**REPORTABLE**

CASE NO: SA 18/2010

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**JOSEF MBUKAMUNA HINDJOU** **Appellant**

and

**THE STATE** **Respondent**

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| **Coram**: | SHIVUTE CJ, MARITZ JAandMAINGA JA |
| **Heard**: | 22 October 2012 |
| **Delivered**: | 22 October 2012 |
| **Reasons:** | 30 January 2013 |

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**APPEAL JUDGMENT (REASONS)**

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SHIVUTE CJ (MARITZ JA *and*MAINGA JA concurring):

[1] After hearing arguments in this appeal matter on 22 October 2012, we issued an order, amongst other things, upholding the appeal and indicated that the reasons for the order would follow.These are the reasons.

Background

[2] The appellant and two others, namely one Abraham Araeb andChristof Hansenwere jointly arraigned in the High Court on an indictment containing a charge of murder, a charge of attempted murder and a charge of robbery with aggravating circumstances, respectively numbered as counts 1, 2 and 3. MrAraeb was accused No 1 while Mr Hansenwas arraigned as accused No 2 with the appellant being accused No 3. Since the appeal concerns only the appellant,we do not find it necessary to deal with the erstwhile co-accused's pleas, convictions and sentences. We will, however, where necessary or appropriate refer to the appellant's erstwhile co-accused persons by their designations in the trial court or simply as 'the co-accused'. As far as the appellant was concerned, he pleaded not guilty to all three counts.However, at the conclusion of the trial,he was convicted on all the counts and sentenced to twenty five years imprisonment on count 1.On counts2 and 3, he was sentenced to five years imprisonment each. The appellant's application for leave to appeal to this Court against the aforesaid convictions and sentences having been refused in the High Court, hepetitionedthis Court for leave to appeal.The petition was granted on 27 July 2010.

[3] The evidence led at the trial reveals that on 12 January 2002 Mr Adolf Walter Paul Karl Heidenrich was murdered and his wife, State witness Mrs Ursula Emma Gertrud Heidenrich, was severely injured in an attack at their Farm Mooirivier in the district of Karibib (the farm). It further emerged from the evidence that the appellant and the co-accused had been employed as labourers on the farm for about 3 days prior to the date of the incidentswhich gave rise to their prosecution and conviction. Accused No 2 was told to leave his employment on 11 January 2002 after the Heidenrich couple had been informed by the police, following a complaint being lodged by a relative of his, that accused No2 was a minor. It appears that accused No 1 and No 2erroneously interpreted the termination of the second accused's employment as anunlawful dismissal. The two accused persons and the appellant sat around a fire where accused No 1 declared his intention to kill the Heidenrich couple the next day.The following day while Mrs Heidenrichwas preparing lunch, accused No 1 entered the kitchen. Without warning, he struckMrs Heidenrichwith what she thought was a metal pole. She called out for help before she lost consciousness as a result of the severity of the assault. The appellant and the deceased were working when they heard her crying for help. When the deceased arrived in the kitchen, accused No 1 also assaulted him with the metal pole. Mrs Heidenrichtestified that, when she regained consciousness, she found herself in the generator room and saw her husband lying outside with the appellant standing a few metres away from him. Mr Heidenrich was taken by accused Nos 1 and 2 away from the farmstead to a place elsewhere on the farm where he was eventually killed. Upon their return, Mrs Heidenrich was assaulted again in the generator room. The co-accused loaded a

number of items from the farmstead onto the deceased's vehicle and departed for Okahandja, their place of residence. The appellant also accompanied them to Okahandja but he denied that he had loaded any of the Heidenrich's property onto the vehicle. Accused No 1 on the other hand testified that the appellant had loaded a vacuum cleaner onto the vehicle. We will return to this aspect of the evidence later on.It iscommon cause that when the appellant and his co-accused arrived in Okahandja, the co-accused took some of the Heidenrichs' property to their respective homes.The appellant did not take anything.

[4] Mr Namandje, instructed by the Director of Legal Aid, argued the appeal on behalf of the appellant while Ms Moyo argued the appeal on behalf the respondent.

[5] The evidence of Mrs Heidenrichwas regarded by the trial Court as the most reliable. She was characterised as a 'fair and honest witness'. Her evidence thus carried much more evidentiary weight than the evidence of the accused persons, including the appellant. In so far as the role played by the appellant is concerned, Mrs Heidenrich testified in brief that while she was locked in the generator room she requested the appellant to bring a mobile phone to her. The appellant was willing to assist her and proceeded towards the house to collect the phone but turned back when he heard the approaching vehicle in which the co-accused were returning to the farmstead. She further testified that the appellant had told her that accused No 1 had stated that he would kill her and her husband that day. He also warned her to move away from the window so that she could not be seen by accused No 1.She conceded

that these wordsand conduct on the part of the appellant amounted to an attempt to shield her away from accused No1. It was Mrs Heidenrich's testimony that when the deceased was first struck, the appellant was not far from her or the deceasedand thus had an opportunity to harm them both if he was minded to join in the assault. He did not do so and, in fact, just stood back. Mrs Heidenrich, the appellant and the co-accused testified that the appellant was neither present at the scene whereMrs Heidenrichand the deceased were initiallyattacked nor did he accompany the co-accused when the deceased was transported to the area where he was killed and his body later found.It was not in dispute that the deceased died at that place as a result of a severe head injury.

[6] Mrs Heidenrichfurther testifiedthat,upon the return of the co-accused to the farmstead, she pretended to be dead.She heard accused No1 instruct someone to hit her, upon which instruction she was struck once with severe force on her head. The appellant admitted that he was the person who was instructed to hit Mrs Heideinrich. He claimed, however, that it was not accused No 1 who instructed him but accused No 2 who had threatened to stab him with a knife should he refuse to attack Mrs Heidenrich. He went on to say that he pretended to execute the instruction but, instead of striking MrsHeiderich, hehit the floor. Accused No 2 was standing at the closed door of the generator room and did not see that he had struck the floor.

Arguments by counsel

[7] Ms Moyo strenuously argued that the appellant and the co-accused acted with a common purpose to murder the deceased, assault Mrs Heidenrichand commit robbery with aggravating circumstances.Mr Namandje,on the other hand, argued that the State did not prove beyond reasonable doubt that the appellant in any way actively associated himself with any act of the co-accused in committing the crimes. There was thus no evidence that the appellant had acted in common purpose with the co-accused. He further contended that the State had failed to prove that the appellant committed the crimes he was convicted of. As regards the charge of attempted murder Mr Namandjeargued that the complainant herself testified that the appellant did not threaten her; she did not see him attacking her, and that he was prepared to save her from the criminal enterprise of the co-accused.

The law

[8] In *S v Gurirab* 2008 (1) NR 316 (SC) this Court had occasion to consider the scope and ambit of the doctrine of common purpose and has endorsed the principles enunciated in South African case law dealing with this doctrine and the principles to be applied in the absence of a prior agreement to commit a crime. The headnote contains a comprehensive outline of the trite position in our law regarding the aforementioned principles. There it is stated as follows:

> 'Furthermore, the court approved the dictum in *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705 - 706 that in cases where the State does not prove a prior agreement and where it was also not shown that the accused contributedcausally to the wounding or death of the deceased, an accused can still be held liable on the basis of the decision in *Safatsa* if the following prerequisites are proved, namely:

(a) The accused must have been present at the scene where the violence was being committed;
(b) he must have been aware of the assault being perpetrated;
(c) he must have intended to make common cause with those who were actually perpetrating the assault;
(d) 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;
(e) he must have had the requisite *mensrea*;
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.'

Analysis

[9] The first count, namely murder, is considered first below. It was contended on behalf of the respondent that the night before the incident, the accused persons had discussed the plan to be executed the next day and the appellant, at the very least,had listened to the discussion and carried out the agreed plan with the other two accused persons. It was further argued that by being present when the other two accused persons were discussing the actions to be carried out the next day, the appellant became a partyto the agreement.

[10] The contentions advanced on behalf of the respondent in this regard cannot be accepted as correct. The mere fact that the appellant overheard a statement of accused No 1’s intention to murder his employers the next day does not, without more, justify an inference beyond reasonable doubt that there was a prior agreement to commit the murder and that the appellant became a party to the agreement.

Evidence of a prior agreement is simply non-existent. The State, therefore, did not prove that the appellant entered into an agreement with the two accused persons. The second leg of the enquiry is whether the appellant causally contributed to the injuries or death of the deceased. There was no evidence presented before the High Court that the appellant had acted in such a manner. On the contrary, the appellant was not present when the deceased was first attacked in the kitchen; he didnot assist the other accused persons to load or transport Mr Heidenrich; did not accompany themto the site where he was offloaded and was not present when the fatal blow to his head was inflicted. It follows that the prerequisites set out in paragraphs (c) to (e) of the dictum in *S v Gurirab*above had not been met. In our view, the evidence does not establish beyond reasonable doubt that the appellant actively associated himself with the crime of murder being perpetrated by the former co-accused persons and the State's contention that the appellant's role was to act as a look-out as found by the trial court is not sufficiently substantiated by the evidence. The submission that the appellant had acted as a look-out or 'guard' is based on Mrs Heidenrich's evidence that while she was inside the generator room, the appellant peeped through the window and appeared to have passed on information to accused No1 about Mrs Heidenrich'smovements by visual gestures. Mrs Heidenrich readily conceded that she did in fact not see the appellant passing on information and that her evidence in this regard was based on an assumption. We are therefore of the view that the appellant did not perform any act of association with the conduct of the perpetrators of the crime of murder nor did he exhibit an intention to commit the crime.

[11] It is convenient to consider next the charge in count 3, namely robbery with aggravating circumstances. There was no evidence that the appellant took any of the items removed from the farm with him when he arrived in Okahanjda. In fact, it hadbeen accepted that the appellant went home without any of the items and informed his parents of the attack on the Heidenrich couple at their farm.It was contended on behalf of the respondent that the appellant merely underwent ‘a change of heart’ by not taking the stolen goods upon arrival in Okahandjaand that this change of heart could not absolve him from criminal responsibility in respect of the robbery charge. This contention appears to be based on the evidence by accused No 1 whotestified that all three of them participated in the removal of the property from the Heinderich's homestead and that the appellant, as previously mentioned,had loaded a vacuum cleaner onto the vehicle and this brings us back to this aspect of the evidence. The trial court found accused No 1's evidence in general to be unsatisfactory and full of material contradictions. It nevertheless accepted that part of his evidence that the appellant had participated in the removal of the property from the farmhouse and had loaded a vacuum cleaner onto the vehicle. We are of the view that it is not safe to rely on accused No1's testimony insofar as it implicated the appellant in this regard.The Court a quo for good reasons 'entirely' rejected accused No 1's evidence and he was characterised as an 'outright liar'. There is thus no credible evidence proving beyond reasonable doubt the appellant's participation in the loading of the property onto the vehicle and the intention on his part to commit robbery.As counsel for the respondent rightly conceded in argument,other than the evidence emanating from a discredited source, namely accused No 1regarding the

loading of the vacuum cleaner onto the vehicle, there was no evidence that the appellant had committed the robbery.In our view, the appellant should not have been convicted of robbery with aggravating circumstances.

[12] The evidence relating to count 2 remains to be considered next. We are of the opinion that the appellant should not have been convicted of attempted murder based on an earlier alleged agreement with the co-accused for the reasons already given. It was, however, proven that someone hit Mrs Heidenrichupon the instructions of accused No 1. This piece of evidence must be accepted because Mrs Heidenrichwas correctly found by the trial Court to have been a credible witness.As previously mentioned, the appellant admitted that he had been instructed to strike Mrs Heidenrich;that the instruction came from accused No 2 rather than accused No 1, and that instead of striking Mrs Heidenrich, he struck the floor. The last two aspects of his evidence are contrary to Mrs Heidenrich's evidence in that regard.Counsel for the respondent argued that the appellant could not have been instructed by accused No 2 to attack Mrs Heidenrichsince accused No 2 was much younger and had a smaller body frame than the appellant. Counsel for the appellant on the other hand contended that the events which had occurred that day and the heinous crimes perpetrated by accused No 2 were sufficient to instil in the appellant some fear of accused No 2;appellant was witness to what accused No 2 was capable of doing. We are satisfied that Mrs Heidenrich’s evidence that she hadbeen struck with a hard object following an instruction by accused No1 cannot be faulted and must be accepted. She heard accused No 1 giving the instruction and felt the blow to her

head. There can be therefore no possibility of the appellant being ordered by accused No 2 or only striking the floor. Appellant's evidence that it was accused No 2 who had given the instruction to attack Mrs Heidenrich is clearly false and appears to have been motivated by a misguided attempt to protect accused No 1. It is therefore rejected.

[13] We are satisfied that the appellant had acted on the instructions of accused No 1 to hit Mrs Heidenrich but that in doing so, there was no evidence of manifestation of the intent to murder her. On the contrary, the evidence showed that he attempted to assist her. As stated already, he had warned her to duck so that accused No 1 could not see that she was still about;he warned her that accused No 1 had expressed the intention to kill her and her husband that day, and he was on his way to fetch the cellular phone for Mrs Heidenrichand returned half way through only when he heard the vehicle in which the co-accused had travelled to the river bed where they dumped the deceased approaching.In the circumstances, a conviction on assault with the intent to do grievous bodily harm as opposed to that of attempted murder is justified. This was reflected in the order we made on 22 October 2012 as is apparent from paragraph 15 (c) below.

[14] As regards the sentence, we imposed a sentence of five years. In coming to this decision, we had due regard to the facts that the assault was severe and the crime wasperpetrated against a member of avulnerable section of the community, namely farmers.Farmsteads are normally relatively isolated and therefore farmers

and their families are vulnerable to this sort of attack. We note that this type of crime is relatively prevalent on farms in our country. In our view, an even stiffer sentence would have beenappropriate but for the fact that the trial Court imposed a sentence of five years on the appellant for attempted murder and the appellant was not alerted beforehand that his sentence may be increased on appeal should the appeal fail in respect of all or some of the convictions. In the circumstances, we considered that the sentence of five years imprisonment antedated to 31 August 2004 would beappropriate.

[15] It was for all these reasons that the following order was made:

'(a) The appeal is upheld.

(b) The appellant's convictions and sentences for the crimes of murder and robbery with aggravating circumstances are set aside.

(c) The appellant's conviction for the crime of attempted murder is set aside and substituted for a conviction for a crime of assault with intent to do grievous bodily harm and a sentence of five years imprisonment is imposed.

(d) The sentence is antedated to 31 August 2004.'

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**SHIVUTE CJ**

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**MARITZ JA**

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**MAINGA JA**

APPEARANCES

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| APPELLANT: | Mr S Namandje |
| | Instructed by Legal Aid |
| RESPONDENT: | MsC Moyo |
| | For the State |