

SOUTH AFRICA / JUDGMENT

Legalatladi v S (CA45/2017) [2019] ZANWHC 55 (3 October 2019)

[2019] ZANWHC 55

COURT

North West High Court, Mafikeng

BEFORE

R D Hendricks, J T Djaje

CASE / FILE NUMBER

CA45/2017

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IN

THE NORTH WEST HIGH COURT, MAHIKENG

CASE

NO: CA 45/2017

In

the matter between:

GAASITE
UNITY LEGALATLADI
Appellant
And
THE
STATE
Respondent
HENDRICKS
AJDP & DJAJE J
DATE
OF HEARING
: 02
AUGUST 2019
DATE
OF JUDGMENT
:
03 OCTOBER 2019
COUNSEL
FOR APPELLANT : ADV.
PISTORIUS
COUNSEL

FOR THE RESPONDENT :

ADV. RASAKANYA

JUDGMENT**THE COURT****ORDER**

- (i) The appeal is upheld.
- (ii) The conviction and sentence are set aside.

Introduction

- [1] Mrs. Gaasite Unity Legalatladi (the appellant) was convicted on the 30th October 2017, in the Regional Court, Lehurutshe on charges of attempted conspiracy to commit murder and incitement to commit murder. The two counts were taken together for the purpose of sentence. She was sentenced to five
- (5) years imprisonment in terms of section 276 (1)(i) of the Criminal Procedure Act 51 of 1977, as amended (CPA). She was also declared unfit to possess a fire-arm in terms of section 103 (1) of the Firearms Control Act 60 of 2000. Leave to appeal against conviction was refused by the court a quo but was granted against sentence. She successfully petitioned the Judge President of this division for leave to appeal against conviction. This appeal is therefore against both conviction and sentence.

The Charge Sheet and plea

- [2] The charge sheet consisted of a multiplicity of counts in the alternative and reads as follows:

“Count No. 1:

CONSPIRACY TO COMMIT MURDER IN CONTRAVENTION OF SECTION 18(2)(a) OF THE RIOTOUS ASSEMBLIES ACT, 17 OF 1956 READ WITH SECTION 51(2), 52(2), 52A AND 52B OF THE CRIMINAL LAW AMENDMENT ACT, 105 OF 1997.

THAT the accused is guilty of the crime of contravening the provisions of The Section 18(2)(a) read with Sections 51(2), 52(2), and 52A and 52B of the Criminal Law Amendment Act, 105 of 1997.

IN THAT on or about the 21st November to 1st December 2014 and at or near Masebudule village, Lehurutshe in the Regional Division of North West, the accused, did unlawfully and intentionally conspire with Tshanako Reginald Tshukudu, a traditional healer to aid or procure the commission of or to commit the offence of murder, to wit: to unlawfully and intentionally kill the following persons:

- The Premier, of the North West, Supra Obakeng Ramoeletsi Mahumapelo and/or
- The Executive Mayor Mahikeng Local Municipality, Enthia Seane Seatlholo Gosame and/or

- The Executive Mayor of Ngaka Modiri Molema, Tshepo Justice Makolomakwa and/or
- Councillor Pontsho Tabane.

1st alternative to Count 1:

INCITEMENT TO COMMIT MURDER IN CONTRAVENTION OF SECTION 18(2) (b) OF THE RIOTOUS ASSEMBLIES ACT, 17 OF 1956 READ WITH SECTION 51(2), 52(2), 52A AND 52B OF THE CRIMINAL LAW AMENDMENT ACT, 105 OF 1997.

THAT the accused is guilty of the crime of contravening the provisions of Section 18(2)(b) read with Sections 51(2), 52(2), and 52A and 52B of the Criminal Law Amendment Act, 105 of 1997.

IN THAT on or about the 21st November to 1st December 2014 and at or near Masebudule village, Lehurutshe in the Regional Division of North West, the Accused, did unlawfully and intentionally incite, instigate, command or procure Tshanako Reginald Tshukudu, a traditional healer to commit the offence of murder, to wit: to unlawfully and intentionally kill the following persons:

- The Premier of the North West, Supra Obakeng Ramoeletsi Mahumapelo and/or

2nd alternative to Count:

ATTEMPTED MURDER

IN THAT upon or about 01st of December 2014 and at or near Masebudule village, Lehurutshe in the Regional Division of North West the accused did unlawfully and intentionally attempt to kill the following persons:

,by enlisting the services of a traditional healer and further using muti provided by the said traditional healer for the purpose of bringing about the death of the abovementioned persons.

Count 2 Incitement

INCITEMENT TO COMMIT MURDER IN CONTRAVENTION OF SECTION 18(2) (b) OF THE RIOTOUS ASSEMBLIES ACT, 17 OF 1956 READ WITH SECTION 51(2), 52(2), 52A AND 52B OF THE CRIMINAL LAW AMENDMENT ACT, 105 OF 1997.

IN THAT on or about the year 2014 and at or near Seweding village, Mahikeng in the Regional Division of North West, the Accused, did unlawfully and intentionally incite, instigate, command or procure Pono Molefe, a traditional healer to commit the offence, to wit: to unlawfully and intentionally kill the following persons:

- The Premier of the North West, Supra Obakeng Ramoeletsi Mahumapelo and/or
- The Executive Mayor Mahikeng Local Municipality, Enthia Seane Seatlholo Gosiame

1st Alternative to count 2:

THAT the accused is guilty of the crime of contravening the provisions of Section 18(2)(a) read with Sections 51(2), 52(2), and 52A and 52B of the Criminal Law Amendment Act, 105 of 1997.

IN THAT on or about the year 2014 and at or near Seweding village, Mafikeng in the Regional Division of North West, the Accused, did unlawfully and intentionally conspire with Pono Molefe, a traditional healer to aid or procure the commission of or to commit the offence of murder, to wit: to unlawfully and intentionally kill the following persons:

- The Executive Mayor Mahikeng Local Municipality, Enthia Seane Seatlholo Gosiambe and/or”

[3] The appellant pleaded not guilty to all the charges preferred against her. In her plea explanation she specifically denied that she had the required legal intent (*dolus*) in any of its forms to commit any of the offences preferred against her in the charge sheet. In the alternative to the plea of lack of *mens rea*, she specifically pleaded that the State employed the services of a police informer, Mr. Tsukudu, and that she was entrapped with regard to certain utterances she made whilst consulting with Mr. Tsukudu. She stated, with specific reference to the prescripts of section 252 A (6) of the Criminal Procedure Act (CPA), *supra*, that she would not normally engage in any illegal or criminal activity but had a belief in traditional medicine and rituals. Her belief was employed and misused by the police informer and that a trap was employed by the State, to illicit and give her instructions to make certain utterances. The trap should be excluded in terms of section 252 A of the CPA because its evidence was unconstitutional obtained.

The

Facts

- [4] The facts can be summarized as follows. Mr. Pono Molefe (Molefe) is a Botswana citizen and practice as a traditional healer in Mahikeng, using muti or herbs and bones. The appellant used to consult him when she experienced problems in the past. This happened over a period of time and she had paid him a number of visits. On one of these visits in 2014, she requested his assistance in order to get muti or herbs to use on herself so that some people can be killed. The names Mahumapelo and Seatlholo were mentioned. He was unable to assist because he believed that there is no muti or herbs that can be used on oneself that can kill someone else. He recommended that she consult another traditional healer, Mr. Tshukudu. Molefe then contacted Tshukudu and a meeting was arranged. The appellant, Molefe and a friend to Molefe travelled to Tshukudu in Mmasebodule, Lehurutshe more than 80km from Mahikeng. Upon arrival, Molefe introduced the appellant to Tshukudu as a patient. Tshukudu consulted the appellant in the absence of Molefe and his friend. The appellant, after the consultation, showed a receipt of R15 000.00 to Molefe. They then travelled back to Mahikeng. The following day, the appellant gave Molefe an amount of R1 000.00 to deposit for Tshukudu.
- [5] During cross-examination this witness repeatedly reiterated that the use of muti or herbs on oneself cannot kill someone else. He also did not refer her to Tshukudu in order to get assistance through muti to kill someone else. He was therefore not conspiring with the appellant in that regard. Insofar as incitement is concerned, the following

appears from the record:-

(Quote in Italics)

- [6] Tshawako Reginald Tshukudu (Tshukudu) confirmed that he was visited by Molefe and the appellant on the 21st November 2014. In privacy, the appellant asked him to help her to get rid of two persons, namely Mr Mahumapelo and Ms Seatlholo. The appellant informed him that the reason she wanted to get rid of the two people was because Mr Mahumapelo had appointed Ms Seatlholo to be a mayor of Mahikeng instead of herself. This was during the first visit. On the second occasion he first verified with the appellant if she still had the same request and he gave her a herb to bath in called “tlonya” and to mention what she wished for whilst bathing. Tshukudu explained that the said herb is normally used on children when they have sores but he was giving it to the appellant so that he could understand what she really wanted him to do for her. After the appellant took a bath at the consulting rooms, Tshukudu asked her to pay R1000-00 and she did deposit the money. The amount that he had asked for his services was R15 000-00. After the second visit he then asked the appellant to give him time to prepare himself and she would come back after some time.
- [7] In the mean-time Tshukudu attended an ANC rally where he met with Mr Tabane and confided in him about his consultation with the appellant. They dialed the appellant’s number and she answered with the phone on speaker. During the conversation Tshukudu informed the appellant that the Mr Mahumapelo was going to attend the ANC rally where he was and enquired from the appellant if she still had the intention of causing his death. The appellant responded positively. Tshukudu then promised the appellant that he would take the soil where Mr Mahumapelo was standing so that they can use it. Mr Tabane was present the whole time during the telephone call and heard everything. Mr Tabane then called Mr Makolomakwa and Ms Manketsi. On their arrival, Tshukudu made another telephone call to the appellant and repeated his earlier enquiry now in the presence of others and with the phone on speaker.
- [8] Tshukudu reported the matter to the police and they agreed that he should meet with the appellant on 2 December 2014 so that a trap could be set for the appellant. Indeed a meeting was arranged with the appellant for the 2 December
2014. The police arrived at Tshukudu’s place and set cameras and a monitor inside his consulting room. Later in the evening the appellant arrived with her siblings. In the consulting room the appellant gave Tshukudu two other names of people she wanted to be killed, namely Mr Tabane and Mr Makolomakwa. At that time the recording devices that had been set up in the consulting room were switched on and recording what transpired. Tshukudu proceeded to throw bones and asked the appellant to speak with emotion to the bones expressing her wishes. After that the appellant was given the ‘tlonya’ herb to place in the sorghum beer and utter the words that she wanted to. The following words were then uttered by the appellant in the recording and were interpreted:

“You cannot just try to destroy my life, I want you dead. I do not want you to hinder my life, I want you to be removed from my life, to be removed from my way. Get off me, get off from my back, you Supra Mahumapelo. You, Supra Mahumapelo, Obakeng Moeketsi, you be removed, be involved in an accident and die on Wednesday so that you can be finished about you, you be removed from my life, that it be finished with you. You be removed, you, Obakeng Supra Mahumapelo, you, you die, die. You as Anthea...”

May we repeat it again your worship, I did not capture the name correctly?

You, Anthea Seame Seatlholo, you on Wednesday must fail to attend the councillor so that then, so that the councillor not be there, so that the councillor not to sit you to experience an accident and you die and you die and you be removed from my life, you to die and be removed from my life. Councillor not to sit on Wednesday, that there be nothing. You, Anthea Seame Seatlholo, you, you, Gosiamo Anthea Seatlholo, you to die on Wednesday so that the councillor cannot sit, so that that meeting cannot be. I am removing you. You, Makolomakwa, Supra Mahumapelo, Ramoeletsi, I am telling you on Wednesday just as I requested you to pass, to experience an accident or be involved in accident and die.

You, Anthea Seatlholo, the councillor not to sit on Wednesday, you to be involved in an accident and you to pass and be removed and die. You, Supra Ramoeletsi Mahumapelo, you hear me, you must die, be involved in an accident on Wednesday. You, Supra Ramoeletsi Mahumapelo, I am telling you, you hear me.”

[9] When the appellant was done uttering the above words, Tshukudu gave her a blanket to lie on her stomach and asked one of the appellant’s siblings to rub the sorghum beer on the appellant whilst she was naked. As the sorghum was being applied on her the following appears on the record as words uttered by her:

“What was I instructed to say?” There are people who want to ruin or destroy my life, who want to disarm me my belongings, they took my position and they took my land. Those people are Supra Ramoeletsi Mahumapelo. I am telling you, Supra, you will not defeat me. I am telling you, I am ordering you, you will experience an accident or you will be involved in an accident and as a result you will die if you want to kill or ruin my life. You, Anthea Gosiamo Seatlholo, you, you have told yourself that you are going to destroy my life. Because of your minds I am now ordering you, you, you as well with, as well as Supra, I am ordering you, I am ordering you....”

May you please back again so that I start that portion?

You, you have told yourself that you are going to destroy my life about your minds, I am ordering you, you, as well as Supra, I am ordering you, you better die. I am ordering you, you not to succeed in destroying my life. All of you who are fighting me, Makolomakwa,

Justice Tshepo, Tabane, Ramonstho Mothupi, you Eric Landsman, you Sejake, you Morutse, I am ordering you, all of you who are together

against my name, I am ordering you, you to have conflict on each other and fight, you and Tabane. Tabane, Ramontsho Mothupi, Eric

Landsman, Sejake Morutse. I am ordering you, all of you, I am ordering you, all of you have formed against me, against my name, you to have conflict and fight. I am causing you to shatter or expel you. I am causing you to drift apart, you to have conflict, fight one another, the meeting not to take place. I am ordering you, you Supra Mahumapelo who is using Justice Makolomakwa to fight me and destroy me and to..."

Tshukudu testified that he advised the appellant that the purpose of the sorghum beer being applied on her was to achieve the death of the people she mentioned.

- [10] During cross examination, Tshukudu stated that he never shared any of the thoughts with the appellant or had the intention to kill anybody. All that he wanted to do was to pretend to assist her so that he could go to the police. Tshukudu was also confronted with the allegation that the ANC had promised him money for the tuition of his daughter and he confirmed that. He however indicated that the promise was not related to the case of the appellant. Tshukudu further confirmed that the utterances made by the appellant whilst sorghum beer was applied are of a personal nature directed to the divine or ancestors.
- [11] The state further led the evidence of Mr Tabane, Mr Makolomakwa and Ms Manketsi Tlhape, The three confirmed the incident at the ANC rally when Tshukudu spoke on the phone with the appellant about the plan to cause the death of Mr Mahumapelo and Ms Seatlholo killed.
- [12] At the close of the state case there was an application for the discharge of the appellant which was refused and the appellant testified in her defence without calling any witnesses.
- [13] The appellant in her testimony stated that in 2014 she was an active member of the ANC and had political ambitions within the party structures. She alluded to the fact that she knew all the people mentioned in this matter within the party structures and she had no issue with any of them. It was her testimony that she believed in traditional healers for emotional problems and when one is uncertain about the future. She confirmed that she used to consult with Molefe and in 2014 specifically she went to consult with Molefe and during the consultation, Molefe threw the bones and advised her that the people mentioned in this case as complainants are her enemies and that Mr Mahumapelo is planning to kill her. The appellant was shocked and did not believe what was said. Molefe then suggested that they should go and consult with another traditional healer from Botswana who taught him to verify what he told the appellant about the plot to kill her. However they ended up meeting with Tshukudu.
- [14] At the consultation with Tshukudu the appellant was informed by him that she has enemies in politics and outside and that Mr Mahumapelo and another woman want to kill her. Tshukudu then prepared muti for her to prevent the killings by reversing whatever the people who want to kill her were doing. At that time the appellant believed that the curse

would be reversed back to those people but they would not be harmed but their spirits would be harmed. Throughout the process of the muti and cleansing the appellant was instructed by Tshukudu to utter certain words addressing them to the ancestors to reverse the curse. After the first consultation, Tshukudu continued to call the appellant and saying he was monitoring her progress. He then asked her to come back for another consultation and she did comply as she still felt that the curse of those people was with her.

- [15] The appellant testified about the telephone calls he received from Tshukudu when he was at an ANC rally. During the said calls Tshukudu informed her that Mr Mahumapelo was present at the rally and he is going to uplift his foot print by picking up the soil where he was standing. Tshukudu made two calls to her on that day. The appellant denied that he uttered the words that she had the intention to kill the complainants in this matter.
- [16] The other consultation took place in December 2014 after Tshukudu called the appellant to come to his place and bring some left over sorghum beer. In the consulting room, Tshukudu prepared muti for the appellant to be applied on her body whilst inhaling and exhaling it. The appellant then requested Tshukudu to lead her on what words she should utter during the ritual. The appellant was left alone in the consulting room and she proceeded to utter the words she was told to utter. It was her understanding that she was talking to the ancestors as there was no one present in the room. The appellant testified that the whole time Tshukudu was instructing her on what to say and how to say it.
- [17] In convicting the appellant the court a quo found that there was no conspiracy to commit murder as there was no meeting of the minds between the appellant and Tshukudu. However, the court found that there was attempted conspiracy. The learned Regional Magistrate went on to state that the intention of the appellant was clear and therefore she attempted to commit conspiracy. In relation to the count on incitement the court a quo found that the crime was committed the moment the appellant influenced Molefe to commit the crime and that it was irrelevant whether Molefe was indeed influenced or acceptable to influence.
- [18] The issue before us is whether the appellant was correctly convicted of the two counts involving attempted conspiracy and incitement to kill.

The law

- [7] In terms of the charge sheet, insofar as count 2 is concerned, section 18 (2) (b) of the Riotous Assemblies Act 17 of 1956 finds application. Section 18 (2) provides:

“18.

- (1) ...
- (2) Any person who –
- (a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

[8] In *Snyman, Criminal Law*, 6th edition, on page 290, the learned author states:

“The law tries to discourage people who incite others to commit crimes by threatening with punishment any act whereby one person influences the mind of another to commit a crime.” “In the leading case in Nkosiya (1966 (4) SA 655 (A)), Holmes JA described the act as follows: “An inciter is one who reaches and seeks to influence the mind of another to the commission of a crime”.

[9] On page 291, it is stated:

“(c) Conduct that does not qualify as incitement X’s conduct does not qualify as incitement if X merely describes to Y the pros and cons of a proposed commission of a crime

by Y, or merely raises Y’s curiosity about the possibility of the commission of a crime, or merely arouses greed on the part of Y (eg. to obtain Z’s money). Thus if X merely tells Y how easy it is to embezzle money in a specific organisation, or how easily someone who has done it escaped being caught, X’s words do not necessarily amount to incitement to theft. Neither do X’s words which amount merely to the expression of an opinion, a wish or a desire, necessarily qualify as incitement. Thus if X merely informs Y that it would be a good thing if Z should die, one cannot beyond reasonable doubt make the deduction that X was trying to influence Y to kill Z. It is not sufficient for X merely to create a motive in Y to commit a crime.”

[10] In the case of *Economic Freedom Fighters and Another v Minister of Justice and Constitutional Development and Another*, case no 87638/2016 and 45666/2017, Gauteng Division, Pretoria, the Full Court dismissed the application to declare section 18

(2) (b) of the Riotous Assemblies Act unconstitutional, save in as far as the part dealing with the sentence prescribed is concerned. We need to quote extensively from this judgment. Under the heading “The crime of incitement”, the following is stated:

“[20] The crime of incitement is the intention, by words or conduct, to influence the mind of another in the furtherance of committing a crime. The question then is what kind of unlawful acts form part of this definition?”

[21] It is apparent from this definition that the mere voicing of one’s opinion will not be enough for incitement. *Snyman* provides the example of a person expressing the desire that ‘it would be a good thing if x should die’ as not falling under the crime of incitement...

[22] The inciter’s conduct need not have an element of persuasion or coercion. It is now settled that the decisive question is not how but if the accused intended to influence the mind of the other person towards the commission of a crime...

[23] The types of conduct which constitute incitement are fairly narrow. It also is clear that the intention behind the conduct or communication is vital in deciding whether or not incitement took place. Liability for incitement is further restricted by the manner in which our courts have handled the intention requirement.

[25] Our courts, in applying section 18(2), have required that the State prove that the accused possessed the requisite intention, with the aim of influencing the mind of another to commit a crime, beyond a reasonable doubt...

[33] ... To reiterate what was held in Nkosiwana, the decisive question is whether or not the inciter intended to influence the mind of another to commit a crime.

[34] Subsequently, it is clear that for the crime of incitement to be committed the accused must possess the direct intention to influence

the mind of another so that they may intend to commit a crime..."

(emphasis added)

[11] Insofar as conspiracy is concerned, section 18 (2) (a) of the Riotous Assemblies Act 17 of 1956, provides:

"18.

(1) ...

(a) conspires with any other person to aid or procure the commission of or to commit; or

(b) incites, instigates, commands, or procures any other person to commit,

[12] Snyman in Criminal Law, 6th edition states at page 286:

"Although conspiracy is punishable in terms of an old statute dealing with riotous assemblies, the crime of conspiracy as defined in the act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit any crime."

On page 287 the following is stated:

"(b) Pretended consent not sufficient"

"There is no conspiracy if one of the two parties only pretends to agree but in fact secretly intends to inform the police of the other party's plans so that she may be apprehended. A trap can therefore not be convicted of conspiracy; what is more, the other party who seriously wishes to agree to commit a crime cannot be convicted of conspiracy either, because there was no true agreement between at least two persons to commit a crime."

With regard to intention the learned author states:

“There is not yet a conspiracy if the two parties are still negotiating with each other. As soon as they have reached agreement the crime of conspiracy is complete, and it is unnecessary to prove the commission of any further acts in execution of the conspiracy.”

[13] According to J Burchell, *Principles of Criminal Law*, 3rd ed (2005), at page 65, the crime of conspiracy is only committed if what the parties agree to do is a crime. There can be a conspiracy only if there is a definite agreement between at least two persons to commit a crime. May I add emphasis to the word “crime”.

[14] In *S v Libazi* 2010 (2) SACR 233 (SCA), the Supreme Court of Appeal quoting from CR Snyman *Criminal Law*, 5 ed (2008) at page 294-295 states at paragraph [18] and [19]:

“[18] The offence of conspiracy is punishable in terms of section 18(2)(a) of the Riotous Assemblies Act 17 of

1956. The section provides: ‘Any person who . . . conspires with any other person to aid or procure the commission of or to commit . . . any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.’ Although conspiracy is punishable in terms of an old statute dealing with riotous assemblies, the crime of conspiracy as defined in the act is not limited to acts relating to riotous assemblies. The definition is wide enough to cover conspiracy to commit a crime. According to Burchell the crime of conspiracy is committed ‘if what the parties agree to do is a crime. There can be a conspiracy only if there is a definite agreement between at least two persons to commit a crime . . .’ Furthermore, Snyman

has the following to say about the offence: ‘To constitute a crime there must be an act or an omission; a mere subjective contemplation of future criminal conduct which does not find outward expression in deed or omission is not criminally punishable. If a person agrees with another to commit a crime, the subjective contemplation advances to the stage of objective expression, and the agreement is an act which amounts to a conspiracy.’

[19] It appears that for a conviction on a charge of conspiracy to be achieved the commission of an offence must be the focal point of the agreement between the perpetrators. It is, however, not a requisite for a conviction on a charge of conspiracy for the actual offence to have been committed. Once the planned offence is committed it appears that it is preferable to rather convict of that offence than the conspiracy or both.”

[15] The appellant was not convicted of conspiracy but attempted conspiracy. In the words of Snyman there must be a meeting of minds. This coincides with whether the offence is capable of being committed or whether the conduct contemplated indeed constitutes an offence. It is indeed true that a person may be convicted of attempted conspiracy provided that an offence was planned. ‘The mere subjective contemplation of future criminal conduct which does not find outward expression in deed or omission is not criminally

punishable.’

[16] The facts of this case is on all fours with this statement of Snyman. The appellant consulted with Tshukudu at his homestead which is more than 80 km away from Mahikeng. He told her to undress and to lie on a mattress. He caused a lady to massage her with sorghum beer and told her to express her wish or desire loudly knowing very well that the cameras of the trap was installed. Her wish or desire was that the persons which she mentioned must die in an accident. No detail as to

how and when and in what manner the accident should occur. The wish or desire does not constitute criminal conduct. This is irrespective

whether she took herbs or muti when she was so massaged with soghum beer. The impossibility of the contemplated crime goes without

saying. There is no evidence of any deed on appellant’s part to commit the offence. She merely wished for it.

[17] The facts of this case is clearly distinguishable from the facts of Libazi, *supra* and also *S v Kekana* (581/11) [2012] ZASCA 75 (25 May 2012). In those cases not only was there conspiracy or an attempt to conspire but the contemplated offences were indeed crimes capable of being committed, unlike in this case. The question that begs an answer is what control did the appellant had over an accident if she did not orchestrate any deed in order that the accident must occur. For example, a motor vehicle accident. There was no plan or conspiracy that something must be done to the motor vehicles of the persons mentioned in order for them to

be involved in motor vehicle accidents and die.

[18] Neither was there an attempt to conspire to let the accident indeed occur when she was not only more than 80 kilometers away, but no actual planning was done as to how these accidents would happened. This is, to say the least, far-fetched. To crown it all, according to Molefe the use of herbs or muti on oneself cannot kill another person, but according to Tshukudu it can, if the money is right. This in itself is a material contradiction in the evidence tendered by the State. The Regional Magistrate, Mr. Du Toit, believed both Molefe and Tshukudu and accepted their evidence in the face of this material contradiction. As correctly conceded by Adv. Rasakanya on behalf of the respondent (State), this is a misdirection which, together with others, enable this Court to set the conviction aside. This concession, we find, was indeed correctly made.

[19] Snyman treats attempt, conspiracy and incitement as different crimes or offences.

See: Snyman *Criminal Law*, 6th ed. at page 275.

[20] Section 18 (1) of the Riotous Assemblies Act 17 of 1956 makes attempt to commit any offence against a statute or statutory regulation an offence. Section 18 (1) reads:

“18.

- (1) Any person who attempts to commit any offence against a statute or a statutory regulation shall be guilty of an offence and, if no punishment is expressly provided thereby for such an attempt, be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable.”

The appellant was not charged with contravening section 18 (1) of Riotous Assemblies Act. Therefore, she was not charged with attempt in terms of this section. The legislature enacted section 18 (1) separate from section 18 (2) of the Riotous Assemblies Act.

- [21] In terms of Section 256 of the Criminal Procedure Act 51 of 1977, as amended if the evidence does not prove the offence charged but proved an attempt to commit that offence, or an attempt to commit any other offence of which an accused may be convicted on the offence charged but proves an attempt to commit that offence or an attempt to commit any other offence of which an accused may be convicted on the offence charged, the accused may be found guilty of an attempt to commit that offence or, as the case may be, such other offence.

There is no competent verdict of conspiracy. This means that if an accused is charged with an offence and the evidence does not prove the commission of the offence but rather an attempt to commit such an offence, then (s)he can be convicted of attempt to commit that offence if the prescripts of section 256 of the CPA is employed. So too, if the evidence does not prove the commission of the offence charged with but an attempt to commit another offence like for instance an offence that is a competent verdict to the offence charged, (s)he can be convicted of attempt to commit such other offence. This is so provided that an offence was contemplated to be committed by the accused. It goes almost without saying that if what is intended to be done is not an offence, there can be no conviction on the basis of attempt.

- [22] Hiemstra: Criminal Procedure states that:

Du Toit et al: Criminal Procedure states that;

- [23] In *S v Ngobese* 2019 (1) SACR 575 (GJ) the following is stated:

“[9] It is evident that ss (2)(a) deals with conspiracies while ss (2)(b) deals with incitement or procurement and the like.

- [10] The broad wording of ss (2)(a) also makes it evident that aside from a person being culpable if he conspires with another to commit the offence alone, he will also commit the statutory offence of conspiracy if the unlawful agreement involves executing only a step in the plan, or is but one of a number of separately concluded agreements with others to attain the same unlawfully agreed objective. It will also suffice if a preparatory step is taken towards achieving the unlawful objective agreed upon or in arranging that one of the conspirators will conclude another unlawful agreement with a third person who will actually do the deed.

[11] The statutory offence finds its origins in the common law. The Act did not purport to alter the ordinary requirements of actus reus and mens rea in common law offences.

Accordingly the prosecution is required to prove beyond a reasonable doubt that the accused committed the unlawful act and that he is culpable for that act. Leaving aside criminal capacity, this effectively means that the State must prove that the accused intended “to perpetrate the unlawful conduct or cause the unlawful consequence.”

[12] The requirement of intention in respect of the offence of a conspiracy is satisfied provided the accused;

- (a) has the intention to commit the crime or assist in its commission; and
- (b) intends to conspire with another person to attain that objective.

Intention in the form of *dolus eventualis* is sufficient.

[13] However in dealing with the crime of conspiracy text book writers require not only that the offender must intend these consequences in order to satisfy the element of mens rea but, in order to satisfy the actus reus element of the offence, at least one of his co-conspirators must have subjectively agreed to engage in the conspiracy.

In other words, the authors appear to require a subjective state of mind on the part of the co-conspirator in order to render the conduct of the accused unlawful.

Suffusing the actus reus with a subjective mental element in order to render the act unlawful is explained only on the basis that a conspiracy requires a meeting of the minds.

One should however bear in mind that with the crime of conspiracy, the unlawful act consists of concluding an agreement to commit a specific crime (or to assist in its commission). In other words not only must there be the mens rea to commit the crime in question but the actus reus must consist of an agreement, between at least the accused and one other person, to do so.

[14] In our law of contract, an agreement requires “consensus ad idem” or a “concurrence of intention” which, as I attempt to demonstrate later, does not have regard to the inner workings of the mind, but rather their external manifestation, save in certain limited cases, such as mutual error or actionable misrepresentation.”

[24] The facts of the Ngobese matter is quite distinguishable from the facts of this case. In that case a fire-arm was provided as well as a photograph of the person to be killed. Quite different from this case. That brings us to the impossibility of the offence. The offence must be capable of being committed. As alluded to earlier this case is distinguishable from other cases of attempt conspiracy. There was no meeting of minds as stated by Snyman due to the impossibility of the ‘offence’. A wish, prayer or believe is not punishable. No offence was committed, hence there can’t be an attempt to commit an offence that does not exist.

[25] In Snyman, 6th ed. At page 282 it is stated:

“But what about the superstitious person who believes that she can kill her enemy by prayers or incantations? Following a similar distinction made in German and American law, it is submitted that in cases such as these, where an ordinary person would see no danger to anybody, the “attempt” is too farfetched to be punishable. The mere fact that, as far as is known, there has never been a reported case of what may be termed “superstitious attempt” in all probability proves that our prosecuting authorities do not regard such cases as punishable.”

To echo this, it is indeed mind boggling that the Director of Public Prosecutions, North West decided to charge the appellant with these plethora of charges based on a “superstitious attempt”. An incantation, or a spell, is a magical formula intended to trigger a magical effect on a person or objects. The formula can be spoken, sung or chanted. An incantation can also be performed during ceremonial rituals or prayers. “Incantations” therefore means a series of words said as a magic spell. This is exactly what occurred in the matter at hand. During argument of this matter counsel for the respondent correctly in our view conceded that there was a misdirection by the court a quo and the conviction should be set aside.

R D HENDRICKS

JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG.

I agree

J T DJAJE

NORTH WEST DIVISION, MAHIKENG.

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