IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CC 202A/05

In the matter between:

BAREND CLARENCE LOVING Appellant

and

THE STATE Respondent

CRIMINAL APPEAL

HENDRICKS J; GURA J; GUTTA J

DATE OF HEARING : 27 MAY 2011
DATE OF JUDGMENT : 09 JUNE 2011

COUNSEL FOR THE APPELLANT : ADV STRYDOM
COUNSEL FOR THE RESPONDENT : ADV VAN BILJON

JUDGMENT

HENDRICKS J

[A] Introduction:-

[1] The Appellant (accused 3 during the trial) was indicted together with four co-accused on charges of murder, attempted murder and pointing of a firearm in the North West High Court, Mafikeng (court ***a quo***). At the inception of the trial, all the charges against accused no 5 were withdrawn by the State. The charges of attempted murder and pointing of a firearm were withdrawn against the remaining accused persons with the result that they were only charged with one count of murder.

[2] It was alleged that on 26 September 2004 at Blydeville in the district of Lichtenburg, they unlawfully and intentionally killed Oliphant Chulu *"by amongst others stabbing him with knives, hitting him with a golf club and a beer bottle"*. The State furthermore alleged that they acted with a common purpose in committing the said offence.

[3] The Appellant (amongst others) was convicted and he was sentenced to fifteen (15) years imprisonment of which five (5) years was conditionally suspended for a period of three (3) years. The Appellant appeals with leave of the court ***a quo*** the conviction and sentence.

[B] The Facts:-

[4] The evidence tendered by the State can be summarized as follows. On the day of the incident, the deceased was at home with his family members when accused 1 came and collected him. They then proceeded to a tuck shop.

[5] Elisa Mathibe, who was from the tuck shop, saw the deceased being held by accused 1. The deceased freed himself from accused 1 and ran away. The deceased was chased after by accused 1, 2, 3, 4 and 5. Accused 1 then threw a bottle at the deceased. The deceased ran into a nearby house and closed the door. Accused 1 kicked the door open and they entered into the house. Accused 5 had a knife and the Appellant was armed with a golf club.

[6] A report was made to Johannes Chulu, the brother to the deceased, that the deceased was embroiled in a fight which prompted him and his father to go and see what was happening. They went to the neighbour's house.

[7] When accused 4 came out of the toilet of that house, Johannes Chulu struck him with a stone. The Appellant (accused 3) emerged with a golf club in his hand. Accused 1, 2 and 5 emerged from the toilet having bloodstained knives in their hands. Steven Makiti and others chased after accused 1 and 5.

[8] The pathologist, Dr Els, who performed the post-mortem examination on the body of the deceased, testified that the cause

of death was as a result of *"stab wounds into the chest with hypovolemic shock"*. Also present on the body of the deceased were superficial, non-life threatening scratches and abrasions which did not contribute to the cause of death. The deceased sustained no head injuries. If the deceased was assaulted with a heavy object on his head, it would have been evident from the examination. Abrasions are not bruises.

Evidence of Accused 2:-

[9] Accused 2 admits that he was present in the house into which the deceased ran. His version is that in the house, he saw the deceased being taken out of the bedroom. He could not speak to the deceased because the deceased was being assaulted with bare hands. There was a vegetable knife, on the kitchen cupboard. The deceased fell onto the sofa in the kitchen. When he took the knife from the kitchen cupboard, he fell next to the deceased. He then stabbed the deceased twice at the back of his chest. He stabbed him because the deceased had assaulted him the previous day.

[10] According to him, his intention was not to injure the deceased seriously. He did not want to kill him. His intention was just to injure him because the deceased had also injured him. He intimated that he prevented him from dying by stabbing him on the lower body with a knife and that if his intention was to kill him or to stab him to death, he could have stabbed him on his neck or on the upper body.

[11] When he so stabbed the deceased, accused 1 and accused 4 were present. He then went out of the house. He was never in the toilet and when he was outside the house, he met the Appellant when he went out through the gate into the street. The Appellant passed by him and entered into the yard.

The Appellant's version:-

[12] The Appellant testified that on the day of the incident he was in the company of accused 1, 2, 4 and 5. At a certain stage, whilst seated at the shebeen, accused no 1 left and returned later on with the deceased, who was by then unknown to him. The deceased ran away. Accused 1 and 4 chased after him, followed by accused 2. He and accused 5 came walking from behind. They followed them because they wanted to see what was going on because he did not understand as to why the deceased was running away.

[13] The door to the house in which the deceased ran into was kicked open. Accused 1, 2 and 4 entered the house. When the Appellant entered the house he saw accused 4 kicking the deceased. He held accused 4 with his belt and pulled him out of the house up to the gate. He cannot say at that stage where accused 1 was but he did hear his voice from the toilet. Besides accused 1, 2, 4 and the deceased he saw no other person inside the house.

[14] He denied that he had a golf club in his hand. He left accused 1 at the door because people were throwing stones and he left running to the street. He denied that he assaulted the deceased with a golf club or at all. After some time he was informed that a person at

Extension 2 was dead and then he thought it could have been the person who was assaulted by accused 2 and the others.

[15] This incident happened during midday. He did not know what accused 2 and the others' plans were when they chased the deceased. He had not contributed towards the death of the deceased and did not plan the killing.

[C] **<u>The Law</u>**:-

[16] In **<u>S v Mgedezi</u>** 1989 (1) SA 687 (A) on page 705 I to 706 C the principles relating to common purpose were enunciated as follows:-

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

whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SAL 38 at 39. In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt."

[17] The decision in **S v Mgedezi**, ***supra*** passed constitutional muster as was found in **S v Thebus and Another** 2003 (6) SA 505 (CC). To quote from the head note:-

"Challenge to the doctrine of common purpose

Held, (per Moseneke J; Chaskalson CJ, Langa DJP, Ackermann J, Goldstone J, Madala J, Mokgoro J, Ngcobo J, O'Regan J and Yacoob J concurring), that the need to develop the common law under s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996 could rise in at least two instances. The first would be when a rule of the common law was inconsistent with a constitutional provision. Repugnancy of that kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arose even when a rule of the common law was not inconsistent with a specific constitutional provision but may have fallen short of its spirit, purport and objects. Then, the common law had to be adapted so that it grew in harmony with the 'objective normative value system' found in the Constitution. (Paragraph [28] at 525D/E-F.)

Held, further, that the Superior Courts were protectors and expounders of the common law. The Superior Courts had always had an inherent power to refashion and develop the common law in order to reflect the changing social, moral and economic make-up of society. That power had been

constitutionally authorised and had to be exercised within the prescripts and ethos of the Constitution. (Paragraph [31] at 526E/F-F/G.]

Held, further, that when it was contended that a rule of the common law was inconsistent with a constitutional provision the Court was required to do a threshold analysis, being whether the rule limited an entrenched right. If the limitation was not reasonable and justifiable, the Court itself was obliged to adapt, or develop the common law in order to harmonise it with the constitutional norm. (Paragraph [32] at 526F/G-527A.)

Held, further, that, ordinarily, in a consequence crime, a casual nexus between the conduct of an accused and the criminal consequence was a prerequisite for criminal liability. The doctrine of common purpose dispensed with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. The principal object of the doctrine of common purpose was to criminalise collective criminal conduct and thus to satisfy the need to control crime committed in the course of joint enterprises. The phenomenon of serious crimes committed by collective individuals, acting in concert, remaining a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it was often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a casual prerequisite for liability would have rendered nugatory and ineffectual the object of the criminal norm of common purpose and made prosecution of collaborative criminal enterprises intractable and ineffectual. (Paragraph [34] at 527D-G.)

Held, further, that the doctrine of common purpose did not trench upon the rights to dignity and freedom. It was fallacious to argue that the prosecution and conviction of a person de-humanised her or him and thus invaded the claimed rights. The entire scheme of ss 35 and 12(1) of the Bill of Rights authorised and anticipated prosecution, conviction and punishment of individuals, provided it occurred within the context of a procedurally and substantively fair trial and a permissible level of criminal culpability. The essence of the complaint had to be against the criminal norm in issue. The doctrine of common purpose set a standard of criminal culpability. It defined the minimum elements necessary for a conviction in a joint criminal enterprise. The standard had to be constitutionally permissible. It could not unjustifiably invade rights or principles of the Constitution. Put differently, the norm could only impose a form of culpability sufficient to justify the deprivation of freedom without giving rise to a constitutional complaint. However, once the culpability norm passed constitutional muster, an appropriate deprivation of freedom was permissible. (Paragraph [36] at 528C/D-F/G.)

Held, further, that the definitional elements or the minimum requirements necessary to constitute a meaningful norm for common-law crime were unique to that crime and were useful to distinguish and categorise crimes. Common minimum requirements of common-law crimes were proof of unlawful conduct, criminal capacity and fault, all of which had to be present at the time the crime was committed. Notably, the requirement of casual nexus was not a definitional element of every crime. Thus, under the common law, the mere exclusion of causation as a requirement of liability was not fatal to the criminal norm. (Paragraphs [37] and [38] at 528G-529A.)

Held, further, that there were not pre-ordained characteristics of criminal conduct, outcome or condition. Conduct constituted a crime because the law declared it so. Some crimes had a common-law and other a legislative origin. In a constitutional democracy, a duly authorised legislative authority could create a new, or repeal an existing, criminal proscription. Ordinarily, making conduct criminal was intended to protect a societal or public interest by criminal sanction. It followed that criminal norms varied from society and within a society from time to time, relative to community convictions of what was harmful and worthy of punishment in the context of its social, economic, ethical, religious and political influences. In the South African constitutional setting, any crime, whether common-law or legislative in origin, had to be constitutionally compliant. It could not unjustifiably limit any of the protected rights or offend constitutional principles. Thus, the criminal norm could not deprive a person of her or his freedom arbitrarily or without just cause. The just cause pointed to substantive protection being deprived of freedom arbitrarily or without an adequate or acceptable reason and to the procedural right to a fair trial. The meaning of just cause had to be grounded upon and be consonant with the values expressed in s 1of the Constitution and gathered from the provision of the Constitution. (Paragraphs [38] and [39] at 529A-E/F.)

Held, further, that common purpose did not amount to an arbitrary deprivation of freedom. The doctrine was rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It served vital purposes in the criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices would be beyond the reach of the criminal justice system, despite their unlawful and intentional participation in the commission of the crime. Such an outcome would not have accorded with the

considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds struck more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime was a legitimate, pressing social need. In practice, joint criminal conduct often posed peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arose in the case of an individual accused person. Thus there was no objection to this norm of culpability even though it bypassed the requirement of causation. (Paragraph [40] at 529E/F-530B.)

Held, further, that the doctrine of common purpose did not relate to a reverse onus or presumption which relieved the prosecution of any part of the burden. The doctrine of common purpose set a norm that passed constitutional scrutiny. The doctrine neither placed an onus upon the accused, nor did it presume her or his guilt. The State was required to prove beyond a reasonable doubt all the elements of the crime charged under common purpose. When the doctrine of common purpose was properly applied, there was no reasonable possibility that an accused person could be convicted despite the existence of a reasonable doubt as to her or his guilt. The common purpose doctrine does not trench the right to be presumed innocent. (Paragraph [43] at 530F/G-531A/B.)

Held, further, that the two principal criticism against the doctrine of common purpose, namely that, in some cases, the requirement of active association had been cast too widely or misapplied and that there were less invasive forms of criminal liability short of convicting a participant in common purpose as a principal, did not render unconstitutional the liability requirement of active association. (Paragraphs [44] and [45] at 531B-C/D.)

[18] Par [50] at page 533 A-B reads as follows:-

> *"[50] Despite the evocative history of the application of the doctrine of common purpose in political and other group prosecutions, I am of the view that the common-law doctrine of common purpose in murder, as set out in S v Mgedezi and cases considered in this judgment, does pass constitutional muster and does not, in the context of this case, require to be developed as commanded by s 39(2)."*

[D] <u>Evaluation of the evidence tendered</u>:-

[19] In evaluating the evidence tendered on behalf of the State, it is evident that there are several material contradictions. This was also correctly conceded by counsel acting on behalf of the State, <u>Adv Van Biljon</u>. Not only did the State witnesses contradict one another with regard to the assaults perpetrated on the deceased, but they also contradicted themselves. Furthermore, their ***viva voce*** evidence contradicted the contents of the previous statements they made to police officers. No reliance whatsoever should have been placed on the evidence of the State witnesses, because of the numerous material contradictions.

[20] Of critical importance however is the fact that the eye-witness evidence that implicates the Appellant as one of the perpetrators of the assault on the deceased is in sharp contrast to the medical evidence tendered by the pathologist, <u>Dr Els</u>. No medical evidence could be found that proves that the deceased was assaulted with the golf club. On the contrary, the findings by <u>Dr Els</u> perfectly coincide with the admission made by accused 2 that

he inflicted the two stab wounds at the back of the deceased with a knife.

[21] On the other hand, the evidence tendered by the Appellant is reasonably possibly true. No valid criticism can be levelled against his testimony. The fact that he was present at the scene and displayed a keen interest in what transpired between the deceased and his fellow accused does not exonerate the State from its onus to prove the guilt of the Appellant beyond reasonable doubt. Because of the contradictory evidence tendered by the State witnesses, doubt exist as to whether the Appellant did assault the deceased, and he should have been given the benefit of the doubt and should have been acquitted.

[22] It is clear from the judgment of the court ***a quo*** that the conviction of the Appellant was premise on the application of the doctrine of common purpose. In order to arrive at the conclusion that the guilt of an accused is proved beyond reasonable doubt in a case of a mob attack, regard must be had to the five principles enunciated in **S v Mgedezi**, ***supra***.

[23] Although the Appellant was present at the scene and was aware of the attack on the deceased, the State did not prove beyond a reasonable doubt that:-

- he intended to make common cause with those who were actually perpetrating the assaults; and
- he 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; and

- he had the requisite ***mens rea*** (intention) in respect of the killing of the deceased by either intending him to be killed or foreseeing the possibility that the deceased might be killed and performing his own act of association with recklessness as to whether or not death was to ensue.

[E] **<u>Conclusion</u>**:-

[24] Having found that the State did not succeed in providing the guilt of the Appellant beyond reasonable doubt, it follows that the conviction of the Appellant by the court ***a quo*** must be set aside. Having reached this conclusion, it is not necessary to deal with the appropriateness of the sentence imposed, suffice to state that it follows automatically that the sentence must also be set aside.

[F] **<u>Order</u>**:-

[25] Consequently the following order is made:-

[i] The appeal is upheld.

[ii] The conviction and sentence is set aside.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

SAMKELO GURA
JUDGE OF THE HIGH COURT

I agree.

N GUTTA
JUDGE OF THE HIGH COURT