



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

CASE NO: AR322/2022

In the matter between:

**MADAKANE NTSHABA
SIBUSISO MADONDO
BONGINKOSI MPUNGOSE
THABANI MPUNGOSE**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

and

THE STATE

RESPONDENT

Coram: Mossop J and Marimuthu AJ

Heard: 25 August 2023

Delivered: 18 December 2023

ORDER

On appeal from: Greytown Regional Court (sitting as the court of first instance):

1. The appeal against the convictions of the appellants is dismissed.

2. The appeal against the sentences imposed on each of the appellants is upheld. The sentence of life imprisonment is set aside and substituted with a sentence of 14 years' imprisonment in respect of each appellant.

3. The sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 28 February 2022.

JUDGMENT

MARIMUTHU AJ (MOSSOP J concurring)

Introduction

[1] The appellants stood trial in the Greytown Regional Court on a charge of murdering a Mr Mduduzi Nxongo (the deceased). The charge of murder was read with section 258 of the Criminal Procedure Act 51 of 1977 (the Act) and the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the CLAA) as the State alleged that the appellants acted with common purpose in the furtherance of the murder.

[2] The appellants were legally represented throughout the proceedings in the court *a quo*. On 10 February 2022, they all pleaded not guilty to the charge and elected to not disclose the basis of their defence. They later each testified in their own defence but on 28 February 2022, they were all convicted as charged, and the court *a quo* proceeded to sentence each of them to life imprisonment. This appeal is before us by virtue of their automatic right of appeal which they have exercised in respect of both their convictions and sentences.¹

The cause of death of the deceased

[3] A Dr Neethiananthan Naidoo (Dr Naidoo) performed the post-mortem examination of the deceased's body. His findings were not controversial and were

¹ This right of appeal arises from the provisions of s 309(1) of the Act.

handed in with the consent of the defence, as was his affidavit prepared in accordance with section 212(4) of the Act. Dr Naidoo found the body of the deceased to have sustained the following injuries:

- (a) Multiple linear abrasions, consequent upon allegedly being hit with a stick all over the right side of the head and body;
- (b) A sutured wound to the forehead;
- (c) A lacerated wound to the left lower jaw;
- (d) A lacerated upper jaw and right lower jaw;
- (e) A fractured skull; and
- (f) An intracranial haemorrhage.

[4] Dr Naidoo determined that the cause of death of the deceased was the skull fracture and intracranial haemorrhage. This is of some significance given the facts that were later found to have been established by the court *a quo*.

The State's case

[5] The events in question all occurred on Christmas Day in 2019. The first State witness, Mr Mduduzi Lembethe (Mr Lembethe), testified that he knew the appellants and the deceased as they all resided in the same area of KwaNgubo. At 14h00 on Christmas Day, he was at his homestead in the company of his family and friends, celebrating the day and consuming alcohol. He estimated that there were ten people present, amongst whom were his younger brother, Mr Ncembeseni Lembethe (Ncembeseni),² his friend, Mr Philangaye Hadebe (Mr Hadebe) and the fourth appellant.

[6] In the midst of the celebrations, the deceased arrived at Mr Lembethe's homestead and stated that he had assaulted a Mr Bongani Ntshaba (Mr Ntshaba), who was the first, third and fourth appellants' brother. Approximately 20 minutes after the arrival of the deceased, the first and third appellants arrived, armed with a stick and a knobkerrie, although Mr Lembethe was uncertain as to which weapon each appellant

² This witness is referred to by his first name, as if he were to be referred to by his surname, there would be two Mr Lembethes, which would simply cause confusion. No disrespect is intended by such reference.

possessed. The first appellant requested Mr Lembethe's permission to take the deceased outside to talk to him. Mr Lembethe testified that the first and third appellants were angry in addition to being armed, and so he refused to permit this to occur. Whilst they were conversing, the first appellant unexpectedly struck the deceased on his head with the weapon in his possession. The deceased retaliated and a commotion ensued. Those present intervened and they managed to diffuse the situation. Mr Lembethe then requested Ncembeseni and the fourth appellant to accompany the deceased to the deceased's home. They agreed to do so.

[7] On their way to the deceased's home which was located a short distance away from Mr Lembethe's home, the fourth appellant and the deceased became embroiled in a fist fight. Ncembeseni tried to intervene to stop the fight. Mr Lembethe and others ran out to assist Ncembeseni and they succeeded in stopping the fight. The fourth appellant then left in the company of the first and third appellants. Mr Lembethe requested another person to accompany Ncembeseni and the deceased to the deceased's home and he and those remaining in his company then returned to his homestead.

[8] The festivities resumed at the Lembethe homestead, but a short while later screams were heard. Upon investigating, Mr Lembethe observed that the deceased was now in a fight with the first, third and fourth appellants. He testified that he witnessed the deceased being assaulted with sticks. He was unsure whether the fourth appellant possessed any weapon, but he was certain that both the first and third appellants possessed sticks. He and the others then made their way to where the deceased was being assaulted. On their arrival, the deceased was still and quiet, lying on the ground.

[9] The second appellant then arrived whilst the deceased was already lying prone on the ground, and he forcefully took the stick from the third appellant and struck the deceased once across his ribs. Mr Lembethe testified that he intervened and dispossessed the second appellant of the stick and then struck him once behind his ear with the stick, causing the second appellant to 'faint' and fall unconscious to the ground. He remained unconscious for between 15 to 20 minutes. Mr Lembethe sent for his

motor vehicle and transported the deceased to the local Church of Scotland Hospital. He was later informed that the deceased had passed away.

[10] Under cross-examination, Mr Lembethe denied the appellants' version that the assault of the deceased took place at the same spot where Mr Ntshaba was earlier assaulted and also denied that it was members of the public who had dispossessed the deceased of his weapons and assaulted him. Mr Lembethe was adamant that Mr Ntshaba was not at the scene where the deceased was assaulted. He, however, agreed with the appellants' version that all four appellants were present at the scene where the deceased was assaulted.

[11] The second State witness, Ms Ntombifikile Ngubane (Ms Ngubane), was married to the deceased. She testified that on 25 December 2019, as far as she was concerned, the deceased had been assaulted twice.³ The first assault occurred when she and her mother-in-law had investigated a noise that they heard coming from outside their home and observed the first, third and fourth appellants assaulting the deceased with sticks. The deceased managed to escape this assault and he was taken home by Ms Ngubane. The second assault was the assault that led to the deceased's death.

[12] She agreed that the deceased had been drinking and when she got him home, she pleaded with him to go to bed. He paid no attention to what she said: after having gone into the bedroom, he climbed out the bedroom window and proceeded to his mother's dwelling, and armed himself with two sticks. Ms Ngubane discovered this and followed the deceased as he made his way back to the first, third and fourth appellants as they continued to proceed in the direction of their respective homes.

[13] The first, third and fourth appellants noticed the deceased return and turned around and advanced towards him. According to the evidence of Ms Ngubane, when they reached the deceased, these appellants immediately started assaulting him with

³ In this she was incorrect. See paragraph 62 of this judgment. Given that she had not been present at all the assaults, this error is understandable.

sticks. Their assault of the deceased caused him to lose possession of his sticks and to fall to the ground, where they then repeatedly struck him.

[14] Ms Ngubane testified that as she witnessed the assault on the deceased, she began to cry, and walked away as she could not bear to watch the assault. Before walking away, she observed the mother of the deceased who was also present, crying and pleading with the appellants to stop assaulting the deceased. They did not heed her pleas.

[15] After a short while, Ms Ngubane returned to the scene, and noticed that Mr Lembethe, Mr Hadebe and others were now present and had intervened and were placing the deceased into a motor vehicle. She saw the appellants, inclusive of the second appellant, leaving the scene. She accompanied the deceased to the Church of Scotland Hospital and noticed that he had sustained injuries and had an open wound to his head, and that he was bleeding. The deceased passed away later that night.

[16] Ms Ngubane stated that after the funeral of the deceased, all of the appellants came to their homestead on two separate occasions. They called allegedly with the view of paying damages. On the first occasion, nothing was discussed in this regard as the mother of the deceased advised them that she needed to first speak to the family. On the second occasion, the appellants were informed that they would need to pay the costs of the funeral and pay for the costs associated with a cleansing ritual that had to take place. Nothing, however, was paid by the appellants to the family of the deceased.

[17] Under cross-examination, Ms Ngubane stated that she did not see Mr Ntshaba at the scene where the deceased was assaulted. She confirmed that the first, third and fourth appellants were armed with sticks and that they had used these sticks to assault the deceased. She denied the suggestion by the appellants that it was the community that had assaulted the deceased.

[18] The third State witness, Mr Hadebe, testified that on Christmas Day 2019, he

was at the home of his cousin, Mr Lembethe. He knew the appellants as they were related to him on his paternal side and were his neighbours. The deceased arrived at Mr Lembethe's homestead and informed those present that he had 'stamped' Mr Ntshaba. A short while later, the first and third appellants, armed with sticks, came to the homestead and requested to speak to the deceased. Mr Lembethe asked them to leave as he noticed that they were angry. The first appellant struck the deceased with a stick, and the first and third appellants thereafter left. Mr Lembethe then instructed his younger brother, Ncembeseni, to accompany the deceased to his home.

[19] The fourth appellant, who was present at Mr Lembethe's homestead, followed the deceased and Ncembeseni as they left the homestead. Just outside Mr Lembethe's yard, the fourth appellant started assaulting the deceased by hitting him with his fists. Ncembeseni intervened and separated them.

[20] Mr Hadebe later observed the deceased returning with two sticks. The deceased was approaching the first, third and fourth appellants who, upon realizing this, turned around and advanced towards him. He witnessed the first, third and fourth appellants striking the deceased with sticks. They all struck the deceased simultaneously and repeatedly. The deceased failed to strike the appellants as they outnumbered him. The first appellant dispossessed the deceased of one of his sticks, and the deceased's other stick fell to the ground. The first, third and fourth appellants struck the deceased countless times and he, too, ultimately fell to the ground. The assault on the deceased continued unabated as he lay on the ground. The deceased's wife, his mother and several other people from the surrounding homes also witnessed the assault and they reprimanded the first, third and fourth appellants, shouting at them to stop their assault, but they did not.

[21] Mr Hadebe observed the second appellant arriving at the scene and witnessed him assaulting the deceased by using a stone to strike the deceased's head. Mr Lembethe then dispossessed one of the appellants of a stick and he used it to strike the second appellant behind his ear, causing him to fall to the ground. This caused the

appellants to cease their assault.

[22] The witness noticed that the deceased was lying on the ground face up. He had injuries to his head and was not moving. He helped with transporting the deceased to the hospital. He noticed the appellants leaving the scene when the deceased was being transported to hospital. He did not see Mr Ntshaba at the scene and he did not witness any other persons assault the deceased, apart from the appellants. He learnt later that night that the deceased had passed away.

[23] Mr Hadebe testified that after the incident, a meeting was called at which the appellants and the men of the community gathered to discuss the events that had resulted in the death of the deceased. The appellants informed the gathering that the whole situation was simply 'bad luck'. The appellants explained that they assaulted the deceased as they were incorrectly informed that their brother, Mr Ntshaba, had died and that the deceased was responsible for his death. The men at the meeting resolved that the appellants must be placed before a court of law.

[24] The final witness for the State was the investigating officer, Warrant Officer Sikhumbuzo Kwenzakuni Emmanuel Khanyile, who simply explained the efforts that he had made to locate Ncembeseni and why he was unable to secure his attendance at court.

The appellants' case in the court *a quo*

[25] All of the appellants testified in their defence. The first, second and third appellants admitted that they individually received reports that Mr Ntshaba had been assaulted and that the deceased was responsible for the assault. They further admitted that they called at Mr Lembethe's home seeking out the deceased, ostensibly for the purpose of compelling him to arrange transport to take the injured Mr Ntshaba to hospital.

[26] The first appellant testified that he had received a report that the deceased had

proceeded to Mr Lembethe's premises after he had assaulted Mr Ntshaba. He claimed that he was not angry about these events and that he did not possess a weapon when he arrived at Mr Lembethe's homestead. Present there were Mr Lembethe, Mr Hadebe, the deceased, the fourth appellant and other individuals. He tried to speak to the deceased but he became aggressive, so he decided to leave and return to the injured Mr Ntshaba. He met the third appellant outside the home of Mr Lembethe and they then made their way to Mr Ntshaba. He initially stated under cross-examination that he and the third appellant came across the second appellant as they made their way to Mr Ntshaba. He later changed his evidence and stated that the second appellant had arrived when Mr Ntshaba was being loaded into a vehicle to be transported to hospital. According to him, the second appellant arrived at the scene after the fourth appellant.

[27] The second appellant testified that he had received news of Mr Ntshaba's assault and proceeded to the scene of the assault, where he met the third appellant. He and the third appellant decided to seek out the deceased as they were advised that he had been the person who had assaulted Mr Ntshaba and they wanted him to arrange transport to take Mr Ntshaba to hospital. They proceeded to Mr Lembethe's homestead, where they, inter alia, found the first and fourth appellants. The first appellant was about to leave, so they also left with him. Also present at Mr Lembethe's homestead were Mr Lembethe, Mr Hadebe, the deceased, and many others. He joined the first and third appellant and they left the homestead to return to Mr Ntshaba.

[28] The third appellant testified that he was at home when he received the news that Mr Ntshaba had been assaulted. He proceeded to the scene of the assault and found the first appellant already present there. A short while later, the second appellant arrived. The three of them decided to seek out the deceased. The first appellant moved quicker than them and he reached Mr Lembethe's homestead before them. When they arrived at the homestead, the first appellant was about to leave and they joined him and left. As they were returning to Mr Ntshaba, the fourth appellant left Mr Lembethe's homestead and caught up with them.

[29] The fourth appellant confirmed that he was at Mr Lembethe's homestead when the other appellants arrived. He stated that he accompanied the deceased home as the deceased was drunk and was causing a commotion. He denied that he had assaulted the deceased by hitting him with his fists outside Mr Lembethe's yard, and stated that it was the deceased who had started assaulting him. He left to join his co-accused after he was assaulted by the deceased.

[30] The appellants all placed themselves at the scene where the deceased was injured. They, however, denied having assaulted the deceased and indicated that he had been assaulted by members of the community who were allegedly angry with him for assaulting Mr Ntshaba. They testified that the deceased was armed with a pick handle, stick and a knife when he confronted them.

[31] As a general proposition, the appellants denied the versions of Mr Lembethe, Mr Hadebe and Ms Ngubane insofar as the assault of the deceased was concerned. They further denied that Mr Lembethe assaulted the second appellant at the scene causing him to 'faint'. They admitted that they called on the family of the deceased after his passing but denied that they did so with the view of making compensation, maintaining that they called on the family purely to pay their respects.

Evaluation of the evidence

[32] In *S v Hadebe and others*,⁴ Marais JA stated:

'...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.'

[33] The court *a quo* potentially had two issues to determine. The first was whether the appellants had assaulted the deceased, thereby causing his death. If that was established, then the second issue to be determined was whether the appellants had acted with common purpose when the said assault was perpetrated.

⁴ *S v Hadebe and others* 1997 (2) SACR 641 (SCA) at 645e-f.

[34] The court *a quo* was alive to the evidentiary burden that rested upon the State. In determining whether the burden was discharged, it considered various Supreme Court of Appeal decisions which all provided a useful guideline to the evaluation of evidence.⁵

[35] Nugent J in *S v Van der Meyden* stated:⁶

‘The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent...’

The learned judge went on to state in the same judgment that:

‘A court does not look at the evidence implicating the accused in isolation in order to determine whether there is proof beyond reasonable doubt, and so too does it not look at the exculpatory evidence in isolation in order to determine whether it is reasonably possible that it might be true.’⁷

[36] Thus the basic approach to adopt in the evaluation of evidence is that all the evidence must be weighed in its totality. Navsa JA in *S v Trainor* stated:⁸

‘A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence, of course, must be evaluated against the *onus* on any particular issue or in respect of the case in its entirety. The compartmentalised and fragmented approach of the magistrate is illogical and wrong.’

[37] The circumstances that gave rise to the appellants seeking out the deceased must be considered. The appellants received news that their sibling had been assaulted by the deceased and they went in search of him. The evidence of Mr Lembethe was

⁵ These judgments were: *S v Jackson* 1998 (1) SACR 470 (SCA); [1998] 2 All SA 267 (A); *S v Ntsele* 1998 (2) SACR 178 (SCA); [1998] 3 All SA 517 (A); *S v Shackell* 2001 (2) SACR 185 (SCA); [2001] 4 All SA 279 (A); and *S v Chabalala* 2003 (1) SACR 134 (SCA).

⁶ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 448f-g.

⁷ *Ibid* at 448h-i.

⁸ *S v Trainor* 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) para 9.

that when the first and third appellants arrived at his homestead, they were both armed and angry. In my view, this was highly probable. The evidence of Mr Lembethe and Mr Hadebe was that the fourth appellant was present at Mr Lembethe's homestead when news reached them that the deceased had assaulted Mr Ntshaba, and he was present when the first and third appellants arrived seeking the deceased. Mr Lembethe's evidence was clear that he would not allow them to speak to the deceased because he could observe that they were angry. The fourth appellant started a fist fight with the deceased after he had heard about the assault of Mr Ntshaba. This too, in my view, was highly probable.

[38] The court *a quo* considered the merits and demerits of all the evidence that was placed before it. It correctly found, in my view, that such contradictions as may have occurred in the evidence of the State witnesses were not material.

[39] When evaluating the version of the appellants, the court *a quo* was alive to the fact that the version put to the State witnesses differed significantly from their *viva voce* evidence. The appellants were simply unable to explain why the version put to the State witnesses was different to their evidence in chief and it became evident that the appellants were tailoring their evidence to corroborate each other.

[40] The admitted medical reports detailed lacerated wounds and multiple linear abrasions which are consistent with injuries inflicted using sticks. Mr Lembethe, Ms Ngubane and Mr Hadebe all testified that they had witnessed the appellants assaulting the deceased with sticks. Mr Hadebe stated that he had witnessed the second appellant strike the deceased with a stone on his head. I am also mindful that the admitted affidavits of the medical staff at the Church of Scotland Hospital record that the deceased presented to them with a history of being assaulted with sticks and stones.

[41] Ms Ngubane appears to have been an impressive witness. She spoke candidly about the deceased being intoxicated, arming himself and pursuing the appellants. Being the wife of the deceased, she could have tailored her evidence to paint the deceased's

conduct in a more favourable light, yet she did not do so. She also candidly testified that she did not witness the entire assault of the deceased as the actions of the first, third and fourth appellants became too unbearable for her to watch. This, too, has the ring of truth to it, considering her relationship with the deceased. Ms Ngubane does not identify or implicate the second appellant as being one of the perpetrators who had assaulted the deceased, despite her testimony that he presented himself together with the other appellants at their homestead to discuss the issue of damages. She was, in my view, correctly found to be an honest and reliable witness.

[42] The appellants maintain that despite seeking out the deceased and being unsuccessful in convincing him to arrange transportation for the injured Mr Ntshaba, they all walked away from the deceased after he had armed himself, pursued them and struck the first appellant. This version is highly improbable when it is weighed against the established facts and all the evidence presented by the State. I am of the view that the court *a quo* was correct to reject same as false.

[43] The court *a quo* fairly and accurately summarised all the evidence in its judgment. The criticisms of the witnesses who testified for the State were evaluated against the entire body of evidence that was placed before the court *a quo*. I can find no fault or misdirection in the evaluation of that evidence and the findings arrived at by the court *a quo*. I am consequently satisfied that the court correctly concluded that the appellants inflicted the injuries upon the deceased and that those injuries caused his death.

[44] Having reached this conclusion, the next issue for determination is whether the court *a quo* was correct in finding that the appellants acted with common purpose to cause the death of the deceased.

[45] The Constitutional Court in *S v Thebus*⁹ recognized that common purpose ('a joint criminal enterprise') has two forms:

⁹ *S v Thebus and another* [2003] ZACC 12; 2003 (2) SACR 319 (CC) para 19.

'The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.'

Thebus,¹⁰ with approval, referred to the following two definitions of the doctrine of common purpose:

'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.'¹¹

and

'The essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.'¹²

[46] In *S v Tilayi*, Van Zyl DJP stated that:¹³

'In the absence of an agreement, express or implied, a common purpose may arise from an act of association if the requirements constituting an active association have been individually satisfied. The requirements for this form of common purpose were determined in *S v Mgedezi and others*¹⁴ and confirmed in *Thebus*. They are the following:

- (a) Presence at the scene where the ultimate unlawful consequence was being committed;
- (b) awareness of the ultimate unlawful consequence;
- (c) intention to make common cause with those who were actually perpetrating the ultimate unlawful consequence;
- (d) manifestation of a sharing of a common purpose with the perpetrators of the ultimate unlawful consequence by performing some act of association with the conduct of the others; and
- (e) the requisite fault.'

[47] In *S v Munonjo en 'n ander*,¹⁵ Nestadt JA dealt with the issue of subject

¹⁰ Ibid para 18.

¹¹ Burchell and Milton *Principles of Criminal Law* 2 ed (1997) at 393.

¹² C R Snyman *Criminal Law* 4 ed (2002) at 261.

¹³ *S v Tilayi* 2021 (2) SACR 350 (ECM) para 23.

¹⁴ *S v Mgedezi and others* 1989 (1) SA 687 (A) at 705I-706C.

¹⁵ *S v Munonjo en 'n ander* 1990 (1) SACR 360 (A).

foreseeability. He found that the liability of persons who are alleged to have a common purpose depends on whether they should have foreseen the consequence of their actions.

[48] In *S v Makhubela and another*,¹⁶ the application of the doctrine of common purpose was once again addressed and the decisions in *Mgedezi*, *Thebus* and *Dewnath v S*¹⁷ found support. In *Dewnath*, Mocumie AJA stated:¹⁸

‘Current jurisprudence, premised on a proper application of *S v Mgedezi and others*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not a limited participation removed from the actual execution of the crime.’

[49] In this matter, the evidence supports the finding that the appellants resorted to the use of violence and that they simultaneously, and repeatedly, struck the deceased on his head, face, and body. They must have foreseen the possibility of death ensuing, and nonetheless stood reckless to the eventuation thereof and continued to act in accordance with the common design. They actively associated in the assault on the deceased, which resulted in his death, although there was no prior agreement. I accordingly cannot fault the finding of the court *a quo* that the appellants had the necessary *mens rea* in the form of *dolus eventualis* in respect of the murder conviction.

[50] I am of the view that the facts of this case also satisfy the requirements for common purpose in its active association form. The accepted evidence conclusively shows that the appellants were present at the scene where the assault of the deceased took place. They intended to make common cause with each other at that time and they manifested that intention by each performing an act of association with their conduct by assaulting the deceased. The deceased was still alive when the ultimate fatal blow of the rock being dropped on his head occurred.¹⁹ I also point out that the appellants only stopped the assault on the deceased when Mr Lembethe and others intervened and

¹⁶ *S v Makhubela and another* [2017] ZACC 36; 2017 (2) SACR 665 (CC) paras 35-38.

¹⁷ *Dewnath v S* [2014] ZASCA 57.

¹⁸ *Ibid* para 15.

¹⁹ All the witnesses stated that the accused only died later that evening.

after the second appellant was struck by Mr Lembethe.

[51] I accordingly find that the court *a quo* was correct in its finding that the appellants should have foreseen that their common intention to assault the deceased, would cause his death, in the form of *dolus eventualis*. The appellants were correctly convicted of murder read with section 51(1) of the CLAA.

Sentence

[52] I now turn to the issue of sentence. Section 51(1) of the CLAA prescribes the imposition of a sentence of life imprisonment unless the court finds that there are substantial and compelling circumstances that warrant a deviation from that minimum sentence. The court *a quo* concluded that there were no substantial and compelling circumstances in the matter and proceeded to impose the mandatory minimum sentence of life imprisonment.

[53] In *S v Malgas*, Marais JA stated that:²⁰

‘A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”. It must be emphasised that in the latter situation the appellate court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so

²⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) para 12.

only where the difference is so substantial that it attracts epithets of the kind I have mentioned.’

[54] In *S v SM and others*,²¹ Le Grange J (in the majority decision), held the view that a subjective test and a proportionality test must be conducted to determine whether substantial and compelling circumstances exist or not. He quoted, with approval,²² the following guidelines from *S v Thonga*:²³

‘In my view the punishment must firstly be reasonable, i.e. it should reflect the degree of moral blameworthiness attaching to the offender, as well as the degree of reprehensibleness or seriousness of the offence. Punishment therefore should ideally be in keeping with the particular offence and the specific offender. It is necessary, secondly, for the punishment to clearly reflect the balanced process of careful and objective consideration of all relevant facts, mitigating and aggravating. The sentence should, thirdly, reflect consistency, as far as is humanly possible, with previous sentences imposed on similar offenders committing similar offences, lest society should believe that justice was not seen to be done. Lastly, the penal discretion is to be exercised afresh in each case, taking the facts of each case and the personality of each offender into account. To all this I would add that the trial Court does not impose sentence *in vacuo*. It, to the contrary, certainly does so within a certain time frame and at a certain stage in the development of the people(s) of a district, or a province, or a country, or even a continent. The criminal court is also an instrument in the hands of society, applying its laws, reflecting its values and its moral indignation at unlawful conduct, as well as the negative or harmful effect thereof on third parties or society itself. But in a civilised society punishment reflects also the interests of the offender himself. The trial court, in a criminal matter then, functions not in a technical laboratory, but as a living instrument, a vital component of the fabric of society, serving the interests of society and all of its law-abiding members. The criminal court primarily seeks to establish and maintain peaceful co-existence among the members of society within a territory, offering protection to life, limb and property by dispensing criminal justice. Furthermore, during the imposition of punishment, the trial court jealously guards the fine line between raw revenge or emotional punishment and the judicial, reasonable and objectively balanced (effective) exercise of its penal discretion.’

[55] Life imprisonment is the harshest sentence that can legally be imposed upon an

²¹ *S v SM and others* 2010 (1) SACR 504 (WCC) paras 10-14.

²² *Ibid* para 12.

²³ *S v Thonga* 1993 (1) SACR 365 (V) at 370d-i.

accused person, and it should be reserved for those individuals that are incapable of advancing factors that constitute substantial and compelling reasons to warrant a deviation from the intent of the Legislature.

[56] All murders are serious as society rightly values human life. When a life is unlawfully and intentionally taken, a severe custodial sentence is generally warranted. The Legislature itself, however, contemplated that there may be instances when the ultimate sentence of life imprisonment should not be imposed, and to this extent it included Part II to Schedule 2 of the CLAA. In this matter, the court *a quo* found that the appellants did not possess direct intention to cause the death of the deceased. They did not form part of a gang or syndicate or mob, they did not conspire to commit murder, nor was the death of the deceased caused while the appellants were committing another offence. The conduct of the appellants and the deceased on the day in question are unique to this case only, and it is of particular relevance in determining the appropriate sentence to be imposed in the circumstances.

[57] The court *a quo* found that the appellants acted in anger and were intent on revenge in assaulting the deceased. This finding, while generally correct, must be viewed in its proper context. The appellants were returning to their home when the deceased armed himself and followed them. The deceased transformed himself into the aggressor and unfortunately contributed to his ultimate death. On the presented evidence, the appellants were no longer in pursuit of the deceased - the converse was true. In my view, the court *a quo* committed a misdirection by failing to consider the conduct of the deceased that commenced with the assault on Mr Ntshaba (of which the deceased openly bragged at Mr Lembethe's homestead) and escalated to the deceased climbing out of his bedroom window, arming himself and again approaching the first, third and fourth appellants in an aggressive manner, foolishly fuelled by the effects of alcohol. There is every possibility that nothing further would have happened had the deceased remained at his homestead, as instructed by his wife. But he did not listen and his conduct in again pursuing the first, third and fourth appellants undoubtedly provoked a response from them.

[58] Having found that the court *a quo* misdirected itself, this court is at large to consider the sentence afresh. At the time of sentencing, the first appellant was 40 years old and the sole breadwinner of the family and had been gainfully employed as a taxi driver for a period of 17 years, and earned an income of R2 000 per month. He lived with his common law wife and two minor children, had completed grade 11, was a first offender and suffered from a life-threatening medical condition which requires him to receive chronic medication.

[59] The second appellant was 44 years old and the sole breadwinner of the family, was gainfully employed in the construction industry, and earned an income of R4 000 per month. He lived with his common law wife and three minor children, had completed grade 6, had two unrelated previous convictions and also suffers from a life-threatening medical condition which requires him to receive chronic medication.

[60] The third appellant was 27 years old, was self-employed as a car washer. He earned an income of R1 500 per month, had no previous convictions or pending cases and had completed grade 11.

[61] The fourth appellant was 24 years old, was gainfully employed as a taxi conductor, and earned an income of R1 500 per month. He lived with his common law wife and minor child, had completed grade 10, and had no previous convictions or pending cases.

[62] Ms Ngubane testified that the deceased was assaulted twice on Christmas Day. I previously indicated that in this she was incorrect: he was, in fact, assaulted four times. The first assault occurred at Mr Lembethe's home when he was struck with a stick by the first appellant; the second occurred when the fourth appellant started a fist fight with him outside Mr Lembethe's homestead; the third occurred when the first, third and fourth appellants assaulted him with sticks; and the fourth, and final time, occurred when he armed himself and pursued the appellants as they were making their way

home with the view to engage them in a further confrontation.

[63] I agree with the finding of the court *a quo* that the appellants were angry on the day in question, and that their assault of the deceased was both vicious and brutal. I also agree that a custodial sentence is the only appropriate sentence in this matter.

[64] Mbatha J in *S v Xaba and others* stated that:²⁴

‘In this matter, the accused attended the meeting called by the induna, armed with dangerous weapons such as cane knives, knobkerries and other weapons, which were used to kill the deceased. They failed to heed the induna's call to put the dangerous weapons away. The deceased was killed in the most brutal, barbaric and horrific way by members of his community. He was stoned, hacked with cane knives and an attempt was even made to burn him whilst he was alive. The trauma suffered by the deceased's family was palpable when the deceased's mother testified in this court. The court vividly recalls the haunting wails of the deceased's mother as she testified about the effect the killing of the deceased has had on her entire family. The deceased was killed by people who lived with him, for no apparent reason. This was vigilantism in its worst form.’

Despite the aggravating features of that matter, the court found substantial and compelling circumstances to exist and none of the accused were sentenced to life imprisonment. The accused that were found to be directly responsible for the injuries that caused the death of the deceased were sentenced to an effective term of 12 years’ imprisonment.

[65] In *Francis and others v S*,²⁵ the three appellants were convicted of murder read with the provisions of section 51(1) of the CLAA. The court *a quo* had found that the appellants acted with common purpose when committing the murder and that *dolus eventualis* found applicability. The court found that the:

‘evidence established that those who perpetrated the assault, applied blunt force to the deceased’s head, that heavy blunt force was applied to the deceased’s chest resulting in the deceased sustaining fractures to his ribs and to the abdomen, resulting in the tearing and laceration of his liver, mesentery and kidneys. Further, that the sub-arachnoid haemorrhaging in

²⁴ *S v Xaba and others* 2018 (2) SACR 387 (KZP) para 25.

²⁵ *Francis and others v S* [2019] ZASCA 177.

the brain and the multiple haemorrhages found on the deceased's head were all indicative of the infliction of heavy pressure...'²⁶

The court found that the deceased 'was brutally assaulted and subsequently died as a result of multiple blunt force injuries to his head, chest and abdomen'.²⁷ The court *a quo* found that a sentence of ten years' imprisonment, five years of which was suspended on certain conditions, was an appropriate term to be served by the appellants. The Supreme Court of Appeal did not interfere with the sentence but remarked that the sentence 'is far too lenient'.²⁸

[66] Having considered all the personal mitigating factors of the appellants, the circumstances that gave rise to the untimely death of the deceased, the appellants being driven by anger and the provocation on the part of the deceased, I find that there are substantial and compelling circumstances to deviate from the prescribed sentence of life imprisonment.

[67] In determining an appropriate sentence, I have considered the triad of factors alluded to in *S v Zinn*²⁹ namely, the crime, the offender, and the interests of society. I have further applied the subjective and proportionality tests to the matter. The facts of this matter are distinguishable from those cases wherein accused persons acted in common purpose with a mob or a vigilante group, or where they set out with a direct or premeditated intent to attack or in the instance where the deceased was a helpless and defenceless victim. I am of the view that a sentence of 14 years' imprisonment will suffice in the circumstances.

Order

[68] I would accordingly propose the following order:

1. The appeal against the convictions of the appellants is dismissed.

²⁶ Ibid para 7.

²⁷ Ibid para 2.

²⁸ Ibid para 13.

²⁹ *S v Zinn* 1969 (2) SA 537 (A).

2. The appeal against the sentences imposed on each of the appellants is upheld. The sentence of life imprisonment is set aside and substituted with a sentence of 14 years' imprisonment in respect of each appellant.

3. The sentence is antedated, in terms of section 282 of the Criminal Procedure Act 51 of 1977, to 28 February 2022.

MARIMUTHU AJ

I agree and it is so ordered:

MOSSOP J

APPEARANCES

Counsel for the appellants : Ms A Hulley
Instructed by: : Legal Aid South Africa
Pietermaritzburg

Counsel for the respondent : Mr X Sindane
Instructed by : Director of Public Prosecutions
Pietermaritzburg

Date of argument: : 25 August 2023

Date of judgment : 18 December 2023