

SOUTH AFRICA / JUDGMENT

Gabela v S (A60/2020) [2020]

ZAGPJHC 280 (6 November 2020)

[2020] ZAGPJHC 280

COURT

South Gauteng High Court, Johannesburg

BEFORE

Adams, Majavu

CASE / FILE NUMBER

A60/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

APPEAL

CASE NO: A60/2020
COURT
A QUO

CASE NO: 43/1277/2013

DATE: 6th
NOVEMBER 2020
In

the matter between: GABELA,
JABULANI
Appellant
and
THE
STATE
Respondent

Coram: Adams J et Majavu AJ

Heard: 15 October 2020 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered:	6 November 2020 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines digital system of the GLD and by release to SAFLII. The date and time for hand-down is deemed to be 11:00 on 6 November 2020
Summary:	Criminal Law – appellant convicted of one count of murder, read with s 51(2) of the Criminal Law Amendment Act 105 of 1997 based on common purpose – no allegations of common purpose in the charge sheet – appellant did not receive a fair trial – conviction set aside and replaced with conviction on competent verdict – assault with intent to cause grievous bodily harm – sentence of three years' direct imprisonment imposed. ORDER On appeal from: The Soweto Regional Court, Protea (Regional Magistrate Mpofu sitting as
Court of first instance):	(1) The appellant's appeal is upheld and succeeds to the extent set out below. (2) The appellant's conviction on the charge of murder and the related sentence of direct imprisonment for a period of seven years are set aside, and replaced with the
following:	'(a) The accused is convicted on the competent charge of assault with intent to do grievous bodily harm. (b) In respect of his conviction on a charge of assault with intent to cause grievous bodily harm, the accused is sentenced to direct imprisonment for a period of three years.' (3) The appellant's bail be and is hereby revoked. (4) The appellant shall report to the Clerk of the Soweto Regional Court in Protea within 48 hours of this Order, to commence serving his sentence.

JUDGMENT

Majavu AJ (Adams J concurring):

[1]. This is an appeal against conviction by the appellant, who was arraigned in the Soweto Regional Court on a charge of murder, as read with section 51 (2) of Act 105 of 1997. He pleaded not guilty and was subsequently convicted and sentenced to an effective term of imprisonment for a period of seven years. The appellant was granted leave to appeal by the court a quo against conviction only. This appeal is opposed by the State.

[2]. The grounds of appeal were fashioned as follows:

‘1. It is respectfully submitted that the Learned Regional Magistrate erred in fact and/or in law in the following respects:

1.1 By finding that the state proved its case against the appellant in respect of the charge of murder beyond reasonable doubt;

1.2 By finding that someone in the appellant’s group stabbed the deceased with a sharp object;

1.3 By finding that the appellant did foresee that something can come about that could cause the death of the deceased, but persisted;

1.3.1 In this regard it is submitted that there was no evidence that anyone else assaulted the deceased at the time that the deceased and the appellant struggled and fell down, followed by the appellant kicking the deceased and thus no basis to find that it was reasonable that others would join in and fatally wound the deceased;

1.4 By failing to find that it was not foreseeable that others would also assault the deceased and/or that someone was armed with a sharp object and would stab the deceased;

1.5 By failing to find that it was not foreseeable that someone would have a weapon and would stab the deceased;

1.6 By finding that the appellant did not act in self-defence when kicking the deceased once or twice. In this regard it is submitted

that on the totality of events, the appellant did not exceed the boundaries of self-defence;

1.7 By failing to find that it was not foreseeable that someone would have a weapon and would stab the deceased;

1.8 By finding that the incident in the street was a new fight completely; and

1.9. By finding that the appellant was present during the fatal stabbing of the deceased, but didn’t “finish the story where it ended”.’

[3]. In this judgment, I will not deal with these grounds ad seriatim or in any particular order, but rather with the totality of the evidence which was before the learned Regional Magistrate.

[4]. The appellant also raised a number of legal points in his Heads of Argument. I turn to deal with those points first.

Points raised for the first time in the Appellant's Heads of Argument

[5]. The first point in limine raised by the appellant is that at his appearance on the 22nd of September 2014 the assessors, who were supposed to be sitting with the learned Magistrate, were not present when the matter proceeded further on this date and they were also not present in all the hearings that followed. It was therefore submitted on behalf of the appellant that, because it was necessary for the Assessors to be part of all proceedings and be present at all appearances, as required by law, this was an irregularity which vitiated the proceedings.

[6]. There is no merit in this submission. The trial proceedings commenced on 31 March 2014 and the trial court placed on record that it was proceeding in the presence of assessors. Mr Grove, who appeared on behalf of the appellant during the trial, indicated that the appellant had no objection to the constitution of the trial court. Similarly, during subsequent appearances no objection was raised as regards the composition of the court. The appellant now asserts that the trial court proceeded without assessors.

[7]. This contention is clearly not sustainable if for no other reason than the fact that it is factually inaccurate. The assertion is at odds with the probabilities – during the trial the appellant was at all times legally represented by Mr Grové. That being the case, it is highly unlikely that Mr Grove would have missed such an obvious irregularity. He would no doubt have taken issue with such a glaringly inappropriate procedure. As a matter of practice, once the appearance of assessors has been noted and confirmed, their attendance at subsequent hearings are not recorded as a matter of course. This is borne out by the fact that the record did not reflect the presence and attendance of the assessors at any hearings subsequent to the first day of the trial, including the record relating to the hearing on 31 March 2014. This was so despite the fact that it is patently clear that the court was constituted, on each occasion, by the learned Regional Magistrate sitting with her two assessors. If this was not so, the appellant's attorney, Mr Grové, would no doubt have objected to the differently constituted trial court and he would inevitably have requested a special entry to be made on the record.

[8]. This point is accordingly dismissed.

[9]. The second legal point raised by the appellant in his written Heads of Argument is that the State, in the charge sheet, did not rely on the doctrine of common purpose when the appellant was formally charged. It is so that no such assertion was made in the charge sheet or at any stage before the appellant was required to plead. Nor was it contended by the State at any stage during the trial proceedings until its conclusion that the charge of murder was based on the doctrine of common purpose. Also, there was no application for the amendment of the charge sheet in terms of section 86 (1) of the Criminal Procedure Act, 51 of 1977[1], to include a reference to common

purpose, which ought to be included in the charge sheet or as part of the summary of substantial facts alleged in the indictment.

[10]. In this case, the respondent belatedly attempted – only at the hearing of the appeal stage – to bring an ex post facto application for amendment to include a reference to common purpose. The text of the relevant subsection is very clear in that such an application must of necessity be brought at any stage before judgment. In this instance, it is raised for the first time in the heads of argument before this appeal court. This is not even raised as a ground of appeal at all. As matters currently stand, we are all none the wiser with regard to what the presiding magistrate's stance would have been had such an application been brought. Moreover, because this was not raised as a ground of appeal, the presiding magistrate is deprived an opportunity to have dealt with it in her judgement with regard to the application for leave to appeal.

[11]. Similarly, the state was also not afforded an opportunity to deal with that aspect, until it was raised in the heads of argument a few days ahead of the hearing of this appeal. It is not open to the respondent to suggest that in the event that the court was to allow an amendment at this stage, it would result in no prejudice to the rights of the appellant. It is equally possible that had the appellant known that he could possibly be convicted on the doctrine of common purpose, he might have considered conducting his case differently. So for example he could have elected not to testify, in which case he would not have offered a version, as he did, in which he clearly implicated himself in some wrongdoing.

[12]. I therefore find that such an amendment cannot be effected at this stage and accordingly this application to amend the charge sheet, insofar as such an application was within the contemplation of the State, was still born. This aspect of the matter will be returned to later on in the judgment as part of the merits of the appeal. Suffice at this stage to say that, in my view, the fact that the charge sheet failed to mention that the count of murder was based on the doctrine of common purpose meant that the appellant may very well not have received a fair trial.

[13]. The third legal point taken by the appellant is that one of the State witnesses, Mr Chato Kobedi, was not sworn in before he testified on 31 March 2014. From the record the following exchanges occurred between the witness and the trial court before he commenced his testimony. The court asked him the following questions: 'Do you have any objection to taking the oath, Mr Kobedi?' and his answer was that he had no objection. Thereafter, the court asked him if he considered the oath to be binding on his conscience, and he answered in the affirmative.

[14]. If regard is had to these exchanges, it is not entirely clear on what basis the appellant avers that the witness had not been sworn in. Especially, if regard is had to the record immediately after these exchanges, which records that the witness, like all the other witnesses, 'duly sworn states (through interpreter)'. It stands to reason that the other missing words were said in vernacular and was not necessarily fully captured in the transcript.

[15]. I have no doubt that an oath was administered and that the witness took the oath in accordance with the regulations before he testified. At all material times the said witness was led in chief on that basis and also cross-examined by the defence legal representative on the same basis. At no stage was a point taken about the defect in the manner in which the oath was administered. It is also noteworthy that such a point was not taken, either as self-standing or as ancillary to any of the grounds of appeal raised.

[16]. Accordingly, I find this point to be without merit and it stands to be dismissed.

What is the effect of this omission (the insertion of the words to the effect of placing reliance on common purpose) in the charge sheet?

[17]. An accused person is entitled to such particulars as he properly requires for the purpose of preparing his case. The position remains

unaltered even with reference to the possibility of the invocation of the doctrine of common purpose which is undoubtedly part of our law. Similarly, an accused person who faces a charge where the state relies on this doctrine is also entitled to be informed as such and prior to him being required to plead or otherwise enter upon his defence. I refer with approval to *S v National High Command*[2] at paragraph 464 where the court held that:

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

[18]. In this case, no such warning whatsoever was given by the state to the appellant, let alone supplying some particularity regarding facts to be relied upon.

[19]. In *S v Mphetha and Others*[3] the court ordered the state to furnish further particulars to the accused, and in doing so it quoted with approval from *R v Adams and Others* as follows

‘It is a well-known principle in our law that an accused person is entitled to such particulars as he properly requires for the purpose

of preparing his case before he is called upon to plead and enter upon his defence, and he is entitled to such particulars even if it entails a disclosure of Crown evidence’.

[20]. *Adams* is an English case which has found resonance with our courts in subsequent judgments. In *S v Ndaba*[4], where the state had similarly relied on common purpose, which it had not alleged in the charge sheet or in the summary of substantial

facts or in the opening address, this court had the following to say at para 102:

‘I am satisfied that the allegation of common purpose has to be made by the state in the indictment, or at least in the summary of

substantial facts furnished to the accused.’

[21]. In this case, we know that the appellant's right to a fair trial on a charge of murder was infringed due to the failure by the Court a quo and the State to forewarn him that the State would be relying on the doctrine of common purpose to secure his conviction. This probably means that when he pleaded, the appellant was unaware that the conduct of others may be imputed to him and could result in his culpability. This, in our judgment, was a fundamental flaw in the proceedings in the Regional Court.

[22]. However, the question is whether it can be said that the defect was of such a nature that it automatically rendered the trial unfair, especially if regard is had to the fact that the appellant was during the trial continuously legally represented. This question should, in my view, be answered in the affirmative. It has to be accepted that the lack of appreciation of his culpability being imputed from the conduct of others distinguishes this case from a case in which, for example, there was a failure to bring to the attention of an accused in the charge sheet the fact that a minimum sentence regime is applicable. (*Johannes September v The State* 2018 ZACC27). The point is that there are no absolute hard and fast rules – each case must still be judged on its particular

facts.

[23]. Having had specific regard to one of the essentialia alleged specifically in the charge sheet, namely that the actus reus was constituted by the 'stabbing' of the deceased, it is not inconceivable that the appellant conducted his defence on the basis that he knew that he did not stab the deceased, hence his denial of the cause of the death of the deceased. That is the case he came to court to meet.

[24]. It is also clear that on his own version, the appellant committed an unlawful act in relation to the deceased. The foreseeability of death eventuating from his self-confessed conduct was neither alleged nor proven on the evidence before the presiding magistrate, as per the trial record.

[25]. In the absence of the pre warning in the charge sheet regarding the invocation of the common purpose doctrine, I am inclined to accept that the learned Magistrate committed a material misdirection when she impermissibly invoked the doctrine of common. This is manifestly unfair to the appellant. I am accordingly of the view that the failure to inform the appellant adequately of the charge he faced and the possibility of conviction on the basis of the doctrine of common purpose prejudiced him and thus resulted in the appellant not receiving a fair trial.

[26]. His conviction on the charge of murder therefore stands to be set aside as is the case with the related sentence. The first time when some reference to the doctrine emerged was in Mr Grove's address at the end of the case on behalf of the defence case. Even then the reference was made rather inconsequentially in relation to whether the first or second incident was one ongoing continuous event, as opposed to separate and distinct acts. Beyond that, not even the prosecutor made that contention or sought to invoke the doctrine in his closing arguments. The

doctrine of common purpose was found by the learned Magistrate to have formed the basis for the conviction on the murder charge without any factual or legal basis for same. More importantly though was the fact that common purpose was not pleaded by the State in the charge sheet. This was therefore a misdirection on the part of the Magistrate and, as indicated above, the murder conviction stands to be set aside.

[27]. In the absence on the facts and circumstances of this matter of common purpose as a basis for finding culpability on the part of the appellant, the question is whether he was guilty of any other crime. The question is this: having regard to the appellant's conduct on the night in question, can it be said that he was guilty of another crime such as an offence, which is a competent verdict on a charge of murder? If the answer is in the negative, then the appellant would be entitled to an acquittal. Conversely, if answered in the affirmative, then he should be convicted on a competent verdict provided the essential elements of such a competent conviction are proven.

[28]. In order to answer this question, a brief overview of the facts is necessary.

The

Facts

[29]. On 3 August 2013, the deceased and the appellant were involved in an altercation at a tavern. The deceased was the aggressor and the first to assault the appellant by hitting him with a half-full beer bottle. The appellant retaliated by throwing some beer bottles back at the deceased. There was an exchange of beer bottles between the two of them with none, except for the first one thrown by the deceased, hitting either of them.

[30]. That incident stopped for a short period and the deceased exited the tavern. Shortly thereafter, the appellant also exited the tavern and met the deceased in the street outside the premises of the tavern. Both the deceased, who was clearly not happy with the events inside the tavern and the fact that he had come off second best in the altercation, and the appellant were in the company of other persons. A further scuffle ensued resulting in both of them falling to the ground, whereafter the appellant's group of friends launched an attack on the deceased whilst he was lying on the ground.

[31]. At some point during the fray, one of the appellant's friends attempted to pull the appellant away from the fight. At that point the appellant was also kicking the deceased whilst he was on the floor. During the commotion, with the appellant and his cronies viciously attacking him, the deceased was stabbed several times by one of the appellant's group. Whilst there can

be little doubt that the deceased was stabbed by one of the appellant's group of about four to five friends during the fracas, nobody knows who did the stabbing. On the evidence, it can also safely be said that it was not the appellant who stabbed the deceased. The appellant's contribution to the attack on the person of the deceased was that he kicked the deceased several times whilst he was lying on the floor. On his own version, the appellant also saw others kicking the deceased while on the ground before he

too joined in and kicked him once or twice.

[32]. When the attack came to an end, it was realised that the deceased had been stabbed. He later died shortly after his arrival at the hospital.

[33]. The second incident (outside the tavern) was not a random act but rather a sequel to the earlier scuffle (inside the tavern) and in respect of which the deceased was the aggressor. The appellant placed himself at the scene of the second incident. He also confirms his active role in the second assault as part of a group of assailants, at least one of whom stabbed the deceased, thus causing his death.

Discussion

[34]. None of the contentions contained in the notice of appeal are borne out by the record. The facts of this matter are straightforward, uncomplicated and largely uncontested. There is simply no room for criticism against the magistrate's consideration, assessment and evaluation of the evidence tendered by both the state, in the form of two witnesses, on the one hand, as well as the defence, through the appellant himself.

[35]. There is no issue regarding identity of the accused person, as he unambiguously placed himself at the scene of the second incident and goes on to state the role he played therein. It is beyond any doubt that the appellant, on his own version, assaulted the deceased. Such an assault is indeed a competent verdict on the charge of murder. There is no justifiable defence to his conduct, again, on his own version.

[36]. On the facts in this matter, I am unable to find any misdirection on the facts. As indicated above, what I do find is that the magistrate impermissibly invoked the doctrine of common purpose. This resulted in an incorrect conviction on the charge of murder, which is not supported by the facts and the law.

[37]. On the other hand, while the conviction on a charge of murder and the sentence imposed in that regard cannot stand, the appellant on his own version was not entitled to physically kick the deceased in the manner he did, and in doing so he unlawfully assaulted the deceased with intent to cause grievous bodily harm. Under s 258(b) of the CPA, assault GBH is a competent verdict on a charge of murder. The appellant should have been found guilty of that offence.

[38]. On the facts, there can be no doubt that the appellant committed the offence of assault with intent to cause grievous bodily harm. He launched a vicious attack on the person of the deceased, whilst he was lying helplessly on the ground after having already suffered at the hands of

appellant's friends. The assault by the appellant was in the form of him kicking the deceased at least twice in circumstances in which the appellant should have realised that grievous bodily harm would be caused to the deceased. We are satisfied, as indicated above, that in the light of the appellant's acquittal on the murder charge, the learned Magistrate could have convicted him of assault GBH. We, as the appeal court, can also do so.

[39]. The only question is whether the fact that the learned Regional Magistrate did not at any stage during the trial proceedings inform the appellant of competent verdicts, impacts on the fairness of the trial. The position with regard to competent verdicts has engaged our courts over the years, particularly when it relates to the position of an undefended accused. It is a time-hallowed principle of our criminal procedure that an accused is entitled to be informed with sufficient detail and clarity of the charges against him or her.

[40]. As Bosielo J observed in *S v Motsomi* 2005 JDR 1080 T as follows:

'[4] It is fundamental and time-honoured principle of our criminal law that every accused must be fully and properly advised of the charge which he/she is facing with sufficient details to be able to answer thereto. (See: section 35(3) (a) of the Constitution). This hallowed principle is intended to avoid the possibility of "a trial by ambush". This requires that where the state intends to rely on competent verdicts in terms of section 256 to 270 to the Code, that such an accused be informed of all relevant competent verdicts even before he pleads to the charge. Such a step will put such an accused in a position to know and make an informed decision *inter alia* as to how to plead, which facts to admit and how to conduct his defence. (See: *S v Velela* 1979 (4) SA 581 (C) and *S v Kester* 1996 (1) SACR 461 (8) at 469i). Furthermore such an approach will avert any possible prejudice to such an accused, particularly if he is illiterate, unsophisticated and unrepresented'.

[41]. This principle is now enshrined in our Constitution. Section 35 (3) (a) entitles every accused person as an essential part of the right to a fair trial, to be informed of the charges he is facing with sufficient detail to answer it.

[42]. Griesel J in *S v Fielies and Another* 2006 (1) SACR 302 (C) at 306 b-f summarises safeguards that have to be taken to avoid such conflict as follows:

'[9] In order to guard against the potential prejudice lurking in these provisions, the courts have over the years developed certain

safeguards. The relevant principles in this regard may for present purposes be summarized as follows:

- (a) The constitutional right to be informed of the charge includes the right to be informed of competent verdicts on the charge.
- (b) While it is not essential to refer to competent verdicts in the charge sheet, it is extremely desirable that an undefended accused be informed timeously of any competent verdicts that might be returned on conviction. This requires the court "to diligently,

deliberately and painstakingly inform the said unrepresented accused of his rights and to ensure and confirm that he accused understands

his rights”.

- (c) In order to give efficacy to this right, it is important that the accused be informed of competent verdicts before pleading.
- (d) These principles have particular relevance but are not limited to the situation where a statutory provision places an onus on the accused.
- (e) Failure to inform an accused of a competent verdict does not per se preclude the court from recording such competent verdict. Everything will depend upon the facts of each particular case and the extent to which an accused may or may not be prejudiced in the conduct of his or her defence by such omission. Where there is the likelihood of prejudice to the unrepresented accused, the return of a competent verdict would not be sanctioned.
- (f) In the ultimate analysis, the enquiry is simply whether the accused has been given a fair trial.’

[43]. Applying these principles in casu, I am satisfied that the appellant was not prejudiced in the conduct of his defence by the omission by the learned Regional Magistrate to inform him of the competent verdicts. Throughout the trial he was legally represented by an experienced and a seasoned criminal lawyer. He was not an ‘undefended accused’ and we do not believe that the appellant’s right to a fair trial had been violated.

[44]. For all of these reasons, we are of the view that a competent verdict on a charge of assault with intent to cause grievous bodily harm should be returned – in the final analysis such a verdict is sanctioned by the circumstances in the matter.

Sentence

[45]. The sentence of direct imprisonment for a period of seven years that the Regional Court imposed on the appellant was because of the conviction on one count of murder, read with section 51(2) of the Minimum Sentencing Act. The conviction we have already indicated stands to be set aside, so too the sentence. In its place must be substituted an appropriate sentence relating to the conviction on the competent charge of assault GBH.

[46]. While it is normally preferable for the trial Magistrate to impose a new sentence on a convicted person, any benefit arising from the Magistrate’s familiarity with this case has been seriously eroded by the length of time that has passed since the appellant’s trial. It is accordingly in the interests of justice for this Court to determine the matter finally.

[47]. The appellant, whose date of birth is the 19th of November 1987, making him 33-years old at present, was a first time offender. At the time of the commission of the crime on the 3rd of August 2013, he was 26-years old and when he was sentenced in the Regional Court on the 7th of October 2015 he was 28-years old. The appellant stands to be convicted of assault GBH in

circumstances in which the victim of the assault lost his life, although I should hasten to add that the appellant cannot and should not be held responsible for the death of the deceased.

Nevertheless, the appellant's assault on the person of the deceased was part of a vicious attack on the deceased in which he was stabbed no less than seven times in the upper part of his body.

[48]. Alcohol played a big part in the events on the night in question. The deceased was in fact the initial aggressor and he had hit the appellant over the head with the half-full beer bottle causing an open head wound. His personal circumstances were that he went to school up to and completed grade 12 in 2006. He is unmarried, but at the time when he was sentenced he was a father to an eight month old toddler.

[49]. The appropriate and proportionate sentence to be imposed in the circumstances following the conviction of assault with intent to cause grievous bodily harm is direct imprisonment for a period of three years.

Order

In the result, the following order is made:-

Z M P MAJAVU

Acting Judge of the High Court

Gauteng Local Division, Johannesburg

I agree

L R ADAMS

Judge of the High Court

Gauteng Local Division, Johannesburg

HEARD ON: 15th October 2020 – The matter was disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013. JUDGMENT DATE: 6th November 2020 FOR THE APPELLANT: Adv Lebohang Mosoaneng INSTRUCTED BY: Legal Aid South Africa FOR THE RESPONDENT: Adv Lwazi Ngodwana INSTRUCTED BY: The Office of the National Director of Public Prosecutions, Johannesburg

- [1] S86 (1) 'Where a charge is defective for the want of any essential averment therein, ... or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part

thereof which it may become necessary to amend.' In this case, the insertion of the words common purpose was never done in accordance with this section.

[2] 1963 (3) SA 462 (T)

[3] 1981 (3) SA 803 (C)

[4] 2003 (1)SACR 364 (W)

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