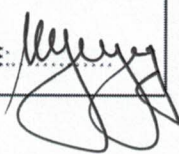


REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE**

CASE NUMBER: AA05/2019

(1)	<u>REPORTABLE: YES/NO</u>
(2)	<u>OF INTEREST TO THE JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
DATE: 06/05/20 SIGNATURE: 	

In the matter between:

MATOME LAZARUS MALAKALAKA

APPELLANT

AND

THE STATE

RESPONDENT

JUDGEMENT

KGANYAGO J

- [1] The appellant and his 3 co-accused appeared before AML Phatudi J on two counts of kidnapping, one count of murder read with the provisions of section 51 (1) of the

Criminal Law Amendment Act¹ (the CLAA), and one count of assault with intent to do grievous bodily harm (GBH). The State relied on the doctrine of common purpose.

- [2] The appellant and two of his co-accused were found guilty on all the counts, whilst the fourth accused was found not guilty and discharged on all the counts. On each count of kidnapping, the appellant was sentenced to 10 years imprisonment of which half was suspended for a period of 5 years on certain conditions; on the count of murder he was sentenced to life imprisonment; and on the count of assault GBH he was sentenced to 10 years imprisonment of which half was suspended for a period of 5 years on certain conditions.
- [3] The background facts are as follows. On the night of the 31st July 2015, the appellant and his co-accused apprehended Nkhola Makhubela and Albert Maletle (deceased) and took them to the appellant's homestead where they assaulted them. Mr Makhubela and the deceased were suspected of having stolen the appellant's bag. Mr Makhubela and the deceased were released from the appellant's homestead after the assault. Later that night the deceased was found lying on the street not far from the appellant's homestead after he had collapsed. He was taken to hospital where he died on arrival.
- [4] Mr Makhubela who was also the complainant in the assault GBH charge, testified for the State and stated that on the 31st July 2015 whilst he was on his way to the laundromat, he met the appellant driving a motor vehicle in the company of another accused. The appellant stopped his vehicle and asked him to board it. After he had boarded the vehicle, the appellant handcuffed him. From there they went to the deceased homestead. On arrival at the deceased homestead, the appellant alighted from the vehicle and went to fetch the deceased. The deceased was brought into the vehicle and he and the deceased were jointly handcuffed. They then drove to the appellant's homestead.
- [5] On arrival at the appellant homestead, the appellant and his co-accused started assaulting him and the deceased with a sjambok and a broomstick until it broke

¹ Act 105 of 1977

into pieces. They were assaulted all over their bodies. They were exchanging amongst themselves in assaulting them. They were assaulted over a long period of time. When they were being assaulted, they were accused of having stolen the appellant's bag. At some stage one of the accused came with bucket of water and poured them with it. One of the accused was assaulting them with bricks on their feet and toes. As they were being assaulted the deceased said the bag was at Ghiba's homestead. They were also assaulted with an object which looked like a pick handle.

- [6] The appellant and the other accused left to go and fetch Ghiba. When Ghiba arrived at the appellant's homestead, the deceased told her that he just mentioned her name as he was in pains as a result of the assault. Ghiba was then taken back to her homestead. After some time, the appellant released Mr Makhubela and the deceased from his homestead. By then the deceased was struggling to stand up. When he tried to pick up the deceased he was just falling. The deceased would take a few steps and fall. He left the deceased at the appellant's gate and went home. As he was walking, when he looked back he saw the appellant falling next to the appellant's gate.
- [7] Maria Ngobeni testified for the State. She testified that she is also known as Ghiba which is her nickname. She stated that on the 31st July 2015 around 22h00 she was at her home when the appellant arrived. On arrival the appellant told her that the deceased had told him that he had left a bag at her homestead. She told the appellant that she knew nothing about the bag. The appellant told her that the deceased was at the police station. She left with the appellant with the intention of going to see the deceased at the police station. She was surprised when they ended up at the appellant's homestead and not going to the police station.
- [8] On entering the appellant's homestead, she found two people sitting down behind the house with their heads covered with plastic bags. After they were uncovered, the deceased told her that he only mentioned her name so that she can come to his rescue, and that he never left any bag at her homestead. After that the appellant wanted to pepper spray the deceased and she reprimanded him. The appellant then fetched a bucket of water and poured it onto the deceased. There were other

two people who were also assaulting the deceased and another person who was unknown to her.

- [9] She stated that she is having a problem with her eye sight. Even though she is having a problem with her eye sight, she could see that these people were using heavy objects to assault the deceased and this other person. These objects were making sound when the two were assaulted. She could not see where on their bodies they were being assaulted. The two looked to be in pains and seriously injured. At some stage the deceased was called by one of the assailant to stand up, but was struggling to do so. The deceased tried to skip and hop but was unable to do so. From there she was transported back to her homestead.
- [10] Archie Mabotja, the paramedic who attended the deceased, testified for the State. He testified that on the 31st July 2015 around 2h00 he was called to the scene. On arrival at the scene he found a young man lying on the ground who was wet all over the body. He was not responding to any command. He loaded him into the ambulance and transported him to the nearest health facility. When he examined him he found that he was having a head injury, and struggling to breath. There was also some foam which was coming out of his mouth. He was very cold. When he examined the wound on his head it looked like a stab wound. He passed away on arrival at the hospital.
- [11] Constable Hanetjie Bezeidenhout testified for the State. He testified that he had reconstructed the scene where the deceased was found lying. That where the deceased was found lying was 114 metres from the appellant's homestead.
- [12] The appellant also testified. He testified that on the 31st July 2015 he took his dirty clothes to the laundromat. After dropping the dirty clothes, he went back to work and continued working as usual. Around 13h00 when he opened the boot of his car he realised that his bag which was in the boot and was containing R15 000-00 was missing. He went back to the laundromat as he suspected that Mr Makhubela might have taken it. He and others started looking for Mr Makhubela.

- [13] They found Mr Makhubela on the street and requested him to board their vehicle. Mr Makhubela told them that he is the one who took the bag from the boot of the car and handed it over to the deceased. Mr Makhubela took them to the deceased homestead. They found the deceased and requested him to board their vehicle. When they told the deceased that they were looking for a bag, the deceased started hitting Mr Makhubela with fists. He then handcuffed them together so that they may not injure each other or jump out of the vehicle. He then drove to his homestead.
- [14] On arrival at his homestead, he asked them about the whereabouts of the bag. Then one of the people who was accompanying the appellant said it seems as if the deceased and his companion were heavily under the influence of drugs and that they needed to be poured with water for them to be a little bit sober. This person poured them with water. According to the appellant, no one was assaulted and he would never have allowed anyone to assault them in his homestead.
- [15] After being poured with water the two started to talk. That is when the deceased told them that he had left the bag at Ghiba's homestead. They went to fetch Ghiba at her homestead. On arrival at his homestead with Ghiba, she disputed that the deceased had left a bag at her homestead. After that they took Ghiba back to her homestead.
- [16] After Ghiba has left, they told the two that since they were refusing to give them the bag, they were now taking them to the police station. The two pleaded with them to give them two days and that they will talk to Ghiba and will bring back the bag, and they released them. According to the appellant, the two seemed to fine when they left his homestead. When they left his homestead they took the direction of the shop and he was walking behind them.
- [17] The appellant is appealing against both conviction and sentence on count 3 only, which is the murder charge. The appeal on conviction is with the leave of this court, whilst on sentence is with the leave of the Supreme Court of Appeal.
- [18] On conviction, the appellant's grounds of appeal are that the learned Judge erred in finding that the appellant and his co-accused had the required intention to cause

the death of the deceased; the trial Judge erred and misdirected himself in finding that there was no evidence that the deceased could have been fatally assaulted elsewhere; and that the trial Judge erred and misdirected himself in drawing the inference, as the only reasonable inference that the appellant caused the injuries leading to the death of the deceased. He further submitted that there is no evidence that the deceased was stabbed with a knife.

- [19] With regard to the sentence, the appellant first ground of appeal is that the trial Judge erred and misdirected himself in finding that the appellant acted in common purpose with the other accused to murder the deceased, and that the provisions of section 51(1) of the CLAA was applicable. The second ground is that the trial Judge erred and misdirected himself in failing to find that the appellant was convicted of murder on the basis of *dolus eventualis* rather than *dolus directus*, and that this form of intention would constitute substantial and compelling circumstances to impose a lesser sentence than life imprisonment.
- [20] In this court counsel for the appellant argued that according to the State case, there were no open wounds when the deceased left the premises of the appellant, but yet he had a stab wound when he was found by the paramedic personnel. The appellant's counsel correctly conceded that the deceased and his friend were assaulted by the appellant and his co-accused acting in common purpose, but submitted that their intention for assaulting the deceased was to persuade him to point out the stolen goods. He further submitted that the appellant should have been found guilty of assault with intent to do grievous bodily harm, alternatively of murder in terms of *dolus eventualis*.
- [21] The State submitted that the trial Judge has correctly convicted the appellant, but conceded that jurisdictional facts to sentence the appellant in terms of section 51(1) of the CLAA have not been established.
- [22] The appellant and his co-accused were charged with murder read with the provisions of section 51(1) of the CLAA, and further that they have acted in common purpose in killing the deceased. The sentence which ordinarily should be imposed was life imprisonment unless the court find substantial and compelling

circumstances to exist which will justify a deviation from the prescribed minimum sentences.

[23] The facts of this case are mostly common cause since the appellant does not dispute that he and his co-accused have apprehended the deceased and his friend, took them to his homestead where they assaulted them in order to persuade them to point out the whereabouts of the stolen bag. The appellant denies that the injuries which the deceased had sustained during the assault led to his death. According to the appellant, the deceased could have been assaulted somewhere after the first assault, and that the second assault could have led to his death since the deceased was found to have had a stab wound on his head, which he did not have when he left his homestead.

[24] What the appeal court must determine is whether the trial court was correct in finding that the appellant and his co-accused had the required intention to cause the death of the deceased, or whether there was a *novus actus interveniens* after the assault by the appellant and his co-accused. In case it is found that the appellant and his co-accused are liable for the death of the deceased, the appeal court must determine whether there are jurisdictional facts which calls for a minimum sentence as prescribed under section 51(1) of the CLAA have been established.

[25] The appellant does not dispute he had acted in common purpose with his co-accused when assaulting the deceased. What he disputes is that the death of the deceased was as a result of their assault. The appellant's contention is that the deceased might have been assaulted somewhere after they have assaulted him, and that is what might have caused his death. In ***S v Lungile***² Olivier JA said:

"In our law, a *novus actus interveniens* is an event which is, in the context of the act that was committed, abnormal, and completely independent of the acts of the accused."

[26] According to the appellant, when the deceased left his homestead he was walking properly and did not have any head injuries. The evidence that the deceased had

² 1999 (2) SACR 597(A) at para 30

what looked like a stab wound on his head was testified by Mr Mabotja the paramedic. He did not say that the deceased had a stab wound, but that it looked like a stab wound, which was his observation. The pathologist who conducted the post mortem examination had recorded his chief post mortem findings as (i) scalp laceration; (ii) cranio-cervical dislocation and; (iii) ponto medullary rent. He concluded that the cause of death was blunt force trauma to head. There is nowhere he recorded a stab wound. The appellant in his section 220 admissions has admitted that the pathologist has noted his findings and facts correctly, and that the cause of the death was blunt force trauma to the head. Mr Mabotja had just made an observation and not an examination. Therefore, his observation will remain his observation and not a fact.

- [27] Mr Makhubela testified that he and the deceased were assaulted over a long period of time with a sjambok, broom stick which got shattered into pieces during the assault, pick handle, bricks and, at some stage they were poured with cold water. After they were released from the appellant's homestead, the deceased tried to stand up, but was unable to do so. He tried to pick up the deceased so that he could stand up, but just fell down. He (Makhubela) walked out of the yard. As he was walking he looked back and saw the deceased trying to stand up, taking a few steps but fell next to the appellant's gate. He also testified that they were assaulted all over their bodies.
- [28] Ms Ngobeni testified that when she arrived at the appellant's homestead, she found that the deceased and Mr Makhubela were covered with plastic bags on their heads. They were being assaulted with heavy objects which made sound when they were being assaulted, and they were also poured with water. She could see that they were really in pains and seriously injured. When the deceased was calling her to come to them, she could see that he was struggling to stand up. The deceased tried to skip and hop, but was unable to do so.
- [29] The evidence of Ms Ngobeni is that of an eye witness. It corroborates the evidence of Mr Makhubela. According to the evidence of Mr Makhubela and Ms Ngobeni the deceased was injured to the extent that he was struggling to stand up and walk. It was not surprising that he was found lying 114 meters from the appellant's

homestead. That confirms the version of Mr Makhubela that when he left the appellant's homestead he saw the deceased taking a few steps and falling. His body could only carry him up to 114 meters from the appellant's homestead. Mr Makhubela cannot be criticized for having not noticed any head injuries on the deceased. The incident occurred at night and it could not have been expected of him to examine the deceased before he left him. He testified that they were assaulted all over their bodies, which will not exclude their heads. At some stage plastic bags were placed over their heads and would therefore not have seen where the deceased was actually assaulted. The appellant's defence of *novus actus intervenes* was therefore correctly rejected by the trial court.

- [30] Taking into consideration the prolonged assault on the deceased and Mr Makhubela, the assortment of objects that were used to assault them, that the deceased was struggling to walk when he left the appellant's homestead, and that he was found lying 114 meters from the appellant's homestead, the only reasonable inference to be drawn is that the deceased died as a result of the injuries he sustained during the assault by the appellant and his co-accused. The appellant and his co-accused are therefore responsible for the deceased death.
- [31] What must be determined now is whether it was murder in the form of *dolus directus* or *dolus eventualis*. The trial court has found that it was murder in terms of *dolus eventualis*. Murder in the form of *dolus eventualis* consists in (i) foresight of the possibility of death occurring, and (ii) reconciliation with that possibility. (See **Director of Public Prosecutions Gauteng v Pistorius³ and S v Nkosi⁴**)
- [32] The intention of the appellant and his co-accused when they assaulted the deceased and Mr Mkhubela was to extract information about the bag that was stolen from the appellant. With the assortment of the objects that they used to assault the deceased and Mr Makhubela, that the assault was for a prolonged period of time, and that the deceased was seriously injured and struggled to stand up even at the time he was being assaulted, in my view, the appellant and his co-

³ [2015] ZASCA 204 (3December 2015)

⁴ 2016 (1) SACR 301 (SCA)

accused have foreseen the possibility of death occurring, and despite that, reconciled themselves with that foreseen possibility. The trial court has therefore correctly convicted them of murder in the form of *dolus eventualis*.

- [33] With regard to sentence, the charge which the appellant was charged with, was classified as murder falling under section 51(1) Part I of Schedule 2 of the CLAA. The provisions of Part I of Schedule 2 prescribe the sentence of life imprisonment when murder is committed when (a) it was planned; (b) the victim was (i) a law enforcement officer performing his or her functions as such, whether on duty or not; (ii) or a person who has given or was likely to give material evidence which to any offence referred to in terms Schedule 1 of Criminal Procedure Act, 1977 (Act 51 of 1977) at criminal proceedings in any court; (c) the death of the deceased was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences: (i) rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively; or (ii) robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act, 1977; (d) the offence was committed by a person, group of person or syndicate acting in the execution or furtherance of common purpose or conspiracy; (e) the victim was killed in order to unlawfully remove any body part of the victim; or (f) the death of the victim resulted from, or is directly related to, any offence contemplated in section 1 (a) to (e) of the Witchcraft Suppression Act, 1957 (Act 3 of 1957).
- [34] Ordinarily murder in terms of *dolus eventualis* fall within the ambit of section 51 (2) of the CLAA where the minimum sentence to be imposed is 15 years imprisonment. In this case murder was committed in the furtherance of a common purpose. The question which must be determined is whether the sentence to be imposed is life imprisonment or minimum of 15 years imprisonment. In my view, the mere fact that the accused have been found to have committed murder in the furtherance of a common purpose, but in the form of *dolus eventualis*, will not automatically invoke the sentence of life imprisonment. By convicting them on basis of *dolus eventualis* is an indication that no jurisdictional factors have been established to convict them on the basis of section 51(1) of the CLAA. Section 51(1) of the CLAA is ordinarily applicable where there is direct intention.

[35] There is nothing preventing the trial court from sentencing the appellant beyond the prescribed minimum sentence of 15 years which may include life imprisonment. However, the trial court should provide the basis for sentencing the appellant beyond 15 years. The reasons for increasing the minimum sentence of 15 years must be clear and not leave one to speculate.

[36] In **S v Msimango**⁵ Bosielo JA said:

"It remains a salutary principle of our law that presiding officers should give reasons for every decision which they make, particularly if it has adverse consequences for the accused. This principle was enunciated as follows by this court in *S v Mathebula and Another* 2012 (1) SACR 374 (SCA); [2011] ZASCA 165) at para 10;

*"A regional magistrate has discretion to impose a sentence exceeding the minimum sentence prescribed by the Act with an additional five years as provided for in the provisions of section 51(2). Such discretion must however, be exercised on judicially and reasonable grounds. Where a regional magistrate intends to depart from the prescribed minimum sentence, it is proper and fair that the regional magistrate give reasons for such departure. Absent any such reasons, the conclusion becomes inescapable that such a decision is arbitrary or that the sentencing discretion was not exercised judicially. It is not proper for an appeal court to have to speculate about reasons which motivated the regional magistrate to impose a sentence prescribed. Such an approach cannot be countenanced as it is subversive to the principles of openness, transparency, accountability and fairness. It is trite that judicial officers can only account for their decisions in court through their judgment. It is through their judgments which contain reasons that judicial officers speaks to the public. Their reasons are therefore the substance of the judicial actions. Dealing with a similar matter this court enunciated the principle as follows in *S v Maake* 2011(1) SACR 263 (SCA) at para 19:*

"It is not a salutary practice, but obligatory for judicial officers to provide reasons to substantiate conclusions" Thus the court went on to state the following in para 20:

"When a matter is taken on appeal, a court of appeal has a similar interest in knowing why a judicial officer who heard the matter made the order which he did. Broader considerations came into play. It is the interest of the open and proper administration of justice that the court state publicly the reasons for their decisions. A statement of reasons give some assurance that the court gave due consideration to the matter and

⁵ 2018 (1) SACR 276 (SCA) at para 25

did not act arbitrarily. This is important in the maintenance of public confidence in the administration of justice"

[37] The trial court has correctly balanced all the factors that it considered to constitute substantial and compelling factors against all the factors that it considered to be aggravating factors and concluded that there are no substantial and compelling circumstances justifying a deviation from the prescribed minimum sentences. However, the trial court failed to identify and record any facts or circumstances which justify a sentence of imprisonment in excess of 15 years since jurisdictional facts to impose a sentence within the ambit of section 51(1) have not been established. The trial court's failure to identify and record facts or circumstances which justify a sentence in excess of 15 years imprisonment entitles the appeal court to interfere and consider sentencing afresh. (See **Chonco v The State**⁶). Taking into consideration the gravity of the offence, the circumstances under which the offence was committed, the appellant's personal circumstances, that the appellant was a peace officer who was supposed to maintain law and order, and that the appellant did not show any remorse, this court does not find any factors which could be considered as constituting substantial and compelling circumstances justifying a deviation from the prescribed minimum sentence of 15 years imprisonment.

[38] In the result I make the following order

38.1 The appeal against conviction on count 3 is dismissed.

38.2 The appeal against sentence on count 3 is upheld.

38.3 The sentence of life imprisonment imposed by the trial court on count 3 is set aside and substituted with the following:

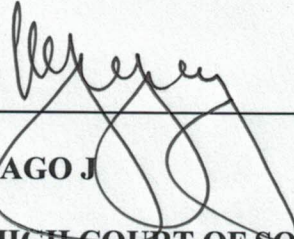
"The accused is sentenced to 15 years imprisonment."

38.4 Count 1, 2 and 4 to run concurrently with count 3.

38.5 The effective period of imprisonment will be 15 years.

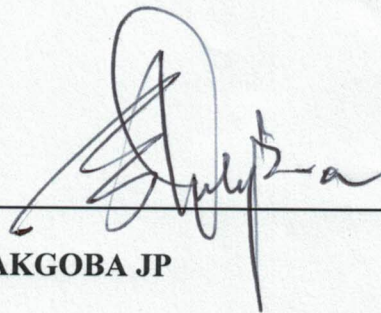
⁶ [2019] ZASCA 75 (30 May 2019) at para 12

38.6 The sentence is antedated to the 23rd June 2016.



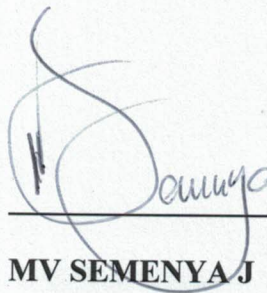
MF. KGANYAGO J
JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I agree



EM MAKGOBA JP
JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

I agree



MV SEMENYA J
JUDGE OF HIGH COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE

APPEARANCE:

COUNSEL FOR THE APPLICANT: ADVOCATE PJC KRIEL

INSTRUCTED BY : BDK ATTORNEYS

E**COUNSEL FOR RESPONDENTS: ADVOCATE J KOTZE****INSTRUCTED BY****: DIRECTOR OF PUBLIC****PROSECUTIONS, POLOKWANE****DATE OF HEARING****: 13 MARCH 2020****DATE OF JUDGEMENT****: 06/05/2020**