IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

(Coram: Henney J, et Andrews AJ)

Case No: A 165/2023

In the matter between:

DUDLEY SAMUELS	Second Appellant (Accused 1)
ELRICO KOOPMAN	First Appellant (Accused 2)

and

THE STATE	Respondent

JUDGMENT DELIVERED: 05 AUGUST 2024

ANDREWS, AJ:

Introduction

[1] The Appellants, Mr Dudley Samuels and Mr Elrico Koopman, were arraigned on one count of murder in Blue Downs Regional Court. On 17 November 2021, the Appellants, who were legally represented, pleaded not guilty and were subsequently

convicted on 29 March 2022 after trial proceedings. Following their conviction, the Appellants were sentenced Imprisonment for Life in terms of Section 51(1) of the Criminal Law Amendment Act[1] ("CLAA") and declared unfit to possess a firearm in terms of Section 103(1) of the Firearms Control Act[2].

[2] Initially, only, the First Appellant filed an application for leave to appeal in respect of conviction and sentence in terms of Section 309(B) of the Criminal Procedure Act[3] ("CPA"). The Appeal in respect of the First Appellant was argued on 13 March 2024. The Appeal was thereafter postponed to 17 May 2024, for Accused number 1, the Second Appellant, to be joined to the proceedings by virtue of his automatic right of appeal in terms of Section 309 of the CPA, so as to avoid a duplication of the proceedings.

[3] The Second Appellant sought condonation for the late filing of his appeal. The application for condonation was unopposed. Condonation was accordingly granted.

Factual Background

[4] On 1 June 2014, Andrew Hattingh ("the deceased"), was fatally wounded. The Appellants, were arrested days later and charged with unlawfully and intentionally killing, the deceased, by stabbing him with a knife. The facts culminating in the conviction of the Appellants can be summarised as follows. On the day in question, the Appellants (hereinafter referred to as Accused 1 and Accused 2), approached the deceased, Marcellino Zana ("Zana") and Dwayne Ficks ("Ficks"). Zana, heard

[1] Act 105 of 1997.
[2] Act 60 of 2000.
[3] Act 51 of 1977.

Accused 2, orating to Accused 1 words to the effect "Let us stab one of these p…". The deceased together with his friends attempted to run away, however, the deceased was caught. Accused 1 took out a knife from his right trouser pocket and stabbed the deceased once. The deceased was pushed towards Zana, who caught him and laid him down on the ground whereafter he immediately sought help. The deceased was thereafter taken to the Day Hospital where he was declared dead.

Grounds of Appeal in respect of the First Appellant

[5] The First Appellant contended that the court *a quo* erred in:

(a) Accepting the state witnesses' version of events although he was a single witness who testified about eight (8) years after the incident happened;

(b) Failing to apply the cautionary rule to the evidence of this single witness;

(c) Rejecting the First Appellant's version that he disassociated himself from the commission of the offence by running away when he and Accused number 1 were chased and thrown with stones;

(d) Failing to find that the Appellant's personal circumstances cumulatively amounted to substantial and compelling circumstances.

Grounds of Appeal in respect of the Second Appellant

[6] A summation of the Second Appellant's grounds of appeal included *inter alia* that the trial court erred in:

(a) Accepting the State's version of events and finding that the State witness was a credible and reliable witness;

(b) Failing to apply the cautionary rule to the evidence of the single witness;

(c) Rejecting the Appellant's version and ignoring his version that he had been attacked when leaving the shop;

(d) Finding that the Appellant was not a credible and reliable witness;

(e) Failing to consider the contradictions in the state witness' statement; and

(f) Failing to find that the Appellant's personal circumstances cumulatively amounted to substantial and compelling circumstances and

(g) His factual findings which were material in nature.

Further evidence

[7] The Second Appellant sought that leave be granted to lead further evidence, more particularly the written statement ("A2") deposed to by the Respondent's witness, Zana, dated 2 June 2014. It is trite that a court of appeal will only hear further evidence or remit a case for further evidence in exceptional circumstances.[4] The matter of ***S v De Jager***[5] sets out the considerations for a court of appeal to hear new evidence as follows:

(a) That there should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which is sought to be led was not led at the trial;

(b) There should be *prima facie* likelihood of the truth of the evidence and

(c) The evidence should be materially relevant to the outcome of the trial.

[8] Counsel for the Second Appellant correctly pointed out that the central question to be answered would be whether the accused had a fair trial.[6] The Second

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[4] *S v Sterrenberg* 1980 (2) SA 888 (A) 893G; *R v Jantjies* 1958 (2) SA 273 (A) 279B-F.
[5] 1965 (2) SA 612 (A) 613C-D.
[6] Second Appellant's Heads of Argument, para 5; See also *S v Bezuidenhout* [2021] ZASCA 52 (case no 41/2020, 23 April 2021) at para 11.

Appellant asserted that the following issues amount to exceptional circumstances that in the interest of justice warrant the admission of Zana's statement, namely:

(a) that he had no knowledge of the written statement, nor had same been canvassed with him by his erstwhile legal representative. Furthermore, that the prosecution failed to raise same at the trial;

(b) that the written statement is to be accepted as being *prima facie* true as it was deposed to by the witness under oath and

(c) that the further evidence is material to the case and the outcome of the trial.

[9] The Respondent opposed the application to lead further evidence on the basis that it was not in the interest of justice and that the application does not meet the requirements envisaged in Section 316(5) of the CPA. In amplification, it was contended that there is nothing indicating that the evidence intended to be led could reasonably lead to a different conclusion. In addition, it was submitted that there was no reasonably acceptable explanation given for the failure to produce the evidence before the close of the trial.

[10] The admission of Zana's statement appears to be predicated on a number of factors which are materially interrelated with the identified grounds of appeal such as the acceptance of the court *a quo* of the evidence of a single witness and credibility findings in that regard; as well as the Appellant's rights to a fair trial insofar as it relates to the adequacy of his legal representation.

[11] In order to properly consider the Appellants grounds of appeal, it is my view that there are exceptional circumstances that in the interest of justice warrant the admission of Zana's statement for the purposes of this leave to appeal application.

Incompetent Counsel

[12] The Second Appellant contended that his erstwhile legal representative, failed to record all that was conveyed to him, more particularly that his legal representative had *inter alia*:

(a) failed to put material parts of his version to the State witness;

(b) failed to take adequate instructions for the purposes of trial;

(c) failed to provide guidance with regard to the proceedings;

(d) failed to address the prior inconsistent statements made by the State's witness in his written statement;

(e) failed to put to the witness that:

(i) he had observed more than 5 males with weapons that day;

(ii) that he and Accused 2 were chased and ran back to Heatherley Court;

(iii) that he was not acquainted with the deceased;

(iv) that he does not have a nickname and

(v) that the allegations levelled against him by the witness are denied.

(f) failed to cross-examine the witness regarding his motive to accuse him, more particularly that it was gang related;

(g) failed to cross-examine the witness with regards to certain relevant / material fact, such as the size of the alleged knife and

(h) address the suspicious circumstances, namely that Fix had disappeared after the incident and that the witness had shortly thereafter become a gang member.

[13] The seminal judgment of ***S v Halgryn*** [7] provides valuable guidance on the issue of inadequate legal representation. In this regard, the court held:

[7] (409/2001) ZASCA 59; [2002] 4 All SA 157 (SCA) para 14.

'[14] The constitutional right to counsel must be real and not illusory and an accused has, in principle, the right to a proper, effective or competent defence. Cf S v Majola 1982 (1) SA 125 (A) 133D-E. Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Cf S v Louw 1990 (3) SA 116 (A) 125D-E. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (cf R v Matonsi 1958 (2) SA 450 (A) 456C as explained by S v Louw supra). The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in Strickland v Washington 466 US 668 at 689:

> *'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has been unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.'*

Not everyone is a Clarence Darrow or F E Smith and not every trial has to degenerate into an O J Simpson trial.'

[14] It thus poses the question whether the Appellant's defence was so incompetent that it rendered the trial unfair. This was held to be is a factual question that does not depend upon the degree of *ex post facto* dissatisfaction of the litigant. It therefore follows that the assessment is to be objective and not based on the benefit of hindsight. The court in ***Halgryn*** *(supra)* was alive to the fact that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect. It recognised that failure to consult stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness.

[15] The Second Appellant raised seven discrepancies insofar as the written statement of Zana conflicts with the oral testimony. It therefore begs the question, how the purported lack of proper legal representation, which led to the inadequate defence, would affect the overall findings of the court. In particular as it relates to the unchallenged discrepancies between the written statement and the *viva voce* evidence of Zana.

[16] In the matter of ***S v Bruiners en 'n Ander*** [8] the witnesses had deviated from their statements in certain respects. The court found that those deviations were not material. The court held that in order to discredit a state witness on the basis of his affidavit, it was still necessary that there had to be a material deviation by the witness from his affidavit before any negative inference could be drawn.[9] The court in ***Bruiners*** further held that although there were differences between versions of the different witnesses, those differences were of a minor nature and not material. The court remarked:

> *'It was a fallacy to presuppose, on the basis merely of differences in the evidence, that neither or both of the witnesses in question were untruthful or unreliable. Experience has shown that two or more witnesses hardly ever give identical evidence with reference to the same incident or events. It was thus incumbent on the trial court to decide, having regard to the evidence as a whole, whether such differences were sufficiently material to warrant the rejection of the State's version.'*

[17] ***Mafalidiso v S*** [10] provides valuable guidance to the judicial approach to contradictions when evaluating police statements:

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[8] 1998 (2) SACR 432 (SE) at 437*h*.
[9] Ibid page 434h-i.
[10] 2003 (1) SACR 583 (SCA).

'The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, *between her or his* viva voce *evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a Court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what the precise nature thereof [is]. In this regard the adjudicator of fact must keep in mind that a previous statement is not taken down by means of cross-examination, that there may be language and cultural differences between the witness and the person taking down the statement which can stand in the way of what precisely was meant, and that the person giving the statement is seldom, if ever, asked by the police officer to explain [his or her] statement in detail. Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Non-material deviations are not necessarily relevant. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions – and the quality of the explanations – and the connection between the contradictions and the rest of the witness's evidence [must], amongst other factors, be taken into consideration and weighed up. Lastly, there is the final task of the trial judge, namely to weigh up the previous statement against the* viva voce *evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings.'*[11]

[18] I am also mindful of what is stated in the case of ***S v Mkohle*** [12] where Nestadt JA held that:

'[c]ontradictions per se do not lead to the rejection of a witness' evidence…They may simply be indicative of an error…' In this matter it was aptly stated that not every error made by a witness affects his credibility; in each case the trier of fact has to take into account such matters as the nature of the contradictions, their number and importance,

[11] English Headnote, 584h – 585d.
[12] 1990 (1) SACR 95 (A) at 98f-g.

and their bearing on other parts of the witness' evidence. No fault can be found with this conclusion that what inconsistencies and differences there were 'of a relatively minor nature and the sort of thing to be expected from honest but imperfect recollection, observation and reconstruction'[13]

[19] The matter of ***S v Govender and Others*** [14]citing ***Bruiners*** *(supra)* with approval recognised that *'discrepancies occur between a witness' evidence and the contents of that witness' police statement is not unusual nor surprising.'* It is therefore trite that the discrepancy must be read in the context of the whole statement. The crucial consideration is whether the unchallenged discrepancies would have made any difference to the outcome of the case, if regard is had to the nature of the discrepancies identified by the Second Appellant, which is to be considered as per the guidelines set out in the referenced authorities.

[20] The First discrepancy pertains to Zana's averment in the written statement that he met his younger brother, Ashely, at the "game shop". Zana also alleged that there were other people around at the time that the incident occurred. Zana also referred to a person by the name of "Ballas". In the oral testimony, Zana only mentions Fix and the deceased who were in the vicinity at the time.

[21] The Second discrepancy pertains to Zana's averment in his written statement that he first saw him standing by the "Somalian Shop" and that Accused 2 walked past and bumped him when he was standing against a pole by "Ahmed shop" before walking over to him. During Zana's *viva voce* evidence in court, he stated that

[13] *Mohle* (ibid) at 98f-g.
[14] 2006 (1) SACR 322 (E), at page 326.

he saw Accused 1 and Accused 2 approaching him and his friends from 35 metres away, when they were standing outside the "Somalian Shop".

[22] The third discrepancy concerns Zana's recollection of the words uttered. In his written statement he alleged that Accused 2 articulated words to the following effect: "Kom ons van teen van hulle en steel hulle hul p..." In court, Zana orated that Accused 2 said "ons vang een van die p... in steek hulle" During cross-examination, when Accused 2's attorney put it to Zana that Accused 2 never uttered words of "Steek hom", Zana responded by saying "Oh, dan weet ek nie was gaan aan nie".

[23] The fourth discrepancy pertains to how Zana described the weapon. In the statement he mentioned first seeing a long blade ("lem"). In court the witness refers to a knife. The fifth discrepancy, concerns the description of the grabbing of the deceased. In Zana's written statement he alleges that he grabbed the deceased swung him around and held him by his chest while Accused 2 grabbed and held his hands. During his testimony in court, Zana testified that Accused 2 was doing nothing after he had allegedly grabbed the deceased and stabbed the deceased.

[24] The sixth discrepancy deals with Accused's 2's involvement. In the written statement, Zana alleged that Accused 2 pushed the deceased towards him after allegedly being stabbed by him. In court, Zana testified that Accused 2 was doing nothing after Accused 1 had grabbed the deceased and that it was Accused 1 that had pushed the deceased towards Zana. Furthermore, Zana stated that Accused 2 did nothing after having allegedly given the command to stab.

[25] Lastly, in the statement, Zana alleged that he and Accused 2 had chased previously "them" with knives, wanting to stab them on previous occasions. During his evidence in court he confirmed that there was no bad blood between them.

[26] The Second Appellant alleges that his legal representative did not deal with these discrepancies in the trial. The matter of ***S v Green*** [15] has settled the courts approach in matters where an accused person, when giving evidence at his trial makes statements of fact which should have been, but were not put to the state witnesses. The court held:

> *'If the accused, when asked, "Did you tell that to your counsel?" answers in the negative he can be asked why he did not do so. If he answers in the affirmative his counsel may explain from the Bar that it was his fault that the statement was not put to the State witnesses, or he may remain silent. If he remains silent the Court may, or may not, be entitled to draw inferences therefrom. The same will apply where an accused person alleges that statements put by his counsel to State witnesses were incorrect statements and were not in accordance with his instructions. If his counsel, sitting in Court, remains silent or asks to be given leave to withdraw from the case, the Court, depending upon the circumstances, may well be entitled to draw the inference that the accused has changed his story.'*

[27] The Magistrate *in casu* could not have known what instructions were given to the Second Appellant's legal representative as he may have exercised a discretion to conduct the Second Appellant's defence in a particular way. The fact that the Second Appellant's legal representative did not cross-examine Zana on the contents of his statement is not sufficient to conclude incompetence. The degree of incompetence envisaged is clear, namely, whether it rendered the trial unfair. It may

[15] 1962 (3) SA 899 at 902A.

very well be, as was pointed out in ***Halgryn,*** that a dissatisfied litigant, with the benefit of hindsight, would attack a legal representative, which should not be encouraged.

[28] I interpose to deal briefly with the aspect of the assertion that the Appellant's fair trial rights were compromised because of the prosecutor's failure to act in accordance with their duties. The assertion in this regard implies that the prosecutor ought to have raised the witness's deviation from what was contained in statement.

[29] The court was referred to ***S v Naude*** [16] where Borchers J held:

> *'…If counsel for the defence had been competent, which the record in this and other regards discloses he was not, he would have cross-examined the complainant on this issue, but he did not do so. The prosecutor also did not bring these discrepancies between the complainant's evidence and her statement to the attention of the regional magistrate."*[17]

[30] The facts of this matter are distinguishable to the facts in *casu*, as the charges concerned allegations of rape and where the discrepancies particularly in regard to the complainant's reasons for not reporting the rape immediately, or soon after they had occurred went to the heart of the accused's defence of consent. This was material to ***Naude's*** factual matrix to prove consistency. The court in ***Naude*** indicated that a report which was made long after an alleged rape, when the complainant cannot satisfactorily explain the delay may in some cases lead to the inference that the complainant possibly consented to intercourse. It was for these reasons that the court remarked:

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[16] 2005 (2) SACR 218 (W).
[17] At page 221e – f.

'In my view, the failure by the defence or the State prosecutor to bring the existence of the complainant's statement to the attention of the regional magistrate has resulted in the trial of the accused being unfair because the magistrate's credibility findings may well have been different if he had known of the discrepancies. The complainant was after all, a single witness.'

[31] It is manifest that the nature of the discrepancies identified in *casu* are on a different footing to ***Naude*** in terms of materiality. After having regard to the highlighted discrepancies, I am satisfied that the identified discrepancies in *casu* are not material for the following reasons:

(a) The differences in what was said is a matter of semantics and nothing turns on this. What is important is that there was an utterance by the First Appellant which caused Zana and his companions to run with the Appellants giving chase.

(b) Where they were initially standing and how far from each other is not a material factor as the Appellants do not deny being on the scene;

(c) It is also not in dispute that the weapon that was used was a knife. Nothing turns on whether it was referred to as a blade "lem" or knife.

(d) It was alleged that the First Appellant acted in common purpose with the Second Appellant for the reasons already stated; therefore, whether the First Appellant held the deceased's hand or pushed the deceased towards Zana or whether it was the Second Appellant who pushed the deceased towards Zana after having been stabbed, in my view, would not have made a difference to the outcome of the matter.

(e) It is my view that nothing turns on previous altercations between the groupings.

[32] To reiterate, the deviations according to ***Bruiners*** must be material before any negative inference could be drawn. In these circumstances, the prosecutor

and the erstwhile legal representative of the Second Appellant cannot be said to have caused any compromise to the Second Appellant's fair trial rights. I am not persuaded that the disclosure of the highlighted discrepancies would not have made a difference to the outcome of the trial for lack of materiality and in my view, did not render the trial unfair.

Discussion

[33] The approach by a court of appeal as set out in ***S v Francis***[18] is explained as follows:

> *'In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, the appellant must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting the witness's evidence – reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of the oral testimony.'*

[34] It is a fundamental legal principle that the powers of a court of appeal to interfere with the finding of a trial court is limited. This a crucial starting point in deciding whether the court *a quo* erred by not applying caution to the evidence of the single state witness who was presumably under the influence of a gang leader, as young, impressionable and testified about the incident approximately 8 years after the incident. It is also generally accepted that courts of appeal are hesitant to interfere with the credibility findings of a trial court as enunciated in ***S v Horn*** [19]**:**

[18] 1991 (1) SACR 198 (A) 198, - 199g.
[19] 2020 (2) SACR 280 (ECG) at para 75.

'In this regard it is of course true that not every error made by witnesses, not every contradiction or deviation, necessarily affects the credibility of a witness. These issues must be carefully weighed, viewing the evidence as a whole, in order to decide whether the truth has been told, despite possible shortcomings.'

[35] The court *a quo,* in determining the reliability of the evidence of the single witness Zana, found corroboration in the post-mortem report in respect of the clothing that was worn by the deceased and the injury sustained by the deceased. Further corroboration was found in the testimony of the Appellants, who confirmed being at the scene the day in question and that there was an incident or altercation that happened between the two groups. Consequently, I am not persuaded that there was any misdirection.

[36] It is trite that in the absence of demonstrable and material misdirection by the trial court, its findings of facts are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong.[20] In considering whether the court *a quo* misdirected by not attaching weight to facts that came to light during cross-examination of the single witness, more particularly, by rejecting the First Appellant's version on the throwing of stones and that too much weight was attached to the differing versions of the Appellants, I can find no misdirection.

[37] It is not sufficient to raise a reasonable doubt about the correctness of the trial court's acceptance of the evidence of a witness. Therefore, insofar as the identity of the Appellants are concerned, it is unrefuted that Zana knew both of the

[20] *S v Hadebe* 1997 (2) SACR 641 (SCA) 645e – f.

Appellants for about 11 years by the nicknames "Eier" and "Kaffertjie" respectively. They stayed in a block of flats adjacent to where he resided. The court *a quo* went further and considered the probabilities and the improbabilities of the evidence and found that Zana was able to observe the incident without any hindrances and found the evidence insofar as it pertained to the identification of the Appellants to be reliable. Consequently, in keeping with the settled approach, I am not persuaded that there is a misdirection of the court *a quo's* findings in this regard.

[38] In relation to the contention that the Magistrate erred in his factual findings it is trite that the Appellant, bears the onus to convince the court on adequate grounds why the trial court was wrong. It is further accepted in our law, that a court of appeal will not lightly interfere with a trial court's factual findings unless findings were clearly wrong. Therefore, in the absence of any misdirection and in keeping with ***Francis*** *(supra)* the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. I am not persuaded that that the Appellant discharged the onus to convince this court why the impugned factual findings of the court *a quo* is wrong.

[39] A further crucial consideration turns on is whether the court *a quo* correctly applied the doctrine of common purpose upon which the state placed reliance to secure the conviction in respect of the First Appellant as it was the Second Appellant who inflicted the fatal wound. In this regard, the court *a quo* remarked that *"both accused (sic) were made aware that the state will rely on the principle of common purpose…Accused 2's conduct conforms with the requirements as*

stipulated in S v Mbanyaru[21]" In this matter Moosa J restated the trite law pertaining to the doctrine of common purpose:

> *'It is settled law that, in the absence prior agreement, an accused charged with murder based on common purpose and whose actions are not causally related to the death of the victim, can only be convicted if certain prerequisites are met. They are firstly that, he must have been present at the scene of the crime; secondly, that he must have been aware of the assault; thirdly, he must have intended to make common cause with the person or persons perpetrating the assault; fourthly, that he must have manifested his sharing of the common purpose by himself performing some act of association with the conduct of the perpetrator or perpetrators and lastly, he must have had the requisite intention i.e the mens rea (s v Mgedezi & Others 1989 (1) SA 687(A) at 705I – 706B.) The court can only convict an accused for murder if he had formed the common purpose before the fatal blow was delivered. (S v Motaung and Others [1990] ZASCA 75; 1990 (4) SA 485 (A) at 520G-521A.) ...'*[22]

[40] It was argued that the state did not prove active association with the stabbing as it was only the Second Appellant who held the deceased with his left hand and stabbed with his right hand. Zana's uncontroverted evidence was "*Ek het gesien vir hulle twee het my tjommie*". Zana went further to explain that the First Appellant was on the left-hand side of the deceased and the Second Appellant was in front. Zana further explicated that the deceased was trying to free himself when the Second Appellant grabbed him by the collar of his jacket.[23]

[41] It is apparent that Zana had a clear view of the incident and was able to observe the deceased and the Appellants from where he was standing. In fact, the deceased screamed for help, drawing the attention of Zana. This evidence was not

[21] 2009 (1) SACR 631 (C).
[22] At par 14.
[23] Record, page 34.

challenged, which in my view is critical and in fact cements the active association of the Appellant. The legal representative for the First Appellant pertinently asked Zana what accused 2 was doing, to which Zana responded:

> *"The time they was pushing then and he was doing nothing. By the time they was pushing him. Na hy hom kla gesteek het wat hy hom gestoot het toe hardloop hulle twee weer die rigting waar hulle gekom het (sic)"*[24]

[42] Notwithstanding the First Appellant's contention that there is nothing which links the First Appellant to have formed the intention the evidence is indicative of the following:

(a) The First Appellant was present at the scene;
(b) The Appellants manifested their sharing of a common purpose by participating, aiding and capturing the deceased;
(c) The First Appellant should have reasonably foreseen the possibility that the concomitant harm as per his own threat of utterance would or could have been manifested;
(d) The fact that the First Appellant gave chase and was in close proximity to the Second Appellant when the deceased was stabbed is sufficient to conclude that the First Appellant intended to make common cause with the Second Appellant who ultimately inflicted the fatal wound;
(e) The First Appellant performed an act of association as they chased after the deceased and his friend; after uttering threating words and
(f) The First Appellant left the scene with his Second Appellant and at no stage disassociated himself with the actions of the Second Appellant.

[43] I am therefore satisfied that the requirements of common purpose were met and that the *court a quo* correctly found that the First Appellant acted in common purpose with the Second Appellant. The inescapable conclusion reached by the court

[24] Record, page 73.

a quo, based on these facts is that the First Appellant reconciled himself with the actions of the Second Appellant.

Conclusion

[44] Zana's evidence was consistent, despite being extensively cross-examined by both Appellants' legal representatives. I am satisfied that there were no material contradictions in Zana's evidence. In my view, Zana's version is more logical and is consistent with the probabilities which is that:

(a) The Appellants walked in the direction to where he, the deceased and Dwayne Fix was standing;

(b) Zana overheard how "Kaffertjie", the First Appellant, gave the instruction to "Eiers", the Second Appellant, with words to the effect "...dat ons een van die p... en steek hulle";

(c) Zana and the deceased ran away, while both Appellants gave chase;

(d) The Second Appellant grabbed the deceased by his collar, took out a knife and then stabbed the deceased;

(e) Zana had a clear view of what had happened as he turned around to try and come to the aid of the deceased.

(f) The First Appellant not only signalled the command to pursue the deceased and his companions, but reconciled himself to the consequence of the actions of his co-accused.

[45] I am therefore satisfied that the court *a quo* considered the matter in its entirety and had due regard to the applicable legal principles pertaining to the evidence of a single witness as set out in Section 208 of the CPA and common

purpose in the evaluation of the evidence. Moreover, I am not persuaded that the purported lack of proper legal representation would have affected the overall findings of the court *a quo* and neither am I persuaded that the Second Appellant's assertion that he did not receive a fair trial is in any way supported for the reasons stated earlier in this judgment.

[46] Consequently, on a conspectus of the evidence I am satisfied that the court *a quo* safely rejected the Appellants versions and correctly found the evidence of Zana to be clear and satisfactory in material respects.

***Ad* Sentence**

[47] The Appellants were sentenced to Life Imprisonment in terms of Section 51(1) of the CLAA. It is trite that an appeal court will not lightly interfere with the trial court's exercise of its discretion in relation to sentence, as was held in ***S v Romer***[25] where Petse AJA (as he then was), stated:

> *'It has been held in a long line of cases that the imposition of sentence is pre-eminently within the discretion of the trial court. The appellate court will be entitled to interfere with the sentence imposes by the trial court only if one or more of the recognised grounds justify interference on appeal has been shown to exist. Only then will the appellate court be justified in interfering. These grounds are that the sentence is*
>
> *(a) Disturbingly inappropriate;*
> *(b) So totally out of proportion to the magnitude of the offence;*
> *(c) Sufficiently disparate;*
> *(d) Vitiated by misdirections showing that the trial court exercised its discretion unreasonably; and*
> *(e) Is otherwise such that no reasonable court would have imposed it.'*

[25] 2011 (2) SACR 153 (SCA) at para 22; See also *S v Hewitt* 2017 (1) SACR 309 (SCA); and *S v Livanje* 2020 (2) SACR 451 (SCA).

[48] The powers of the court of appeal are relatively limited to those instances where the sentence is vitiated by irregularity or misdirection or where there is a striking disparity between the sentence passed and that which this court have imposed.[26] In ***S v Pillay***[27], the court set out the correct approach to an appeal against sentence:

> *"As the essential enquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly or judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree or seriousness that it shows directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence."*

Submissions on behalf of the First Appellant

[49] It was submitted that circumstances exist to warrant a deviation from the prescribed sentence of life imprisonment. These circumstances included that the Appellant was 21 years old at the time of the commission of the offence. The Appellant dropped out of school in grade 11. He was then enrolled at a college in Bellville where he studied IT for almost a year. At the time of his incarceration he was single. He was employed before his arrest as a machine operator and general worker at an Engineering Company in Brackenfell, where he earned approximately R3600 per month. He supported his family financially.

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[26] *State v Steyn* 2014 JDR 0596 (SCA) para 11 where Mhlantla JA stated:
'The imposition of sentence is pre-eminently within the discretion of the trial court. The court of appeal will be entitled to interfere with the sentence imposed by the trial court if the sentence is disturbingly inappropriate or so totally out of proportion to the magnitude of the offence, sufficiently disparate, vitiated by misdirection showing that the trial court exercised its discretion unreasonably or is otherwise such that no reasonable court would have imposed it.'

[27] [1977] 4 All SA 713 (A) 717; 1977 (4) SA 531 (A) 535E-G; See also *S v Van de Venter* 2011 (1) SACR 238 (SCA) at 243c – e; *S v Malgas* 2001(1) SACR 469 (SCA) at para 12.

[50] The Appellant furthermore submitted that the sentence imposes is harsh and excessive for a first offender. Additionally, it was contended that the youthfulness of the Appellant is a crucial consideration.

Principal Submissions on behalf of the Second Appellant

[51] It was contended that the sentence is disturbingly inappropriate in that the court *a quo* misdirected by finding that there were no substantial and compelling circumstances to deviate from the prescribed sentence.

[52] At the time of sentencing the Appellant was 27 years old and was recently married. He was self-employed, selling washing powder from home. This was confirmed by way of the *viva voce* evidence of his wife, Ms Gerswindt. She indicated that the Second Appellant was very hardworking and earned an income of R2000 per month. He is a first offender. He was 19 years old at the time of the incident. The Appellant moved out of the area. The Appellant has not committed any further offences. It came to light that the deceased was in fact a cousin of the Appellant. It was placed on record that the Second Appellant is remorseful for his actions.

[53] The Second Appellant's substantial and compelling circumstances placed before the court *a quo* included:

(a) His youthfulness at the time of the commission of the offence;

(b) That he was not involved in any other offences after the incident;

(c) That for a period of approximately 7 years, he regularly attended court;

Respondent's principal submissions

[54] The Respondent on the other hand, in the Heads of Argument submitted that the sentence imposed by the court *a quo* does not induce a sense of shock if regard is to be had to the seriousness of the offence and prevalence in our communities. The Respondent further contended that the matter *in casu* is particularly serious because it appeared to have been gang related. In addition, the Respondent highlighted that the deceased in this matter was a fifteen-year-old child that was mercilessly killed by the Appellants without any provocation.

[55] During argument, however, Counsel for the Respondent conceded that the sentence of life imprisonment was unduly harsh.

Discussion

[56] The intention of the CLAA is clear that in instances where murder takes place in the execution or furtherance of a common purpose, then life imprisonment is applicable. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and would be disregarded only if the recorded evidence showed them to be clearly wrong.

[57] This court on appeal cannot simply *juxtapose* its views and opinions on sentence and then conclude that the sentence of the court *a quo* is inappropriate if it differs from what this court would have done. It is only when the trial court has exercised its discretion in an improper manner or misdirected itself that interference will be warranted.[28]

[28] *S v Rabie* 1975 (4) SA 855 (A); See also *S v Pieterse* 1987 (3) SA 717 (A).

[58] It is evident from the judgment of the court *a quo* on sentence, that the court had the benefit of a Probation Officer's Reports in respect of both Appellants, as well as a Victim Impact Statement attested to by the mother of the deceased. It is furthermore manifest that the court *a quo* had regard to the aims of punishment, the Appellants personal circumstances, seriousness of the offence and the interest of society.[29] The court *a quo* had regard that the deceased was a 15-year-old minor as the time of the incident and was a scholar.

[59] It is further manifest from the judgment of the court *a quo* that this matter took 8 years to get to trial. There were at least 13 previous legal representatives who had all at some stage withdrawn. It was acknowledged that the delays in bringing the matter to finality was as a consequence of what the Magistrate referred to as being systemic in nature. Such delays are not in keeping with an accused person's constitutionally entrenched right to a speedy trial as was recognised by the court *a quo*.

[60] It is clear that notwithstanding the court *a quo's* reference to the inordinate delays and his disapproval thereof, same was not effectively considered. Emphasis was placed on the seriousness of the offence and that the attack on the deceased was unprovoked involving gangsterism. Although the court *a quo* had regard to the personal circumstances of the Appellants, it is apparent that their relative youthfulness was not considered as being substantial and compelling.

[29] See *S v Zinn* 1969 (2) SA 537 (A) and *Fredericks v S* [208/11] [2011] ZASCA 177 (29 September 2011).

[61] The incident occurred in 2014. At the time of the incident, the Appellants, were 19 years old and 21 years old respectively. It is so, that the deceased is in fact the Second Appellant's cousin. It was placed on record that the mother and grandmother of the Second Appellant had discussions with the parents of the deceased and apologised for what had happened. The Second Appellant did not have an opportunity to do so but expressed that he was desirous to apologise. Both Appellants were on bail but have been in custody initially since conviction on 29 March 2022.

[62] Ponan JA in ***Van de Venter v S***[30] deals with the circumstances entitling a court of appeal to interfere in a sentence imposed by a trial court and recapitulated the considerations as stated in ***S v Malgas***[31], where Marais JA held:

> *"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 the 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…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".'*

[63] It must however, be borne in mind, that even in the circumstances set out in ***Malgas***, courts are not free to substitute the sentence which it thinks appropriate, merely because it does not accord with the sentence imposed by the trial court or

[30] (342/10) [2010] ZASCA 146; 2011 (1) SACR 238 (SCA) (29 November 2010) para 14.
[31] 2001 (1) SACR 469 (SCA) para 12.

because it prefers it to that sentence.[32] This view supports what was stated in ***S v Barb***er[33], where Hefer J remarked as follows:

> *'It is well known that the powers of this Court are largely limited where the matter comes before it on appeal and not as a substantive application. This court has to be persuaded that the magistrate exercised the discretion which he has wrongly. Accordingly, although this Court may have a different view, it should not substitute its own view for that of the magistrate because that would be an unfair interference with the magistrate's exercise of his discretion. I think it should be stressed that, no matter what this Court's own views are, the real question is whether it can be said that the magistrate who had the discretion to grant bail exercised that discretion wrongly...'*[34] (my emphasis)

[64] The approach set out in ***Romer*** *(supra)* is predicated on what was stated in ***Malgas***[35] that:

> *'If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it would be entitled to impose a lesser sentence.'*

Conclusion

[65] It is my view that the sentence imposed *in casu* is unjust in that it is disproportionate to the crime, the criminal and the needs of society for the following reasons:

(a) The crime of murder is serious as it involves taking the life of a person. The right to life is constitutionally entrenched and for good reason, as human life is regarded as sacrosanct. However, the circumstances of this case, require the court to

[32] Ibid, page 478, para 12.
[33] 1979 (4) SA 218 (D) at 220E – H.
[34] See also *Killian v S* [2021] ZAWCHC 100 (24 May 2021) at para 7.
[35] Ibid, page 482*e – f*.

scrutinize the conspectus of the evidence through a different lens. In this regard, it is evident that there was no direct intention to kill the deceased. In addition, the degree of severity, namely one fatal stab wound, is a crucial consideration in relation to the extent of the brutality and magnitude of this incident.

(b) The Appellants personal circumstances viewed cumulatively, more specifically that were both relatively young at the time of the commission of the offence is to be regarded as substantial and compelling;

(c) Both Appellants are first offenders and despite the extraordinarily long time to bring this matter to finality, neither of them were arrested for any other offences during this time, or got involved in any other criminal activities, which is indictive that there is a good prospect for rehabilitation, when regard is had to the principle aims of punishment.

[66] I am of the view the trial court exercised its discretion unreasonably and that the imposition of life imprisonment is unjust, shockingly harsh and disturbingly inappropriate and justifies a departure from the prescribed sentence of life imprisonment for the reasons already stated. Whilst is it so that the hands of time cannot be turned back, which was a desire expressed by the Second Appellant, I am of the view, that the interest of justice demands that considerations unique to this matter warrant interference with the sentence imposed by the court *a quo*.

[67] In the circumstances I would dismiss the appeal on conviction and uphold the appeal on sentence. The sentence imposed by the court *a quo* is accordingly set aside and replaced with the following sentence:

Accused 1 – Twelve (12) years imprisonment

Accused 2 – Twelve (12) years imprisonment

The sentence in respect of Accuseds 1 and Accused 2, respectively, is to run retrospectively from the date that sentence was imposed, namely 19 May 2022.

ANDREWS, AJ

I agree and it is so ordered.

HENNEY, J

APPEARANCES

For the First Appellant:	Advocate A Paries
Instructed by:	R Davies Attorneys
For the Second Appellant:	Advocate G S Barclay-Beuthin
Instructed by:	Boucher Attorneys
For the Respondent:	Advocate C Monis
Instructed by:	Office of the DPP, Cape Town

Dates of Hearing: 09 February 2024; 15 March 2024; 17 May 2024 and 26 July 2024

Date of Judgment: 05 August 2024

NB: The judgment is delivered by electronic submission to the parties and their legal representatives.