpose to murder the deceased must be determined with reference to the well-known test articulated by Botha JA in *S v Mgedezi & others*,[8] in which he said:

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

[36] Schoeman J applied the test in *Mgedezi* as follows:

'When the accused's actions are measured against the prerequisites as set out in **MGEDEZI** the following emerge:

1. They were both present at the scene where the violence was committed.
2. They must have been aware of the assault on the deceased.
3. They intended to make common cause with each other as they both broke into the home of the deceased and in this way
4. They manifested their sharing of a common purpose.

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

5. The manner of the assault on the deceased is indicative of the fact that they must have foreseen the possibility of the deceased being killed and performed their own acts of association with recklessness as to whether or not death ensued.

Although there is no evidence of what transpired inside the house it is clear that if the first accused did not make common cause with the second accused and if only the latter was the aggressor, one would have expected the first accused to have come to the aid of his uncle, the deceased, or at least have said something to the other accused. This did not happen. If the first accused did not make common cause with accused no. 2 regarding the assault that was perpetrated one would have expected him to have said so. Both accused broke open the door and entered the house where the deceased was brutally assaulted. No explanation or reason was advanced for the breaking in.

I am of the opinion that it has been proved beyond reasonable doubt that both accused acted with a common purpose after they jointly broke open the door of the deceased's house. The inference is inescapable that both perpetrated a vicious and brutal assault on a vulnerable man, The nature of the assault makes it evident that they must have foreseen the possibility of their actions causing the death of the deceased, but they acted with recklessness as to whether or not death ensued.'

[37] In my view, Schoeman J was correct in her finding that the accused acted in the furtherance of a common purpose not only to break into the deceased's house but also to assault him with the intention, in the form of *dolus eventualis*, to kill him. That, on the evidence viewed as a whole and in the absence of any innocent explanation, is the only reasonable inference to be drawn.

Conclusion

[38] From what I have said above, it will be apparent that the appeal cannot succeed. There is, however, one further issue that requires comment and that is the worrying evidence of vigilante-ism and the efforts of the vigilantes to subvert justice.

[39] The evidence of Mbushe establishes that the vigilantes committed various criminal offences including assault, that they appear to have access to dockets and that they appear to operate with impunity with the tacit forbearance, at the very least, of the police. That is unacceptable in a democratic society such as ours that is founded on the rule of law and the values of human dignity and the advancement of

human rights and freedoms. The brazen, vicious and lawless conduct of these vigilantes must, self-evidently, be dealt with appropriately by the police and the Director of Public Prosecutions.

[40] For that reason, I shall make an order directing the Registrar to provide the Provincial Commissioner of the South African Police Service and the Director of Public Prosecutions in Grahamstown with copies of this judgment.

[41] I make the following order.

(a) The appeal is dismissed.

(b) The Registrar of this court is directed to furnish the Provincial Commissioner of the South African Police Service and the Director of Public Prosecutions in Grahamstown with copies of this judgment.

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C Plasket

Judge of the High Court

I agree.

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P Tshiki

Judge of the High Court

I agree.

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B Hartle

Judge of the High Court

APPEARANCES

Appellant: L Crouse, instructed by Legal Aid South Africa, Port Elizabeth

Respondent: H Obermeyer, office of the Director of Public Prosecutions, Grahamstown