IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

APPEAL CASE NO: AA03/2024

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED: ~~YES~~/NO

20/06/2025
Date

[redacted]
Signature

In the matter between:

ZAMBA GEORGE BRUTUS BVUMA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

NGOBENI J

[1] The appellant was convicted by the court *a quo* as per Kganyago J, in the Limpopo Division of the High court, held at Polokwane on 3 counts which are constituted as follows:

(i) One count of murder in terms of provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (Act 105 of 1997), in circumstances that are found in Part 11 of Schedule 2 of the said Act,

(ii) Kidnapping,

(iii) Attempt to defeat the administration of justice.

The appellant was sentenced as follows:

(i) Fifteen (15) years direct imprisonment for murder,

(ii) Five (5) years imprisonment for kidnapping,

(iii) Twelve (12) months imprisonment for the attempt to defeat the administration of justice.

The sentences in counts 2 and 3 were ordered to run concurrently with the sentence in count 1. Leave to appeal to the Full Court of this Division on the convictions and sentences on all counts was granted on petition by the Supreme Court of Appeal. The appellant appeared with his two co-accused in the court *a quo,* and he appeared as accused number two in the trial court.

[2] The appellant's grounds of appeal against the decision of the court *a quo* is mainly that the court erred in finding that the appellant acted in the furtherance of a common purpose of killing the deceased (Crosby Xikombiso Ngwenyama) with his co-accused. The appellant argues that the state failed to prove common purpose to commit murder against him.

[3] The second ground of appeal is that the restriction of movement by the appellant on the deceased was not unlawful because the appellant had requested the police to open a charge of Malicious Damage to Property (MITP) and housebreaking against the deceased, and therefore on the charge of kidnapping the state failed to prove its case and the trial court erred in finding otherwise.

[4] The third ground of appeal is that the court *a quo* failed to consider that the meeting that took place at Tarentaal was arranged by the mother of the appellant who even gave the witnesses money to travel, not the appellant himself. The state did not therefore prove the charge of attempted defeating the ends of justice against the appellant.

[5] The sentence on the count of murder that was imposed on the appellant is challenged on the basis that the court *a quo* erred in not finding that there were compelling and substantial circumstances which warranted deviation from the prescribed minimum sentence. The court a quo over-emphasized the prevalence of the offence and the interest of society, overlooking the personal circumstances of the appellant.

[6] The summary of the evidence that led to the conviction of the appellant is that on 05 September 2018, the deceased in this matter broke the window panes of the home of accused number two, being the appellant, on allegations that the mother of the appellant owed him. The deceased ran from the scene, but he was later on found by the first state witness, Sbusiso Fortune Mohlares and Stabo Ernest Ramodike who brought him to the home of accused number 2 where he had broken the windows.

[7] They found accused number 1 (Naughty/Lotty) and 3 (Boss) who then tied the deceased and jointly assaulted him. Accused number 1 phoned accused number 2 (Zamba/Appellant), who came to the scene with one Nhlamulo and another person who did not play any part in the events of that night. The appellant and Nhlamulo also joined in assaulting the deceased. During the assault the deceased lost consciousness, and they would pour him with water for him to wake up or regain consciousness. The police were called to the scene, and the deceased subsequently died in hospital as a result of severe blunt force trauma to the head, intracranial bleeding and severe brain edema and collapsed left lung.

[8] The appellant argues that because he only assaulted the deceased with an open hand that wouldn't be fatal to an extent that he must be held liable for the death of the deceased. When the appellant arrived at the scene the deceased was already tied and it cannot therefore be said that he kidnapped the deceased. He was not present when his mother told the state witnesses that they must not tell anybody about what happened. I must however on the aspect of assault state from the outset that even if that was the position that the appellant only slapped the deceased once,

where common purpose is alleged there is no room for requiring proof of causation on the part of the participants, all what the state has to prove is the intention to participate in the act that is performed by the others.[1]

[9] It is trite law that a court of appeal will not interfere with the trial court's decision unless if it finds that the trial court misdirected itself as regards its findings or the law. To succeed in an appeal, the appellant needs to convince this court on adequate grounds that the trial court misdirected itself in accepting the evidence of the State and rejecting his version as not being reasonably possibly true. There are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong[2].

[10] This court, sitting as a court of appeal, must take into consideration the totality of the evidence including the evidence led on behalf of the appellant, to determine what the evidence of the state witnesses was, as understood within the totality of the evidence and compare it with the factual findings made by the trial court in relation to that evidence and decide as to whether the trial court considered all the evidence before it, weighed it correctly and whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision, and lastly, determine whether the appellant was correctly convicted. In *S v Shaik*

[1] S v Safatsa and Others 1988 (1) SA 868 (A), S v Williams en Ander 1970 (2) SA 654 (A), S v Kramer en Andere 1972 (3) SA 331 (A).
[2] S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15.

and Others[3], it was clearly laid down that the act of one becomes the act of the other if that act is done in pursuit of a common design.

[11] The test in criminal cases is well known. It was clearly set out in *S v Van Aswegen*[4] where the following was stated:

> "*The proper test is that an accused is bound to be convicted if the evidence establishes his guilt beyond reasonable doubt, and the logical corollary is that he must be acquitted if it is reasonably possible that he might be innocent. The process of reasoning which is appropriate to the application of that test in any particular case will depend on the nature of the evidence which the Court has before it. What must be borne in mind, however, is that the conclusion which is reached (whether it be to convict or to acquit) must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable; and some of it might be found to be only possibly false or unreliable; but none of it may simply be ignored.*"

[12] The following evidence delineates the role of the appellant in what led to the demise of the deceased. It is important to quote directly from the transcribed court record so that it can be clear as to what role did the appellant play, if any. On bundle 1 of 6, paginated page 35, line 20, the first state witness said the following:

> *"Zamba was holding a Castle Light bottle, then he hit the deceased with that Castle Light bottle on the back"*

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[3] 1983 (4) SA 57 (A).
[4] 2001 (2) SACR 97 (SCA) at para. 8.

The evidence continues on paginated page 36 line 10"

"Was it a small bottle was it a...was it a litre? ... 750 milliliter bottle. How did he hit, did he throw it at ...throw it at the deceased or did he hit the deceased holding on to the bottle - - -He threw it at the deceased.

How many times? - - - Once

Alright what happens from there? - - - He started to kick him.

Court: Who - - - Zamba's friend and Zamba.

Mr Mashiane: How did they hit him this time?

Court: Hit or kicking?

Mr Mashiane: Did they kick him or did the hit him? - - - They kicked him while he was lying on the ground.

Court: Where on the body - - - On the stomach

Mr Mashiane: How many times are able to say they now kicked him? - - - I did not count, they kicked him for a long time.

What was Naughty doing at that stage? - - - He was standing on the side.

Boss what was he doing? - - - Boss was standing on the side".

[13] The involvement of the appellant is further shown on paginated page 37, line 10 on Bundle 1 of 6 as follows:

"Mr Mashiane: Yes [indistinct]... - - - They continued to kick the deceased.

Still on his stomach? - - - And on the chest.

Yes. - - - Then Zamba took a rock and started to hit the deceased with a rock on the knee

...

How did he hit now the deceased with this rock, did he throw it at the deceased did he hit the deceased holding on to it? - - - He threw it at the deceased".

...

Interpreter: I am trying to get clarity, the witness is indicating that the, the rock was in the hand and he was hitting the deceased with the rock while holding the…while… he was hitting the deceased with the rock while holding it on his hand".

[14] The further evidence without quoting verbatim is that the deceased lost consciousness three times. On the first two occasions when he lost consciousness, Naughty is the one who poured him with water and he regained consciousness, but for the third time it is the appellant who poured him with water for him to regain consciousness. When the deceased regained consciousness for the first time, it is something that the appellant and his friend laughed about.

[15] When the witness was cross examined by Mr. van Tonder, he was clearly and categorically taken through his evidence on the account of his evidence regarding the role of each accused person in the court *a quo,* and where necessary I will quote verbatim from the transcribed record, so that the context can be better understood. He was also cross examined at length regarding the discrepancies in his evidence in chief as compared to what he stated in the statement that he gave to the police. The explanation of the witness with regard to that, was that he was afraid to say many things, because he was told not to tell anyone.

[16] There is a lot of case law on the aspect of contradictions, discrepancies and omissions in a statement that is mainly made to the police, and in *Johnson v Road Accident Fund*[5] the following summary is quoted:

"the real test of truth does not lie in a comparison between what the witness is alleged to have told someone else and what he now tells the Court. What a witness is alleged to have told someone else leaves room for misstatements, misunderstandings and misconstructions. ... Signing or otherwise confirming the content of a previous statement does not remove the inherent deficiencies of the hearsay nature of the evidence and all its other inherent faults. The best test of the accuracy and truth of what a witness says lies in an independent assessment of his actually spoken words. It lies in the Court's ability to observe and note any degree of hesitancy or uncertainty which may or may not attend upon a concession by the witness or his affirmation of a given fact. Ultimately this Court is the trier of facts of the case and the credibility of a witness does not entirely depend on the score he may achieve in testing inconsistencies between what he now says and what someone else says he told them".

[17] When it was put to the witness, Mohlares by the legal representative of the appellant that the appellant only slapped the deceased once with an open hand, the witness denied that version, and that appears on paginated page number 101 of Bundle 1 of 6 as follows:

[5] 2001 (1) SA 307 (C) at 310H – 311E, S v Bruiners 1998 (2) SACR 432 (SE), S v Mafaladiso en andere 2003 (1) SACR 583 (SCA) (30 August 2002).

"Thereafter Zamba once slapped the deceased - - - Can you repeat the question again. Yes
Zamba slapped the deceased once - - - No"

[18] In a quest to ascertain as to what caused the death of the deceased the state also called a paramedic who came to the scene, as there is evidence that the deceased fell from a stretcher as he was about to be loaded onto the ambulance. The evidence of the paramedic with regard to that aspect is that the distance from which the deceased jumped from the stretcher was estimated to be 30 cm after the deceased apparently regained consciousness, as the witness Joseph Mthjembi testified that when the deceased jumped they were still bending. He also said that there were no objects such as stones or bricks where the deceased fell.

[19] He disputed that the deceased fell on the ground on an object or objects. When cross examined on visibility or illumination the witness said that the source of light was from the house and the police vehicle. His version that there was light from the house is the same as the version of the first state witness about the lighting at the second scene. The first defence witness, Stabo Ernest Ramodike also testified that they could see well because of the lights from that home.

[20] The first defence witness also confirmed that the appellant kicked the deceased. In fact, the first defence witness testified that the appellant and Naughty kicked the deceased until he was unable to do anything as he was no longer moving. On paginated page 148, line 20 of Bundle 2 of 6, the first defence witness stated that all

of them when they were busy assaulting the deceased they were also assaulting him on the head. He clarified that by all of them he was referring to Zamba (the appellant), Naughty and the boy who came with Zamba.

[21] On paginated page 158 to 159, line 20, when the first defence witness was cross examined, he answered as follows:

> *"Who did that who picked him up and dropped him? - - - That boy who came with Zamba is the one who picked him up, and while he was in the air Zamba was kicking him at the time he was in the air, and he was kicking him on his stomach and on the chest.*
> *Mr Mashiane: …*
> *Did that happen once? - - - It did not happen once.*
> *Yes, tell us how many times can you recall? - - - It happened many times that they would pick him up and throw him a little bit far.*
> *And then Zamba would continue with kicking him? - - - Yes"*

[22] The first defence witness also said that the appellant told them that if the police approach them they must tell them that they do not know anything about the incident that transpired, being the incident where they assaulted the deceased. The appellant also told them that if they were arrested he would appoint a legal representative for them and would also pay bail for them.

[23] In response to all these allegations against him the appellant says that he only assaulted the deceased with an open hand. The evidence by the one state witness and the first defence witness is that the appellant poured water on the deceased.

The appellant on the other hand says that Nhlamulo is the one who went to fetch the water with a bucket to pour on the deceased when he realized that the deceased was no longer moving. His further version is that when the police arrived Nhlamulo told them that the deceased was assaulted by members of the community, and he did not correct that as he was afraid of Nhlamulo.

[24] The appellant confirmed that his mother called the first state witness (Sbusiso) and the first defence witness (Ramodike) to Tarentaal because she wanted to know as to what happened with regard to the person who broke the windows. The evidence of the two witnesses mentioned is that the appellant was also there. The appellant also confirms that he was there because that is where they keep the meat but denies any involvement. There was actually no need for the witnesses to tell the mother of the appellant as to what transpired, because common sense must have dictated that, that was the course for the police to follow. The only probable version is that they wanted to sway the witnesses from telling what they knew or saw. The evidence of the fifth defence witness (Mathebula) was not long because after the deceased fell down he went to the toilet, and he was there for about 25 minutes, and he did not witness most of the things which the other witnesses testified about.

[25] The state in this case relied on provisions of section 51(1) of Act 105 of 1997 on the basis that the appellant and his co-accused acted in the furtherance of a common purpose, and the court *a quo* in evaluating the evidence before it rightly relied and applied the principles on the doctrine of common purpose as laid down in *S v*

Mgedezi[6]. The Constitutional Court in *Thebus and Another v the State*[7] approved the principles on the doctrine of common purpose as laid down in *Mgedezi, supra*. The trial court did not just mention the principles on common purpose, but applied each principle to the facts of the case.

[26] In *Thebus, supra*, the court declared as constitutional the common law principle which requires mere active association instead of causation as a basis of liability in collaborative criminal enterprises. The Constitutional Court even quoted from the book by Burchell and Milton at 393 where common purpose is defined in the following terms:

> *"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their common purpose to commit the crime".*

[27] The argument by the appellant is that his attribution to the whole assault on the deceased was a slap with an open hand, and therefore not the one who delivered the fatal blow, which from the evidence is not correct, and the trial court correctly rejected that version by the appellant based on the evidence that was presented before it. The appellant actively associated in the assault of the deceased, and

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[6] 1991(1) SACR 150 (T), where there is no proof of a previous agreement between the perpetrators, the following requirements must be met for one to be found guilty based on common purpose:
(i) the perpetrator must have been present at the scene of the crime and not as a passive spectator,
(ii) the perpetrator must have been aware of the unlawful act on the victim,
(iii) the perpetrator must have intended to make common cause with the others committing the unlawful act,
(iv) he/she must have performed an act of association with the conduct of the others,
(v) the perpetrator must have had the intention to commit the unlawful act or to contribute to that act.

[7] 2003 (6) SA 505 (CC).

liability was rightly attributed to him because of the collaborative criminal enterprise he engaged with, with the other co-perpetrators on the second scene (scene).

[28] The appellant arrived at the scene and found that the deceased was tied. He never ordered that the deceased be untied. When the deceased gained consciousness after he was poured with water for the first time, he laughed with his friend about that aspect. It is actually clear from the evidence that was presented that serious assault on the deceased started after the appellant and his friend Nhlamulo arrived at the scene. The deceased never lost consciousness before they arrived. He however lost consciousness three times after their arrival, and on the last occasion the appellant is the one who resuscitated the deceased. The appellant and his co-perpetrators could by that stage already see that their actions are capable of causing death to the deceased[8], hence they kept on resuscitating him by pouring him with water. The appellant never disassociated himself with the actions of the other people who assaulted the deceased.

[29] One of the undisputed advantages of the trial court is that it has the advantage of observing the candour of the witnesses such as how soon do they answer questions, any hesitation, openness, frankness, directness, lack of restraint, straightforwardness, plain-spokenness and many other attributes which the appeal court does not have advantage of. The findings of the court *a quo* on the convictions cannot therefore be faulted.

[8] As in Jacobs and Others v S 2019 (1) SACR 623 (CC), where the assault of the deceased on the second scene was found to have been a continuation of the assault on the first scene even though the appellants were not there on the first scene where the deceased was assaulted by community members. In the case at hand the appellant continued with what was started on the first scene where he was not there.

[30] On sentence, the court *a quo* convicted the accused persons, including the appellant on murder by *dolus eventualis* in terms of section 51 (2) of the Criminal Law Amendment Act 105 of 1997. That is contradictory to the fact that the court *a quo* also found that they acted in the furtherance of a common purpose. The court *a quo* misdirected itself and mixed issues on the circumstances upon which the accused were convicted, and that led to the misdirection on sentence. As the court *a quo* found that they acted in the furtherance of a common purpose, then the sentence should have been life imprisonment in terms of section 51(1) of Act 105 of 1997.

[31] This court, sitting as a court of appeal is empowered by section 322 (6) of the Criminal Procedure Act 51 of 1977 to impose a sentence that is different from the one already imposed, including increasing the sentence. The state on the aspect of sentence said that it does not appeal the sentence as it is satisfied with the sentence that the court *a quo* has imposed. This court will therefore not interfere with the sentence that was imposed by the court *a quo,* as the parties were not given an opportunity to fully address this court on the possibility of the alteration of the sentence imposed.

[32] In the result the following order is made:

(i) The appeal against the convictions and sentences is dismissed.

J.T. NGOBENI

Judge of the High Court

I agree

G. Muller

Judge of the High Court

I agree

A. Van Wyk

Acting Judge of the High Court

Appearances

Counsel for the Appellant	: Mr. C.R. Van Tonder
Instructed by	: Van Tonder Attorneys
Counsel for the Respondent	: Advocate L. Mashiane
Instructed by	: Office of the Director of Public Prosecutions, Polokwane
Date of the hearing	: 23 May 2025
Date of delivery	: 20 June 2025