CASE NO.: SA 02/2003

IN THE SUPREME COURT OF NAMIBIA

In the matter between

CYRIL KOOPMAN **APPELLANT**

And

THE STATE **RESPONDENT**

CORAM: Strydom, A.C.J., *et* Shivute, A.J.A.

HEARD ON: 12/07/2004

DELIVERED ON: 07/06/2005

APPEAL JUDGMENT

SHIVUTE, A.J.A.: This appeal was argued before the Court consisting of Strydom, A.C.J., Teek, J.A., and myself. The Court reserved judgment after it heard argument and the responsibility for the writing of the judgment of the Court was assigned to Teek, J.A., by the presiding judge. Teek, J.A., was, however, suspended by the President of the Republic of Namibia on the recommendation of the Judicial Service Commission following allegations of criminal conduct being leveled against him and before he could finalise the judgment. He remains on suspension pending the outcome of investigations by

the Judicial Service Commission. The question for decision is whether the remaining judges can validly deal with the judgment.

This question was comprehensively dealt with by Strydom, A.C.J., in a recent judgment of this Court in the matter of Robert Douglas Wirtz v Humphrey Orford and Another, Case No. SA 01/2003, unreported, delivered on 11/05/2005 and written in circumstances similar to the present.

It is not necessary to restate herein in any detail what Strydom, A.C.J., said in that judgment. Suffice it to say that after a thorough analysis of the law on the point, Strydom, A.C.J., concluded that the remaining judges in a case such as *in casu* can validly and properly give judgment provided that they agree on judgment. I respectfully agree with Strydom, A.C.J.'s, analysis of the law and with his reasoning as well as his conclusions. See also Dresselhaus Transport CC v The Government of the Republic of Namibia, unreported, delivered on 11/05/2005.

It follows that Strydom, A.C.J., and I can validly and properly deal with judgment in this appeal provided we agree.

I turn now to consider the merits of the appeal. The appellant and six others were charged in the High Court on indictment embodying two counts of robbery with aggravating circumstances and one count of murder. At the end of the trial the appellant was convicted on all three counts and in respect of the counts of robbery, he was sentenced to nine years imprisonment, the two counts having been taken together for the purposes of sentencing. In respect of the murder count the appellant was sentences to 15 years imprisonment.

The appellant sought leave in the High Court to appeal against conviction and sentence in respect of all the three charges. The application was refused. His petition to the Supreme Court was successful to the extent that leave was granted to appeal against conviction on the count of murder only. The rest of the petition was refused.

The trial Court summarized the facts that were common cause or at any rate were not disputed as follows:

> The facts generally are that the deceased Piet Beukes, who worked together with Neville Campbell as a bricklayer in the employ of Neville Campbell's father, Mr. Campbell, senior (*sic*). They were dropped by their employer about 17:00 on the day at Park Foods in Khomasdal, and each was paid his salary for month. Neville Campbell getting N$1402, and Piet Beukes N$1502.
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> Neville Campbell was called to give evidence. He said after buying a variety of foods and drinks which they consumed, he was left with N$1302. The party stayed on at the shopping center for a while drinking, Gin and mixers eating some of the food. By nightfall when it was becoming dark they were fairly intoxicated. The blood sample taken from Neville Campbell at the end of the day, was 0.34g of alcohol per 100 ml of blood. Before departing they were joined by Marcellino Montzinger, and together set off home after buying some take away for Piet Beukes's child. Not far from the shopping center as they emerged from round the corner from a dry cleaners in the premises they were set upon by a group of people. Neville Campbell sustained stab wounds to the face, two, and one to the back he suffered bruising but manage (*sic*) to get away after the attack. And was found later sitting by a lamp post by the wife of Piet Beukes not far from the spot of where the original assault was said to have taken place. Montzinger was lucky. He evaded an attempt to trip him and cause him to fall by one of the attackers. He got hold of and warned the wife of Piet Beukes of what had transpired. But Piet Beukes was not so lucky he sustained a fatal stab wound to the left of the chest and died not far from where they were first set upon. In Court there was a debate of whether it was in the riverbed, on the side of the riverbed or against the fence, but it is apparent from the photographs and the evidence that this occurred on a footpath along a riverbed, and not very far from that is a fence and some houses. Neville Campbell said the attack was

> sudden, he couldn't recognize anybody in the dark, and admitted that in any event he was quite drunk.

The State then led the evidence of various witnesses including the evidence of the other surviving victim of the attack, Marcellino Montzinger. Montzinger related the encounter with a group of seven people but did not in any way implicate the appellant. He testified that he recognized who was accused no. 2 among the seven people. He also recognized who was accused no. 4 by voice. The trial Court, however, correctly declined to act on the evidence of identification of accused no. 4.

At the end of the State case all the seven accused persons exercised their right to silence and none called witnesses. The trial Court in the end convicted who were accused nos. 1, 2 and 3 as well as the appellant who was arraigned as accused no. 6 on all the three charges. Accused nos. 4 and 5 were acquitted on all the counts. Accused no. 7 was convicted on the two counts of robbery and acquitted on the count of murder. I shall in due course advert to the trial Court's reasoning in the acquittal of accused no. 7 as I consider that the trial Court's reasoning and findings in this regard could apply and should have been extended to the appellant.

Although we are not dealing here with the appeal of the persons who were jointly charged with the appellant, it seems to me necessary to present a very brief summary of the evidence relating to these accused persons in order to have a better appreciation of the evidence on the basis of which the appellant was convicted.

The appellant and others were convicted of murder on the basis of the doctrine of common purpose. The trial Court found in essence that the accused persons acted in pursuance of a common purpose to rob the complainants and that in the process of the robbery one of the accused took a knife, to the knowledge of the rest of the accused persons and used the knife to stab the deceased. Furthermore that the rest of the accused persons associated themselves with the conduct of the murderer.

It is now a trite principle applicable in cases of murder that where there is shown to have been a common purpose, the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants, provided, of course, that the necessary *mens rea* is present. (S v Safatsa and Others, 1988(1) SA 868 (A) at 901.)

It is also generally accepted that the principles applicable in cases based on common purpose are correctly set out in the headnote of S v Mgedezi and others, 1989(1) SA 687 (A) as follows:

> In the absence of proof of a prior agreement, an accused who was not shown to have contributed causally to the killing or wounding of the victims (*in casu*, group violence on a number of victims) 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 victims. 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, 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.

See also S v Haikele and others, 1992 NR 54 at 67.

The trial Court found, partly on the basis of an admission, that accused no. 3 was the person who had inflicted the fatal wound on the deceased with a knife. Accused no. 3's assertion that he did so in private defence was correctly rejected.

As regards accused no. 1, he made a "warning statement" wherein he explained at length his own involvement in the fracas. He stated *inter alia* that he saw accused no. 3 taking a knife from his, accused no. 1's, pocket and using the knife to stab the deceased. He was accordingly convicted on the basis of the evidence of the warning statement and circumstantial evidence that established that he had associated himself with the murder of the deceased.

Accused no. 2 was convicted on the basis of the evidence given by Neville Campbell and Montzinger who said they recognized him as one of the assailants at the scene, a fact admitted by accused no. 2 himself.

The Court *a quo* in essence found that accused nos. 1 and 2 had associated themselves with the fight at the time when they knew that accused no. 3 had taken the knife to stab the deceased; that they appreciated that a fatality might result in the course of the fight and that they were reckless as to whether that result was achieved.

Turning now to the Court *a quo's* consideration of the evidence against the appellant, there was no direct evidence implicating the appellant in the commission of the crimes. He did neither disclose the basis of his defence nor did he testify. He, however, made a statement to the police upon his arrest wherein he placed himself at the scene. In the "warning statement" the appellant stated simply that he was attacked by Neville Campbell and "his friend" and that he had to defend himself. No further details were given in the terse statement.

The trial Court rejected the appellant's assertion that there was a fight between the deceased and his party and the group of seven men, which fight might have entitled the appellant and company to seek to defend themselves. It was found that there was overwhelming evidence that the deceased and his party were set upon and viciously assaulted by being kicked and stabbed with knives.

The Court *a quo* furthermore observed when dealing with the case against the appellant:

> I have referred to the use of knives, in the light of Doctor Liebenberg's evidence that when she looked at the stab wound on the deceased's chest she was satisfied that this was a boat shaped stab wound which suggested that it had been inflicted with a double edged knife. Doctor Liebenberg was adamant that the knife which was produced in Court is not the knife which inflicted that particular wound. Accused one identified the knife in Court as the knife which was taken from his back pocket to the scene of the fight by accused 3. And, that knife was found near the feet of the deceased. So quite clearly the murder weapon as such is not before the Court. It is clear that there was at least this knife and one other knife, during the attack which other knife was employed in the attack on the deceased. Accused 6 is found guilty by the overwhelming evidence established by the State.

The trial Court then proceeded to consider the evidence against accused no. 7 and this brings me to the trial court's findings and reasoning regarding accused no. 7. Having analysed the evidence against accused no. 7 the Court *a quo* concluded:

> Now as regards accused 7, finally, on the charge of murder, my finding is that there is a doubt whether accused seven can be said to have foreseen death by stabbing. The evidence is that it was very dark at the time. Also there is no evidence that anybody mentioned the presence of a knife or the use of a knife at the time. So unless accused 7 had been aware of the knife being taken as was accused 1 there was nothing in the circumstances of the fight itself, which would have revealed the presence of knives among the fighters.
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> Given that blank in the evidence, it is difficult as far as accused seven is concerned to draw the inference that he would have foreseen a fatality resulting from the use of the weapons used. Accordingly accused 7 is found not guilty on the murder charge.

The implication of the Court's reasoning above is that there was no prior agreement to kill. So common purpose on the basis of which the rest of the accused were convicted was not based on prior agreement. The implication is that unbeknown to accused no. 7, accused no. 3 went to accused no. 1, took accused no. 1's knife and stabbed the deceased. Accused no. 7 did not associate himself with the conduct of accused no. 3 because he was not aware of the knife being taken. Nobody mentioned the presence of a knife or the use thereof and there was no circumstantial evidence suggesting that accused no. 7 was aware of the presence of a knife or knives among the members of his group.

These findings are with respect correct. However, as already stated, I consider that they apply with equal force to the appellant. There is no evidence that the

appellant was aware that accused no. 3 was going to stab the deceased. As the trial Court found when analyzing the evidence against Accused no. 7 relating to the count of murder, the evidence was that it was very dark at the time. There was no evidence that the presence of a knife was mentioned and there was no evidence that the appellant knew of the presence of a knife.

In any event, the evidence was that two persons were attacked that evening, namely the deceased and Neville Campbell. The evidence was further that the victims were attacked simultaneously. Furthermore the appellant specifically mentioned Neville Campbell as the person with whom he was involved in the altercation. For all we know, the appellant may not have been involved in the assault on the deceased and may not have associated himself with the assault on him seeing that he appeared to have been preoccupied with Neville Campbell during the conflict.

For all those reasons the trial Court should have found as Mr. Small, who argued the appeal on behalf of the respondent, correctly and fairly conceded that there was not sufficient evidence to convict the appellant on the basis of the principles set out in S v Mgedezi (*supra*). In particular, it was not proved beyond reasonable doubt that the appellant associated himself with the conduct of the perpetrators of the assault on the deceased or that he had manifested the requisite intention to kill the deceased. I would accordingly allow the appeal.

In the result the following order is made:

1. The appeal succeeds.

2. The conviction and sentence imposed on the appellant in respect of the murder charge are set aside.

3. The sentence imposed on the appellant in respect of the robbery charges is not affected by this judgment.

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SHIVUTE, A.J.A.

I agree.

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STRYDOM, A.C.J.

COUNSEL ON BEHALF OF THE APPELLANT:	MR. W.T. CHRISTIAANS
INSTRUCTED BY:	LEGAL AID
COUNSEL ON BEHALF OF THE FIRST RESPONDENT:	MR. D.F. SMALL
INSTRUCTED BY:	PROSECUTOR-GENERAL