IN THE REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 17/02/2020

APPEAL NO: A283/17

CASE NO: CC 104/2013

MESHACK MALELE	**1ST APPELLANT**
THAMSANQA NGEMA	**2ND APPELLANT**
PERCY JONATHAN MNISI	**3RDAPPELLANT**
BONGAMUSI MDLULI	**4TH APPELLANT**
SIPHO STDWELL NGOBENI	**5TH APPELLANT**
LUNGISA GWABABA	**6TH APPELLANT**
BONGANE KOLISI	**7TH APPELLANT**
LINDA SOLOLO	**8TH PPELLANT**

and

THE STATE	**RESPONDENT**

JUDGMENT

KHUMALO J (MABUSE J & VAN NIEWENHUIZEN J concurring)

INTRODUCTION

[1] The Appellants, are erstwhile members of the South African Police Services (SAPS) who were stationed at the Daveyton Police Station. On 25 August 2015 they were arraigned and convicted by the above Honourable Court on a count of murder and each sentenced to a period of fifteen (15) years imprisonment. With leave granted to the Appellants on petition to the Supreme Court of Appeal, they are appealing against their conviction.

[2] The charge upon which the Appellants were convicted was as per charge sheet specified as follows: The Accused are guilty of murder read with s 51 (1)/ 51 (2) (a) of Act 105 of 1997

> "In that upon or about 26 February 2013 at or near Daveyton in the district of Benoni, the Accused did unlawfully and intentionally kill Emidia Joseph Macia, a 25 year old male person.
>
> In case of conviction the said Director of Public Prosecutions prays for sentence according to the provisions of s 51 (1)/51 (2) (a) of Act 105 of 1997."

[3] The salient facts as constituted in the summary of substantial facts in terms of s 144 (3) (a) of the Criminal Procedure Act 51 of 1977("the Act") which were to be proven by the state are that: On the afternoon of 26 February 2013, the late Emidia Joseph Macia ("the deceased"), a taxi driver was confronted by Accused no 1 and 2 (cited as 1st and 2nd Appellant) that he had parked his vehicle in a manner which obstructed the other vehicles from passing. An argument ensued during which the deceased's driver's licence and vehicle were confiscated. A crowd had in the meantime gathered to enquire as to what was going on. 1st Appellant then left in the deceased's vehicle to call for a backup of other police officers. He returned with about 7 police officers. They handcuffed the deceased to part of the interior of the police vehicle while his body remained outside. The police vehicle then drove off, dragging the body of the deceased behind it for a distance, with the other police vehicle following behind. Between the time of **dragging the deceased behind the vehicle and being booked in at the police station, the accused sustained injuries to which he eventually succumbed while in custody at Daveyton police station.** A post mortem was conducted on the body of the deceased and the cause of death of the deceased was found to be

"EXTENSIVE SOFT TISSUE INJURIES AND HYPOXIA"

[4] The state alleged that the Appellants committed to act and or acted at all relevant times with a common purpose. The mentioned Accused 1 and 2, Meshack Malele ("Malele") and Thamsanqa Ngema, (Ngema) are respectively cited as cited as 1st and 2nd Appellant and all Appellants cited in sequence to their appearance in the trial court.

[5] They all had legal representation during the trial and pleaded not guilty to the charge. They chose to remain silent and not to tender an explanation to their Plea.

[6] They made admissions in terms of s 220 of Act 51 of 1977 in relation to the deceased's identity, conduct and results of the post-mortem and the photo album on the injuries

sustained by the deceased. They furthermore admitted the following facts in relation to the evidence:

[6.1] A warning statement by the 8th Appellant.

[6.2] That 1st and 2nd Appellants were the first police officers to arrive at the scene (where the incident started) and to have a conversation with the deceased.

[6.3] 3rd to 8th Appellants arrived at the scene upon the request of assistance by the 1st Appellant. They **participated in arresting the deceased and in an attempt to put him in the back of the police bakkie whilst they were at the scene where the incident started.**

[6.4] The 6th Appellant drove the police bakkie to which the deceased was attached at the back. That the deceased was ultimately detained at Daveyton Police Station where he later died.

[6.5] That the Appellants were all on duty and stationed at Daveyton during the time of the incident.

[7] The trial court found the Appellants guilty on the basis that the State proved, as per the Appellants' admission that they all participated in the deceased's arrest when he was assaulted and were all aware before the van drove off that the cuff in his hand was clenched dangerously and inappropriately to the bench of the van whilst he was outside the back of the van. Further that they all became aware that he was about to be dragged and foresaw that if dragged through the tarmac he might sustain fatal injuries but they receded from preventing it happening, by their conduct of indifference or omission had associated and reconciled themselves with the possible or eventual outcome, even when they assaulted the deceased in the cells satisfying the second liability requirement of common purpose as stated in *S v Thebus* at [9] that reads:

> "The liability arises from the active association and participation in a common criminal design with the requisite blameworthy state of mind"

[8] In essence the trial court found that all the Appellants knew that the deceased was in a dangerous situation by being unlawfully secured to the van before the 6th Appellant drove off and foresaw at that time that the deceased might die as a result of injuries he might sustain whilst being dragged behind the vehicle and that the Appellants had an opportunity to have assisted the deceased, but did not, further associated themselves with the conduct of the 6th Appellant upon which they also continued in their common criminal design by participating in the assault of the deceased in the cells.

[9] Consequently the court found the state to have proven the Appellants' guilt beyond reasonable doubt as per the charge of murder on the *dolus eventualis* principle.

[10] The trial court indicated that the essence of its finding was based on the fact that it was the extensive soft tissue and severe blunt force injuries that the Appellants **inflicted on the deceased during his arrest and when he was dragged behind the police vehicle and assaulted by them in the police cells** that eventually caused the deceased's death in the cells.

[11] The testimony/evidence that was led by the Appellants with a narrative that implied a further possibility that the deceased died from further injuries sustained in the cells in the absence of the Appellants was rejected by the court.

[12] The Appellants were convicted on the evidence that was led by Lindiwe Ngwenya ("Ngwenya"), the deceased's in law family member who was a passenger in the deceased's taxi when the 1st and 2nd Appellants confronted the deceased and an altercation ensued, and Monica Mahlatsi Sekwati ("Sekwati") who was also at the scene and took a video footage of the incident. Both Ngwenya and Sekwati testified to have witnessed the entire incident (the assault, arrest and dragging of the deceased by the Appellants). In addition the court had also relied on the evidence of Warrant Officer Ngamlana ("Ngamlana") who was in command of the Daveyton police cells during the incident of the deceased's assault in the cells and of Dr Skhosana who gave an expert opinion on the extent, nature and connection between the injuries sustained by the deceased and his death. The other two witnesses testified about the administrative police process that follows the arrest, which was not disputed.

[13] In the appeal hearing the **1st, 3rd, 4th, 5th, 7th and 8th** Appellants were represented by Mr Wyngaardt and **2nd and 6th** Appellant by Mr F Van As. Mr G D Mosetlha appeared on behalf of the State, that is, the Respondent (hereafter referred to as "the State). The Appellants are appealing against the finding by the trial court that the State proved its case of murder beyond reasonable doubt, raising factual issues as well as of the application of the law (mainly the doctrine of common law).

[14] The 1st, 3rd, 4th, 5th, 7th and 8th Appellant (who are in this context also together referred to as "the 6 Appellants") contended that the trial court erred when it mainly found:

> [14.1] as against the 1st Appellant, that he was guilty of murder since after the deceased was dragged and taken to the police station, he apparently did not attend to the deceased's injuries and medical assistance. As for the other Appellants, that since they further participated in the assault of the deceased at the police station, when there was no allegation in the summary of its evidence that the deceased was assaulted in the police cells.
>
> [14.2] that the conduct of the Appellants satisfied the second common purpose liability requirement, as stated in *S v Thebus*, when no previous agreement was proven. Also as set out in *S v Mgedezi* 7 Others 1989 (10 SA 687 (A), specifically that they were all present and aware of the assault of the deceased in the police cells and intended to make common purpose with the other appellants who allegedly assaulted the deceased in the cells or manifested their sharing of common purpose by themselves performing some act of association with the conduct of the others or that they omitted to act.
>
> [14.3] that the Appellants intended (be it *dolus eventualis*) to have killed the deceased.

[15] The criticism on the court's finding on the merits (factual) is extensive and dealt with by both camps in threefold stages as in accordance with the judgment being appealed, that is on (1) the arrest, (2) the dragging and (3) the assault/incident in the cells.

On the arrest

[16] On the arrest, the 6 Appellants (1st, 3rd, 4th, 5th, 7th, and 8th Appellants) allege that the trial court erred when it found:

[16.1] the evidence of the two witnesses Ngwenya and Sekwati on what transpired at the scene prior to the 1st Appellant calling backup to be reliable, when the two actually materially contradicted each other's evidence and the facts as portrayed in the video footage:

[16.1.1] Ngwenya allegedly contradicted herself and her police statement during her testimony and did not answer questions directly, openly and without hesitation but was vague or unable to. Her evidence was in direct conflict with the objective facts as she testified that the 1st Appellant returned to the scene in the deceased's vehicle. She was unable to answer why she did not report the incident immediately to the authorities even though she was related to the deceased. **Her evidence was not treated with caution despite her being exposed to the footage prior her testimony and her evidence contradicting the other witnesses as well.** The court ignored and did not take cognisance of the role the media played in this trial (immaterial). The court should have found her to be an unreliable witness who was not present on the scene and testified to what she has seen on television and you tube.

[16.1.2] In respect of Sekwati its said she could not explain why she had not commenced with taking the video at the beginning of the altercation between the deceased and the 1st and 2nd Appellant. She also testified in conflict with her written statement that she has observed the dragging of the deceased behind the police van as if she was present when as in accordance with her statement, she did not film that part of the incident. She as well conceded that she had viewed the other video of the actual dragging before testifying. The court a quo should have found that but for the portion that is collaborated by the video footage Ngwenya took she was not at the scene and therefore not a reliable witness.

[16.2] the video recordings reliable, not taking cognisance of the fact that the video did not accurately (due to the fact that the footage was not clear) portray the facts as they unfolded before and after the deceased was dragged. Also that the videos were admitted by the defence with the understanding that it was not accurate or detailed, it being unclear on the following:

[16.2.1] the scuffle between the deceased and some of the appellants before and when he was loaded in the back of the police van. Also on what transpired thereafter in relation to the crowd.

[16.2.2] which injuries that the deceased sustained during that period.

[16.3] **that the only reason backup was summoned was to teach the deceased a lesson, when there was no acceptable evidence to that effect** and 1st Applicant had opened a docket against the deceased. The trial court failed to take cognisance of the fact that during the first stage of the arrest, and placing of the deceased in the van, it was undisputed that he swore and insulted the 1st and 2nd Appellants, committing the

offence of *crimen inuira* and was the initial aggressor. It was also the 2nd Appellant's testimony that the deceased offered them money in order to let him go, contravening the Prevention and Combating of Corrupt Activities Act 12 of 2004. Therefore the Appellants were entitled to arrest the deceased as the offences were committed in their presence even though their version of 1st Appellant's assault and robbery was rejected.

[17] The Appellants argued that if the appeal court finds that the trial court correctly rejected the version of the 1st and 2nd Appellant, the deceased never robbed the 1st Appellant of his gun, it would therefore not have erred when it found that the deceased was unlawfully arrested and detained with the result that he was entitled to resist the unlawful arrest and force applied to subdue him and that it may amount to assault, **and should the version had been correctly rejected the actions of the other Appellants cannot be held to be unlawful because they acted in terms of s 40 (1) (b) of Act 51 of 1977 on the complaint by the 1st and or 2nd Appellant.**

On the dragging

[18] On the dragging of the deceased, the Appellants allege that the state did not prove beyond reasonable doubt that the deceased was intentionally cuffed to the bench in the police van, as the 5th Appellant indicated that deceased was accidentally cuffed to the bench, and a reasonable explanation given by the Appellants that the deceased was extremely violent, **as a result his hands were cuffed in the front and the first cuff that was hanging loose from the wrist had accidentally hooked onto the leg of the bench.**

[19] Furthermore the community uproar against the Appellants led to shots being fired to get community away from the vehicle. The Appellants managed to forcefully place the deceased at the back of the van and he was seated on the ground at the back whilst being cuffed to the leg of the bench inside the van and his hands cuffed and held above his head, complying with *Botha v Minister of Safety and Security* 2003 (2) SACR 423 (T). They therefore allege that the trial court erred when it found that:

[19.1] They must have been aware of the fact that the deceased is being dragged behind the vehicle when 1st Appellant had testified that he was not in a good state of mind and the dragging obscured by members of the community

[19.2] 3rd and 7th Appellants must have also been aware that the deceased was being dragged behind the van, even though they testified **that they ran to their vehicle that was parked at the garage to protect it from the angry crowd before the dragging of the deceased.**

[19.3] 4th Appellant associated himself with the dragging of the deceased and that there is serious doubt whether he followed the van with a noble intention.

[19.4] the version of the 5th Appellant that he was not aware of the fact that the deceased was being dragged behind the police van not possibly true but false when he has testified that he was controlling the crowd with his back to the police van and his testimony corroborated by the fact that he is not seen in the video footage just before and when the deceased is being dragged. The firing of a shot can also be heard

which fact was not discredited by the state. His version was therefore supposed to have been found to be reasonably true.

[19.5] all the Appellants knew that the deceased was in a dangerous situation and unlawfully secured to the van before it drove off and foresaw at that time that the deceased might die as a result of injuries he might sustain whilst being dragged behind the vehicle and that they had the opportunity to have assisted the deceased, notwithstanding Dr Skosana reporting that the injuries that the deceased might have sustained during the dragging was not serious and could not have caused the death of the deceased S v Cloete. (foreseen but took a chance, not reconciled which resulted in culpa)

[19.6] although 2 and 8 attempted to assist the deceased at the time when the van drove off, both of them subsequently failed to do anything to stop the 6th Appellant, when 2nd Appellant's version was that he shouted at 6th Appellant to stop. The court should have found that the two Appellants' actions were indicative of their intention for the deceased not to be dragged or caused any bodily harm and therefore disassociated themselves with the dragging of the deceased.

[20] The trial court ought to have found that the state did not prove its case beyond reasonable doubt that **the Appellants except for 6 foresaw the possibility that the 6th Appellant would under the prevailing circumstances have started driving away with the deceased hanging from the back of the vehicle and did not associate themselves with the dragging of the deceased.**

Cell injuries (Fatal injuries)

[21] The defence argues that the court's finding were wrong that no more than a few of the soft tissue injuries could have been sustained during the arrest but mostly/majority sustained during the dragging and later in the cells, contradicting the initial testimony of Dr Skosana that the majority of the deceased's injuries could have been sustained during his arrest as the ones sustained during the actual dragging could not have been severe. Which was corroborated by 4th Appellant's testimony that the deceased was lifting his feet from the ground during his dragging and therefore could not have sustained serious injuries only sock and the bottom of his jeans were torn. The court a quo should have found that the deceased sustained numerous of the injuries during the scuffle whilst he was resisting arrest and from the considerable force that was used twice to get him into the van which resulted in him jumping out and landing on the tarmac and hanging at the back of the van. Also that the blood that was found at the back of the van was from the injuries sustained during the initial arrest and his loading at the back of the van not the dragging.

[21.1] contrary to Ngamlana's testimony that the majority of the injuries were sustained in the cell, that the possibility that the deceased could have sustained a head injury as a result of him injuring himself by falling and hitting his head against the concrete bench in the cell amounts to speculation or conjecture notwithstanding the evidence of Dr Skosana which was confirmed by the fact that the deceased's blood was found on the edge of the bench and corroborated by the blood spatter expert. Ngamlana's evidence was also that the deceased was assaulted at the reception area not in the cell where he was later found lying on the ground when he was left sitting

on a bench by Ngamlana and Moyo. This was after the Appellants had allegedly been present in the cell and had left.

[21.2] the contradictory evidence of Dr Skosana on recall to be acceptable, instead of finding that it was not objective and the injuries could have been sustained as per the different scenarios sketched to him during cross examination. **The Appellants were not even charged with an assault that had taken place in the cells.** The doctor had initially conceded that the deceased could have been injured on his testicles during the arrest yet he had contradicted himself during his later testimony upon which the trial court found the deceased to have been assaulted in the cells. The trial court did not take into account that Skosana had also conceded during cross examination that the deceased could have died of anoxia, deprivation of oxygen as a result of him lying on his back whilst his nose was bleeding.

[21.3] that circumstantial evidence proved beyond reasonable doubt that the 2nd,3rd,4th,5th ,6th, 7th and 8th Appellant were indeed in the cells and had assaulted the deceased when it was not the only inference that can be drawn. Ngamlana, who had a clear motive to implicate the Appellants falsely, as the deceased died when he was under his care and control for nearly three hours was not certain as to who was present in the cells when the deceased was allegedly assaulted with slaps and by whom and when did the 4th Appellant want to hit him with a chair. His testimony was that, the 2nd, 5th, and 8th Appellant were not there and was not sure who between 3rd and 4th Appellant was there. The court should have found Ngamlana not to be a satisfactory witness nor was there corroboration for his evidence, also the fact that the state did not rely on the alleged assault in the indictment indicative of the fact that Ngamlana adapted his evidence being afraid of being criminally prosecuted for his blatant omissions, as according to standing orders he was responsible for the safety and well being of the deceased from the time that he was brought into the cells. Ngamlana was also adamant that the deceased did not sustain any injuries in the presence of the Appellants when he was in the cells. The court was supposed to find him unreliable and dishonest as by his own admission he lied under oath.

[21.4] it is improbable that none of the Appellants would have attended to the cells in order to determine what the condition of the deceased was and not finding that the incident occurred just as the shifts were being changed and reasonably possible that they continued with their normal duties, and common cause that Appellants 2, 4 and 6 attended to the cells. All the Appellants other than 1 and 2 were summoned to the scene for assistance which they rendered and probable thereafter they continued with their normal duties and therefore court erred in rejecting the evidence of 3, 5, 7 and 8 that they had not attended to the cells and continued with their tasks.

[21.5.] that the state had proved beyond reasonable doubt that the 2nd to 8th Appellants assaulted the deceased in the cells and foresaw that he might die as a result of the injuries inflicted when it is common cause that he was left in the cell with Ngamlana and was also seen by Mhlongo and Mofo who had consulted with him and assisted Ngamlana in removing the cuffs. It also erred **in finding that the 1st Appellant foresaw that the deceased had sustained serious injuries and in desperate need of**

should themselves have performed some act of association with the conduct of the others and must also have had the requisite *mensrea* (having intended the deceased to be killed or foreseen the possibility of him being killed) and performed his own act of association with recklessness as to whether or not death was to ensue. The state failed to do so and the trial court was materially misdirected in its conclusion that the Appellant's conduct at the police station satisfied the liability requirement of common purpose.

[30] On Ngamlana, it is alleged that the trial court in the valuation of his evidence neglected to apply the cautionary rule relating to a single witness. Corroboration was necessary and the trial court erred in concluding that there is sufficient corroboration for his evidence when there were material discrepancies and inconsistencies to his evidence. Also misdirected in finding of corroboration in what was alleged by Skosana regarding the possibility of the injuries sustained by deceased on the testicles being as a result of direct violence of kicking when there was no evidence led at any stage that the deceased was kicked whilst in the police cells. The conclusion was speculative and a material misdirection by the trial court.

[31] It is also alleged that the trial court erred in finding the exculpatory versions of the Plaintiffs to be falls and consequently corroborative of Ngamlana's evidence, its interpretation of the principles applicable in the case of false evidence by an accused erroneous and a material misdirection.

Evidence led by the State

[32] Ngwenya, who was a passenger in the deceased's vehicle was the first of the key and eye witnesses to testify for the state. Her evidence was that the deceased's car was parked behind a Quantum taxi, when he was confronted by the 1st Appellant accusing him of blocking the traffic. The 1st Appellant, who was in private clothes, also accused the deceased of not being a South African and having parked his vehicle in a wrong way. An argument ensued and the 1st Appellant took the keys of the deceased's vehicle. She went to make a phone call on the opposite side of the street when she came back the deceased's vehicle was not there. She had seen the 1st Appellant driving off in the deceased's car whilst she was making a phone call. The deceased remained with the 2nd Appellant who was in police uniform. They were engaged in a verbal argument, the deceased was demanding his license back. After a shortwhile 1st Appellant returned with a contingent of other policemen, she did not see the vehicle he came back in. The policemen started grabbing the deceased, attempting to put him in the police vehicle but the deceased was resisting. He was eventually put inside the van but he managed to come out. They grabbed him and fastened his hands to the back of the van. Members of the community gathered around the incident enquiring about what the deceased had done. The van drove off, dragging the deceased who was hanging behind it. The members of the community started throwing stones at the van and someone whom she assumes was one of the policemen fired two shots in the air. Whilst the van was driving away two policemen tried to lift the deceased's legs up but let them go again when the van gained speed. The speeding van was followed by another smaller police vehicle.

[33] She denied the allegation that she was not there at the scene and her testimony was based on what she saw on television (speculative of the defence, not actual a dispute). She also denied that the deceased assaulted and took the 1st Appellant's gun. And that 2nd Appellant had to fire a shot in the air to make the deceased put down the gun. She furthermore denied that 6th Appellant sustained certain injuries during the struggle to get the

deceased in the car. She also said she did not see the police vehicle with a blue light and a siren.

[34] Sekwati's evidence was that at the time of the incident she was assisting in her mother's food stall that is around where the incident occurred. There were several taxis parked there. The police arrived and approached the deceased when an altercation ensued between the deceased and the policemen. She, videotaped the incident with her cellphone. She also identified another footage of the same incident recorded by someone else. Both footages' admissibility not disputed. **She denied what was put to her under cross examination that before she started videotaping the events the deceased assaulted and took the firearm of the 1st Appellant.**

[35] What was seen in the videos is described as follows in the judgment and have not been opposed by the Appellants. At commencement it **shows the incident during the argument between the deceased and the 1st and 2nd Appellant and when the deceased was left alone arguing with the 2nd Appellant.** The 2nd Appellant was then seen making a phone call on his cellphone a distance from the deceased. Several policemen then appear. They grabbed the deceased and tried to move him to the back of the police van. The deceased is seen resisting the attempt and at some stage he was carried by the policemen. The video became obscured by members of the public. The first footage stopped with that scene. The second video continues to show the deceased being carried to the police van with his legs up at the level of the policemen's chest and his head down at the level of below the policemen's knees. It is not clear from the footage if the deceased was put inside the van as the scene is blocked by the policemen and other people who surrounded the scene. A gun shot can be heard. **What is seen next is the deceased sitting on the tarmac behind the van with knees (kneeling) bent and both hands behind his back secured to something on the left of the back of the van. It showed some of the policemen and members of the community standing at the back of the van and one of them picking the accused's leg.** The van reversed for a short distance **and the deceased's upper body seems to be partly under the rear end of the van.** One of the policemen (7th Appellant) went to the driver's door of which the window was open. The van moved forward and two policemen picked up the legs of the deceased and when the van's speed increased they let go. The van drove off dragging the deceased behind it and disappeared from the view, assumedly when it turned left into Hlakwana Street it was followed by another vehicle.

[36] She, on cross examination testified that the 1st and 2nd Appellant's vehicle was not parked next to the deceased's vehicle.

[37] The evidence of Ngamlana was that at 18h45 on the day of the incident he admitted into the cells the deceased who was clad in a red t-shirt and underpants, accompanied by the 3rd, 4th, 6th and 7th Appellant. They were followed by the 2nd, 5th and 8th Appellant. The deceased could not walk on his own and was dragged or carried by the policemen into the cell. He was crying. Inside the cells the policemen asked him why was he blocking the traffic upon which an argument ensued between the policemen and the deceased who was asking for his licence. At that stage the accused fell down. The policemen were surrounding him so he could not see what exactly was happening but heard what sounded like open hand slaps. He stopped 4th Appellant from hitting the deceased with a plastic chair. The deceased was forcefully pushed to sit on a chair and he was complaining that his head was hot and bleeding

from an injury on his head. He was told that the accused was 1st Appellant's suspect in an assault case. He said he requested the policemen to take the deceased for medical treatment and 4th Appellant said they would.

[38] He also said the policemen told him that the deceased also sustained injuries from bricks that were thrown by the community. He then reported the incident to the relieve station commander, warrant officer Mofu, and they called the paramedics. At that stage the deceased was unable to talk. The 9th Appellant also entered and enquired about the person who had assaulted a policemen. The other policemen were moving in and out of the cell. Mhlongo, who was on duty with Ngamlana also came to the cell. The policemen later left. **He then removed handcuffs around the deceased wrists.** They were so tight such that they had to use pliers to turn the key. He left the cell to go and attend to other tasks. At the time the deceased was sitting on the bench with his body bent forward. On his return he found the deceased lying on his back on the floor in front of the bench, his head in a pool of blood. He did nothing as he did not know what to do. The paramedics arrived and declared the deceased dead. He confirmed that there is a clinic across the road to the station. He became aware of a pair of trousers in the adjoining cell that belonged to the deceased and was not there when deceased was in the cell.

[39] During his cross examination he confirmed that he made 6 statements prior to testifying **in which he did not mention in detail what had happened in the cell and the reason being that he was scared of his colleagues fearing for his life** that they might have considered him in a bad light. He disputed a suggestion that the deceased was brought in the cell by the 4th and 6th Appellant and nobody else and Ngamlana was not even there at the time. He was unable to explain why in his 5 statements he incriminated the 9th Accused who was then discharged.

[40] A member of the Independent Police Investigation Directorate, Mr M Z Ramadwa testified as well. According to him he was informed of the death of the deceased at 23h30 that day. Upon his arrival at the station there was no relevant entry in the Occurrence Book on the SAP 14. A docket that was opened did not have the arresting statement or the documents of rights that were explained to the suspect.

[41] The testimony of the pathologist, Dr Skosana that conducted the post mortem of the deceased's body was that he found the deceased lying on his back when he arrived at the police station at 23h45. He had clotted blood underneath his head and around his mouth. There were blood spots on the walls and the floor. Upon conducting the post-mortem the next day, he found a number of external injuries on the body of the deceased. The preliminary findings about the cause of death that he recorded were confirmed by the histological report which were, inter alia,

> [41.1] Laceration right big toe, 2cm laceration **right frontal scalp**, 3cm laceration right angle mandible, 3cm laceration left parietal area of the scalp, **Hematoma left parietal area of the scalp**, 2cm laceration left side occiput 3cm adjacent laceration occiput

[42] The final diagnostic analysis of his findings on the cause of death was the following:

> [42.1] A back lap dissection on second post mortem showed extensive soft tissue injuries which in a dark skinned person would not be apparent.

[42.2] The scrotal evasion technique from inside the pubis showed injuries to the testes which were not visible from the outside examination.

[42.3] The toxicology results done by Dr G Perurnal states as follows: Cerebral oedema and generalised congestion of the brain and lungs.

[43] Skosana determined the cause of death to be:

"Extensive soft tissue injuries and hypoxia".

Explaining the mechanisms of the cause of death and his conclusion he said that either of the **blunt force injuries to the deceased's head** and the injuries to the soft tissues of the deceased's body could have resulted in the deceased's death. He further indicated that timeous medical treatment, or intervention could have made a difference if he survived.

[44] He conceded to the possibility of the blunt force injuries to the head having been sustained at the time when the deceased was overpowered by the Appellants in their attempt to get him into the police van, before he was attached to and dragged behind the van, or that in the holding cell, he, of his own accord, fell against the sharp edge of the bench he was sitting on. Skhosana further conceded in respect of the soft tissue injuries that they could have been sustained during the scuffle with the police or at the time he was dragged behind the police van.

[45] On recall by the court he ruled out that the injuries to the **anterior parts of the deceased's body** could have been sustained when he was being dragged behind the van, he could have twisted his body or turned with his face down. He added that the nature of the injuries was inconsistent with the three scenarios described by counsel for the defence during cross examination, these are: the interaction between the deceased and the policemen when he was forced into the police van whilst resisting the police, his dragging and falling of his own accord in the cell. **He pointed out** that the court was not entrusted with all the relevant facts in respect of what had happened to the deceased as it clearly indicated **that he suffered more direct violence referring in this regard to the injuries on the testicles that could have been caused by direct evidence like a kick.**

[46] The evidence of Coetzee was that the arresting officer is the person primarily responsible for the arrested person's health condition whilst still in the holding cells. The cell commander takes the responsibility after the administrative tasks have been completed. The station commander can change the rules.

[47] The Appellants' evidence was pretty much the same. **The 1st Appellant** who has been in the service of the SAPS for 23 years testified that he was off duty at the time and a casual passenger in the SAPS double cap patrol van when they received a complaint about a vehicle that was blocking the road at Esselen Street. They activated the siren and found the offending vehicle at the taxi rank with the deceased inside. They parked next to it and asked the deceased to move his vehicle. The deceased became aggressive and insulted them. The 1st Appellant and the deceased alighted from the vehicles. 1st Appellant showed his identity card to the deceased who kept on insulting him. The deceased hit him with a clenched fist on his right cheek. It made him dizzy, the next thing he heard a voice saying that "put down the firearm otherwise I will shoot". Then he heard the sound of a gunshot. The deceased then

said "do not shoot me Baba Poisa". He heard 2nd Appellant saying "here is your firearm". He alleged that before he heard the gunshot he actually saw the deceased pointing a firearm and then put it down. He could not say how the deceased got hold of his gun. During the scuffle between 2nd Appellant and the deceased he used the deceased's taxi to go and get assistance or back up from the station. He used it because it was parked close to him and still idling. At the police station he found and summoned help to arrest deceased from of the 4th, 6th, and 8th Appellant who drove with him back to the scene. At the square he told the deceased he was under arrest on the charge of assault with intention to do grievous bodily harm and robbery of his firearm, pointing a firearm and *crimen inuria*. He ordered the deceased to get into the van but the deceased told him that he was mad, refused and resisted arrest. The 6th Appellant also told the deceased to get into the van and deceased still refused. In the meantime the members of the public had gathered. They made a lot of noise and threatened to shoot. 6th Appellant grabbed the deceased by his belt but he still resisted. The policemen then forcefully tried to put the deceased into the police van. The 1st Appellant was in so much pain that he was unable to assist with the arrest. He stood between the group that crowded him and did not see when the deceased was dragged behind the police vehicle. He thereafter walked back to the police station whereupon he was assaulted by members of the public on the way and rescued by the 3rd and 7th Appellant.

[48] At the police station he went to the charge office where he opened two cases one against the mob and the other against the deceased on the aforementioned charges. 4th and 6th Appellant told him that his suspect was in the cell. When they noticed that the deceased was injured they suggested taking him to the clinic. There was no doctor. He came back and completed the dockets and did not visit the deceased's cell. He was not informed that the deceased has passed away and went home at 4h00. He heard about the deceased's death the next morning. He submitted the J88 medical certificate reflecting that the he was examined on 27 February 2013 and was found to have soft tissue injuries.

[49] Under cross examination he said that **2nd Appellant accompanied him to the police station.** He pointed that even though he was the arresting officer the cell commander was responsible for the deceased. He said if he had seen the deceased being dragged **he would have stopped it.** He said he did not arrest the deceased at gun point when he was slapped and robbed by the deceased because he was scared of the members of the community who were surrounding them. He conceded that a suspect should not be handcuffed to the police vehicle.

[50] The 2nd Appellant had been in the employ of the SAPS for 5 years at the time of the incident. He testified that when they arrived at the rank, the 1st Appellant alighted from the vehicle and he drove off to park the police van. He noticed the 1st Appellant fighting with the deceased. The deceased pointed a firearm at the 1st Appellant. He then ordered the deceased to put the firearm down. He did not know when he took out his own gun but realised he has just fired a shot in the air. Both the deceased and the 1st Appellant looked shocked. The deceased put down the firearm. He retrieved the firearm and returned it to 1st Appellant. He requested the deceased to hand over his licence which he eventually did. The 1st Appellant drove away with the deceased's vehicle. He was offered money by the deceased which he refused. He informed the deceased that he was under arrest and read him his rights. The deceased became aggressive and he moved slightly away from the deceased to avoid him. **The deceased grabbed him and kept on demanding his licence.** When the deceased moved

slightly away from him he became concerned not knowing what he was going to do next as he remained aggresive. More people gathered around them and he realised that they were alone and in danger he therefore made a phone call to the station for assistance but nobody answered. 1st and 4th Appellant arrived with other policemen. They grabbed the deceased in order to put him into the police van. The deceased fell down during the ensuing scuffle. One of the policemen managed to cuff one of the deceased's hands and the deceased kept on fighting. Another policeman then cuffed both hands. A community member grabbed 4th Appellant by his shirt from the back to overpower him. He pulled his firearm and fired a warning shot into the air causing them to slightly disperse. They had succeeded putting the deceased inside the van but the deceased managed to come out and sat behind the van with his hands cuffed and held behind his head hooked to the bench inside the vehicle. He did not have much strength then. When he moved closer to the deceased the crowd was making noise and chaotic, asking what did he do and threatening the policemen. He became afraid and confused and did not know whether to continue with the arrest or face the crowd. He realised that the deceased was attached to the van in a wrong way and became scared. **The van started moving.** He picked up one of the legs of the deceased in order to prevent the deceased getting injured. The other leg was picked up by another policeman who it is known was the 8th Appellant (culpa). He had to let go when the van increased its speed. He screamed to stop the vehicle but the noise by the crowd was louder. The van turned around the corner at the crossing with Hlakwana Street. He did not see any injuries on the deceased at the time. He noticed that the other police vehicles had already departed and he walked back to the station. At the charge office the 6th Appellant handed him back the keys of the police van. The right rear door window was broken. He did not go to the cells. The 1st Appellant who was completing the docket was shaking and not right his one eye was red. He was therefore taken to the clinic and found the doctor not there. He subsequently reported the shots that were fired to the officer in command. The 3rd and 7th Appellant also did the same. Mofu informed him that there was something wrong with the deceased and the ambulance was on its way. **He went to check on the deceased who was sitting on the bench with his back against the wall.** He then continued with other work. Later he heard tht the deceased passed away. He did not think the deceased would die from being dragged behind the police van.

[51] Under cross examination he said the deceased handed over his driver's licence and tried to bribe him and when he refused to take the money he became aggressive. He also wanted to know what wrong he did as he has returned the firearm. The deceased was calm after he returned the firearm. It was pointed out to 2nd Appellant that he was not truthful when he said the deceased became aggressive and angry again as he had an opportunity to make a phone call. He said he said the 1st Appellant and the deceased were fighting because the 1st Appellant had his hands in front of him fending off the deceased's blows. He admitted to have been the one who arrested the deceased and was actually the arresting officer. He added that initially the 1st Appellant was the arresting officer although he became also the complainant. At the police station he was surprised to see the 1st Appellant completing the dockets and was awaiting his instructions. **He did not see any bruises or injuries at the scene where the deceased was arrested** and was aware that the police are not supposed to arrest a person for a traffic fine. He did not know what happened to the 1st Appellant after he left the scene of the arrest. He did not attend to the deceased at the cells as it was the work of the cell commander. He said Ngamlana lied when he said he was at the cells. **When he later**

checked on the deceased in the cells he was partly undressed but did not see any injuries or remember seeing any bleeding.

[52] The 3rd Appellant had (five) 5 years of experience as a police officer with the SAPS and a member of the backup team. His version was that he arrived at the scene with the 5th and 7th Appellant after the 1st, 4th, 6th and 8th Appellants. They could not get through the crowd with their vehicle and parked at the Engen garage some distance from the H square. They **pushed** through the crowd and the **1st, 2nd, 4th, 5th and** 8th Appellants held on to the deceased and attempted to put him in the police van. They managed to put his upper body inside the vehicle and the 3rd Appellant went closer pushing the crowd back from the van ordering them to let the deceased be put into the van. The deceased was handcuffed and he sat behind the van with his hands above his head. The 2nd Appellant then fired a shot into the air but the people became more angered and the situation violent and dangerous. They threatened to hit the police car. He went to the 7th Appellant and told him that they should fetch their vehicle. Inside the van he had a pepper spray he could use. They ran to their vehicle. He did not see the deceased being dragged behind the police van. Along Hlakwana Street they came upon a group that was attacking the 1st Appellant. They had to fire shots in the air to get the group to disperse. The incident and the shots were reported to the duty officer at the police station. They returned to the scene to collect the cartridges but could not find them as it was too dark. He then heard Mafo calling over the radio that they had to report because the deceased had died in the cells.

[53] Under cross examination he confirmed that the deceased was fastened to the inside of the van and he thought it was done to assist the policemen to get the deceased into the vehicle.

[54] The 4th Appellant had been a policeman for 4 years on his arraignment. He was a member of the 1st Appellant's backup team. He was accompanied to the scene by the 8th Appellant. On arrival he noticed that the policemen was busy with a man in a red t-shirt who was resisting arrest. He opened the rear door of the police van, the space was limited so he could not get hold of the deceased. The other policemen were also struggling with the deceased who succeeded in shifting his body out of the van. He was grabbed by somebody by his belt, lost balance but held onto the door. A shot was then fired by the 2nd Appellant. **The deceased was hanging by his hands cuffed to the inside of the vehicle.** There was general confusion. He moved away from the van pushing community members away. The van drove off and dragged the deceased behind it. The 2nd and 8th Appellant picked up the deceased's legs but they let go when the van accelerated. He then jumped in his vehicle and followed the van at speed. Upon entering Hlakwana he noticed the van in front of him and flickered his lights to stop it. The deceased was still being dragged with his feet bumping up and down lifting from the tarmac. The van stopped he approached the deceased who was without shoes. **He lifted the deceased's body into the van. He did not have keys to unlock the handcuffs.** At the police station he fetched the keys from his private vehicle and unlocked the handcuffs where it was attached to the inside of the van. The deceased alighted from the van and kicked off his pants that had fallen off. **His hands were still cuffed together.** The deceased walked to the cells unaided. He apologised and asked them not to arrest him. **The 6th Appellant picked up the deceased's pants and put them on his shoulders. At the time he noticed an injury at the back of the deceased's head that was bleeding.** The deceased was taken to the cells in the presence of Mhlongo. Ngamlana arriving at the same time. The

deceased sat on a bench in the cell. The 6th Appellant told Ngamlana that the deceased was the 1st Appellant's suspect without giving any further details. He left with the 6th Appellant to resume their duties. He later received a phone call from Mhlongo informing him that there was something wrong with the deceased and they were waiting for the ambulance. That gave him a fright. He and the 6th Appellant walked to the clinic but did not succeed to get medical assistance for the deceased. He was told that the ambulance was occupied at another venue.

[55] During cross examination he **admitted that he did not know why the deceased was arrested he only knew that he was resisting arrest which is a crime in itself.** He conceded that **it was clear from the video that he was close to the deceased when he was forcefully taken to the van.** He said he did not regard the injury at the back of the head of the deceased as serious and did not take a closer look. He did not see any blood in the van when the deceased alighted or that his toe was injured. The deceased would not have managed to get into the van himself as he had no balance. He had no time to properly look at the deceased when the 6th Appellant stopped. And therefore did not see any injuries. In the cell he had sufficient time but did not think he must check the deceased for injuries. He denied and alleged that Ngamlana is mistaken when he says all the Appellants were in the cells except for the 1st Appellant and that it was Mhlongo who removed the handcuffs from the deceased. He denied that he attempted to hit the deceased with a chair. And said there were no plastic chairs in the cells or at the police station. He conceded that he realised that 6th Appellant jumped into the van in order to drive it.

[56] The 5th Appellant also had 4 years service with the SAPS and one of the back up team. According to him he arrived at the scene with his official vehicle and parked about 5 metres away from the scene. He had to push through the mob to get there. The 2nd Appellant and the 6th Appellant were busy with the deceased who was violently resisting arrest. He took out his handcuffs but only managed to cuff deceased's wrist only on one hand. The other part was left hanging loose from the deceased's wrist. The 6th Appellant then succeeded to cuff both hands of the deceased. They tried to put the deceased into the van by picking him up but he was still resisting. The deceased was very strong and not easy to overpower him. The deceased also fell down and it took a lot of time to put him into the van. The noisy members of the community were screaming drawing closer and demanded that the deceased be released. The deceased laid on his back with his head inside the van but managed to move out of the vehicle. Somehow the handcuffs became attached to the inside of the vehicle and the deceased sat on his buttocks behind the vehicle. He indicated that it does not take much force to attach the handcuffs to the leg of the bench at the back of the van. He said he was facing the crowd and pushing it back. A shot was fired. When he turned back to look at the van it was moving with another one following it. He only saw the top of the canopy and did not see that the deceased was being dragged behind the van. He heard something shattering but did not know what was thrown at them. The crowd threatened to damage the vehicle. He went to his vehicle and followed the van. There were a lot of people in Esselen Street and he followed a different route to the police station. At the charge office he found the former 9th Appellant and they proceeded with patrol duty. Later he was called to the police station by Mofu.

[57] On cross examination he said he managed to cuff only one hand of the deceased and that the other part of the cuffs somehow hooked to the inside of the vehicle. He conceded that he became aware that the handcuffs he used had become fastened to the inside of the

vehicle. He said he could not remove them because the crowd was approaching and he turned to stop them. He said he did not appreciate that the position the deceased was in was precarious. It was later pointed to him that the deceased was sitting behind the van for a relative long time before he drove off and that nobody tried to remove the handcuffs from the inside of the van. He said he was actually overpowered by the crowd and therefore could not see what was happening. He said he did not know how the deceased arrived at the police station and did not enquire. He said the last time he saw the deceased he was attached to the van and sitting behind it. He heard from the former 9th Appellant that the deceased was dragged behind the van.

[58] The testimony of the 6th Appellant also with a 4 year period of service with the SAPS was that the 1st Appellant told him that he was assaulted and his firearm taken away. He and the 4th Appellant accompanied the 1st Appellant to the scene. The 1st Appellant pointed out the deceased encircled by the crowd. He instructed the deceased to get into the police van. The deceased refused and he grabbed him by his belt. The 2nd Appellant assisted him. The deceased resisted and during the struggle both the deceased and the 6th Respondent fell. The 5th Appellant succeeded in putting handcuffs on only one hand of the deceased. He managed with another pair of handcuffs to cuff both hands in front of the deceased's body. The deceased made it difficult to cuff his hands according to the standing order due to his resistance, pushing and pulling and the crowd made things worse by threatening to burn the police vehicles. The policemen managed to get the deceased into the bakkie but the situation was problematic. Their safety and that of the police property was in danger. He decided to drive the van away from the crowd. He believed the deceased was inside the van because the 1st, 2nd, 4th and 8th Appellant were behind the van at the time. He concentrated on what was happening in front of him. A police vehicle was parked in front of him and other members of the public there. The noise was loud and he did not hear anybody shouting at him to stop. He drove off first along Esselen Street and then turned into Hlakwana Street. In Hlakwana he stopped when he observed the vehicle behind him driven by the 4th Appellant flicking its lights. He stopped and was surprised to see the 4th Appellant going to the back of the car. He alighted and saw that the deceased was still outside the van. He assisted the 4th Appellant to get the deceased back into the van by taking hold of one leg. The deceased was no longer wearing his tekkies. He had at that stage driven approximately a distance of 200 meters. He felt so bad about what happened such that if there was somebody else with him he could have asked him to drive from there. At the police station the 4th Appellant fetched handcuffs key from his private vehicle and unlocked the set of cuffs that had become locked to the leg of the bench inside the canopy. The deceased alighted from the van and walked to the cells on his own. His trousers fell down and he kicked them away. The 6th Appellant picked up the trousers and put it on the shoulders of the deceased. The deceased had an injury to the back of his head which was bloody but not ripping blood. The deceased sat on the bench in the cell. They left the deceased in the cell in the care of Mhlongo whom he told that the deceased was the 1st Appellant's suspect. The deceased did not look like he was seriously injured. He admitted that if that was the case him and the 4th Appellant would have been responsible to take care of the deceased. He found the 1st and 2nd Appellant at the charge office. He told the 1st Appellant that his suspect was in the cell. He thereafter left on patrol duty with the 4th Appellant. They were later called by Mofu informing them of the deceased's condition and that an ambulance has been requested. They sought help from the clinic but were not successful. They went to Ekurhuleni Emergency Services to look for the ambulance which had

already been alerted. They came back and reported to Mofu and he did not go to the cells again.

[59] He under cross examination confirmed the standing orders on handcuffs. He said the manner in which the Appellants cuffed only one hand posed a danger to the police because the deceased could still move his hands and could have hurt somebody. **He could not say if when he left the rear door of the van it was opened or closed.** The reason was that the crowd was angry and he decided to drive the van away. He said he was focusing on the crowd in front of him and depended on the 1st, 2nd, 4th, 5th and 8th Appellant who were behind the vehicle. He could not say why none of the other Appellants got into his vehicle when he drove away. **He agreed that nothing obstructed his view to the rear view mirror before driving off and he should have looked and he would have noticed that the deceased was not in the vehicle. He said he actually does not remember if he looked or not. He said he had no knowledge if the Appellants who were behind the van had tried to stop him driving off.** He did not remember if the 7th Appellant talked to him before he drove off because of the noise made by the crowd and did not see the 3rd and 7th Appellants **when he drove off even though the 3rd and 7th Appellant can be seen in the video footage with 7th Appellant standing next to 6th Appellant just before he drove off and 3rd Appellant slightly behind 7th Appellant.** He said the physical condition of the deceased was alright when he and 4th Appellant put him back in the van. And he walked normally. He denied that he all along knew that the deceased was not in the van and had dragged him deliberately behind the vehicle.

[60] The 7th Appellant has been in the service of the SAPS for seven years. He arrived at the scene as a back- up team. He says he went to the right hand side of the van where there were members of the community at that side and requested them to make way. A gunshot went off and he noticed that the 2nd Appellant had a firearm in his hand. The van started to reverse and he looked around the back of the bakkie to see whether there was anybody behind. He noticed a man sitting behind the bakkie with his hands above his head. It appeared that the bakkie had touched that person, he therefore rushed to the driver of the van and informed him of the person behind the bakkie. He does not remember if the driver has responded. The 3rd Appellant then arrived and told him about the threat of their vehicle and suggested that they should fetch it from the garage. **On their return they found the crowd still making a lot of noise and threatening.** They noticed the van turning into Hlakwana Street. Whilst driving on Hlakwana they encountered the 1st Appellant being assaulted by people. They alighted and fired shots into the air and the crowd dispersed. They took the 1st Appellant with them to the police station. They reported the shooting incident to Captain Soopersahd. He then proceeded with his other duties. Three hours later he was called by Mofu to the police station. He did not visit the cell were the deceased was detained.

[61] On cross examination he said he did not see the deceased's hands even though he saw the deceased behind the van. He warned the driver. **He said he did not participate in the arrest or detention of the deceased and did not see him when he was being dragged behind the van Ngamlana must have been mistaken when he says he saw him in the cells.** On being questioned by the court he said **the admission that he participated in the arrest of the deceased and the attempt to put him in the van was wrongly made.**

[62] The 8th Appellant was a warrant officer of 30 years and the most senior policeman at the scene. He was one of the backup team. According to him he assisted in getting the

deceased into the van. He lifted the deceased's leg whilst the deceased was sitting inside the van. It was of no avail. **The van reversed slightly and he pushed against it to prevent an injury to the deceased. The crowd closed in and the van started moving forward. He and the 2nd Accused each grabbed a leg of the deceased but the van increased speed and they had to let go. The van drove off dragging the deceased. He did nothing to stop the van and returned to the police station. He was on duty him and his crew member attended to other complaints.**

[63] During cross examination he agreed that a person should not be secured to the inside of a police van and admitted to having not done anything to rectify the situation. He said the reason was that he was confused and it also did not occur to him that he should check the deceased at the police station. He confirmed that the 1st, 2nd, 4th, and 6th Appellants visited the cells. They followed the van when it returned to the station.

[64] The inspection of the bakkie according to the trial court yielded the following observations:

> [64.1] From the driver's position the inside of the canopy is visible from the rear view mirror which is more visible when the door of the canopy is open;
>
> [64.2] From the driver's position the respective sides of the vehicle are visible in both left and right outside rear view mirrors;
>
> [64.3] In an open position the rear door to the canopy is visible in the right hand side outside rear view mirror;
>
> [64.4] A person attached in the way the deceased had been would be able to twist his body around from the sitting position to lying on his stomach.
>
> [64.5] In a sitting position the back of the head of such person will be close to the steel edge of the loading bay, and in a turned about position, it would be the face that is close to the steel edge.

[65] The second inspection was conducted at the request of the defence and the following observed. That the 4th and 6th Appellant, with considerable force, managed to pick up a man sitting behind the vehicle and put him into the van. The man was of the same built as the deceased and cuffed in the same way as the deceased and attached to the bakkie.

Appeal on the merits (factual finding)

[66] It is not only trite that the Appeal Court's powers to deal with the findings of the trial court are very limited but also a well-established legal principle that the trial court's factual findings are presumed to be correct and will only be disregarded if the recorded evidence shows a clear misdirection of a material nature, bearing in mind that the trial court had the advantage of seeing, hearing and appraising a witness. It would therefore be in exceptional cases that an appeal court will be entitled to interfere with the trial court's valuation of the oral testimony of witnesses. Therefore in order to succeed, the Appellants will have to convince the Appeal Court that the trial court was wrong in accepting the evidence of the state and rejecting their version, in so far as it was in conflict with that of the state, as being reasonably possibly true, hence a reasonable doubt will not suffice to justify interference with

such findings; see *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705-706; *S v Francis* 1991 (1) SACR 198 (A) at 204c-e; *S v Monyane* and Others 2008 (1) SACR 543 (SCA) at para [15].

[67] The appeal court is therefore to establish if the defence's criticism of the State witnesses evidence is justifiable, that is if it has been proven to be not reasonably possibly true thus unreliable. Equally, to have been wrong or arbitrary for the trial court to have accepted the said evidence rather than that of the defence, keeping in mind the issue that the trial court sought to resolve, that is, if the arrest of the deceased and the use, nature and extent of the force applied was justified.

[68] In *S v Pistorius* 2014 (2) SACR 314 (SCA) at [30] Bosielo J for the court articulated that:

> "It is a time-honoured principle that once a trial court has made credibility findings an appeal court should be deferential and slow to interfere therewith unless it is convinced on a conspectus of the evidence that the trial court was clearly wrong"

[69] The test has therefore evolved from the pre- enactment of the Criminal Procedure Amendment Act 37 of 1948 when the enquiry was limited to whether the defence has shown that there was no evidence to confirm the finding of the trial court. **Courts of appeal have now a greater liberty to disturb the findings of the trial court when dealing with inferences and probabilities**; see *Minister of Safety and Security v Craig* 2011 (1) SACR 469 (SCA) par [58]. If in doubt on the correctness of the trial court on the facts, its judgment must remain in place; see *S v Robinson* 1968 (1) SA 666 (A) at 675H; *Taljaard v Sentrale* 1974 (2) SA 450 (A). The fact that something is not mentioned does not mean that it has not been considered.

On the arrest

[70] The defence's main criticism is on the evidence of Ngwenya, Sekwati and the admitted video footages. They contend that Ngwenya and Sekwati were not there when the incident happened. They allege that the media played a major role to their evidence which the court a quo failed to treat with caution. It was argued on their behalf that the court should have found their evidence untrustworthy since they have not been at the scene but had based their testimony on what they have seen on the video footages, television and you tube.

[71] The contention in relation to Ngwenya's testimony raised by the defence is that her absence at the scene was evident as her testimony was in direct conflict with the objective facts, as she testified that the 1st Appellant returned to the scene in the deceased's vehicle. She also was unable to answer why, she did not immediately report the incident to the police, seeing that she is related to the deceased. She contradicted herself and her police statement, did not answer questions directly or openly and without hesitation, but was vague or unable to answer the questions.

[72] In relation to reporting, Ngwenya did actually give an explanation why she delayed reporting the incident. She had explained that when the incident occurred the deceased was coming back from fetching her from hospital as she was sick and also because of the fact that the police were involved. She was then informed that the deceased has succumbed to his injuries. For the next two days she was not feeling well.

[73] On Ngwenya' supposed contradictory allegation that the 1st Appellant came back in the deceased's vehicle, she articulated the situation very clearly in her evidence in chief, that

the 1st Appellant came back with other policemen but **she did not see the vehicle he was in. She also reiterated during her cross examination that she could not remember** whether or not 1st Appellant came back in the deceased's car. In her police statement she never stated it as a fact that 1st Appellant came back in the deceased's vehicle. In any event the fact of what car the 1st Appellant was driving when he came back is not material to the issues that the court sought to resolve, what was key and material was the fact that it was not in dispute that the 1st Appellant came back with a back -up of other policemen who participated in the arrest of the deceased. It is of further importance that Ngwenya's evidence that the deceased was indeed confronted for a traffic violation, accused of blocking the road, the police enforcing a law of which they lacked authority was corroborated and confirmed by further evidence. Ngwenya also ruled out any physical altercation between the deceased and the 1st Appellant except confirming that the deceased was enraged about the 1st and 2nd Appellants confiscation of his licence and vehicle and had persistently and aggressively demanded his license and vehicle from the 2nd Appellant. She denied the incident described by the 1st Appellant of his gun being taken from him by the deceased ever occurring. This was likewise corroborated by the video footages and Sekwati. She even went further and confirmed that 1st Appellant drove off in 1st Appellant's vehicle even though it is not depicted in the video.

[74] The argument on the alleged contradiction of the objective facts, is therefore not only on immaterial aspects of the evidence, but unpersuasive. The trial court was correct to disregard the contention, as contradictions per se do not necessarily negate the evidence of a witness, especially if he does not differ on material aspects. Not every error made by a witness affects his credibility and a court has to make an evaluation, taking into account the contradictions, their number and importance, as well as their bearing on other parts of the witness's evidence; see Nomandela v S (2007) 1 ALL SA 506 (E). It was also correct of the court to appreciate that Ngwenya did not feel the need to answer to things that she was not sure about or she did not see, refusing to speculate.

[75] In relation to Sekwati, the defence alleged that her absence from the scene should be inferred from her failure to recognise that the 1st and 2nd Appellant came in a police van which stopped next to the deceased's car. Also from the fact that she did not film and or left out some details on what happened prior to the 1st Appellant driving off in the deceased's vehicle. In particular the alleged physical altercation and the deceased's robbing of the 1st Appellant of his firearm whereupon the 2nd Appellant is alleged to have fired a shot into the air prompting the deceased to surrender the firearm to the 2nd Appellant.

[76] Taking into account Ngwenya's evidence that she only saw the 1st and 2nd Appellants next to the deceased's window when they confronted the deceased. They were on foot, not in a police vehicle. They had stopped their vehicle next to the deceased's vehicle, especially if its sirens were on as alleged by the defence she could have seen it, Sekwati's version is plausible that the police vehicle was actually parked at the back of these other cars nearly at the end of Esselen Street. She saw the two approach the deceased on foot whilst the deceased was sitting in his taxi. It corrobates Ngwenya's version.

[77] The 1st Appellant's evidence was that they parked the vehicle parallel to the deceased's vehicle. 2nd Appellant asked the deceased whilst still in the vehicle to move his taxi. The deceased answered in a vulgar language insulting them. At that point 1st Appellant and the deceased alighted from their vehicles. It was put to Ngwenya that the Appellants will

say the 2nd Appellant then parked the vehicle in front of the deceased's vehicle. However Ngwenya had testified that there was another taxi, a Quantum that was in front of the deceased's vehicle, therefore not possible that the police vehicle could have parked in front of them. The 2nd Appellant's version **was that when they arrived at the rank, the 1st Appellant alighted from the vehicle and he drove off to park the police van.** The exchange and argument between the 1st Appellant and the deceased started in his absence. The 1st and 2nd Appellant's evidence contradictory.

[78] Sekwati has furthermore alleged to have started videoing the incident during the exchange between the 1st and 2nd Appellant and the deceased when it became apparent that there was going to be an altercation. Prior to that there was no altercation. The 2nd video commences with the incident during the argument between the deceased and the 1st and 2nd Appellant and then when the deceased was left alone arguing with the 2nd Appellant. All that was shown to have happened during the altercation was the deceased argumentation and aggressive demand of his licence, with no shot fired or firearm snatched from the 1st Appellant or assault. The deceased was just forceful in his demand of his vehicle and licence.

[79] The trial court dealt with all the evidence led in its entirety on the arrest of the deceased. The difference may be in the details, but this does not detract from the fact that all the evidence on this aspect was considered. The court thereafter correctly found the defence's denunciation of the evidence of these two state witnesses to be without merit and to have been invented solely so that it can fit in with their fictional defence that there was justification for the arrest of the deceased. Similarly the criticism of Sekweta of not having videoed the incident from the beginning was intended to discredit the footage as it also is criticised for not being clear and therefore not accurately portraying the facts as they unfolded although its contents were accepted.

[80] The trial court that had the advantage of seeing, hearing and appraising the two witnesses and the video footages was not only satisfied with the impression the two witnesses made, but also with the authenticity of their evidence that was corroborated by video footages. It therefore was not wrong for the trial court to have relied on the two witnesses' evidence compared to the contrived evidence of the 1st and 2nd Appellants.

[81] In the light of the correct finding by the trial court that the deceased never assaulted the 1st Appellant, the arrest of the deceased was unlawful and his resistance to arrest did not amount to a criminal offence. Under the circumstances the Appellant's application of force on the deceased that they admitted to, amounted to an assault. Assault is not only a criminal act, but a violation of the deceased's basic human rights, in that respect undermines constitutional principles that propagates: Equality before the law that includes the right to equal protection and benefit of the law; an inherent right to have one's dignity respected and protected; right to life, freedom and security of the person; the right not to be deprived of freedom arbitrarily or without just cause, to be free from all forms of violence from either public or private sources, not to be tortured in any way, treated or punished in a cruel, inhuman or degrading way. These rights are to be afforded to every human being indiscriminately, even those who are suspected of having committed a crime: see secs 9, 10, 11, 12, and 14 of the Constitution of te Republic of South Africa, 1996.

[82] It has been argued on behalf of the 3rd to 8th Appellants that should the 1st and 2nd Appellant's version on the reason of the arrest be found to have been correctly rejected, the actions of the other Appellants cannot be held to be unlawful because they acted in terms of s 40 (1) (b) of Act 51 of 1977, on a complaint by the 1st and or 2nd Appellant.

[83] In that regard it was argued that the trial court found that whether the 3rd to 8th Appellants realised or appreciated that the deceased was arrested for nothing more than the traffic violation was not proved by the State and that it was reasonable to accept that they were probably misled by 1st Appellant, by word or conduct, to accept that the deceased had committed a more serious offence, justifying their participation in his arrest and detention.

[84] However the court's finding that the 3rd to 8th Appellants were probably misled or maybe not aware or appreciative of the fact that the deceased was arrested for any other offence other than a traffic violation, is not supported by the evidence led. There was testimony to the contrary. One of the state witnessses, Ngamlana, whose evidence was accepted by the trial court albeit cautiously, testified that when the Appellants arrived with the deceased in the cells, they kept asking him what was he doing, why was he blocking the traffic? Upon which an argument ensued with the deceased asking for his licence from the Appellants. Accordingly that is direct evidence that the Appellants knew and were aware that the deceased's alleged transgression was a traffic violation offence, ie, blocking the traffic. For that reason their arrest and undue application of force was unlawful and the latter amounting to an assault. It is not surprising that no transgression was either reported or entered in the Occurrence Book. The docket was empty with no statement from the 1st Appellant who alleged to have been a complainant and happens to have instigated the deceased's arrest. There is no evidence of any of them having accused the deceased of any other transgression, not even of the alleged assault on the 1st Appellant. The 3rd Appellant stated that he was only told that the deceased was resisting arrest, not about his transgression.

[85] The trial court however appreciated the fact that even though the 1st and 2nd Appellants, and as a result of my finding, also the 3rd to 8th Appellants, may have committed the crime of assault, therefore could be held liable for the injuries sustained by the deceased, it does not follow that they on that basis can be held liable in terms of criminal law for all the subsequent consequences, including the death of the deceased. **The commission of an offence of murder still has to be proven.** There must be a nexus between the Appellants' conduct and the death of the deceased. The trial court reckoned to hold them liable on that basis would be to wrongly apply the old *versari in re illicita* principle which is not part of our law anymore; Criminal Law by C R Snyman p 153. It is a practical rationale.

[86] During the Appellants 'attempt to put the deceased inside the vehicle the deceased fell as shown in the footage, he was lifted up by his legs with his head facing down and also shoved, physically mishandled and bundled into the police van as recounted by the 2nd, 4th, 5th, 6th and 8th Appellant. He certainly would have sustained injuries during that scuffle for which all of them are liable.

On the dragging

[87] Regarding the dragging of the deceased, the Appellants allege that the cuffing of the deceased to the leg of the bench in the police van was not intentional but an accident. The

state had failed to prove beyond reasonable doubt that it was intentional. The 5th Appellant alleged that **due to community uproar, and the deceased's extreme violent behaviour** the Appellants managed to forcefully place the deceased at the back of the van but he ended up seated on the ground at the back. **The first cuff that was hanging loose from his wrist was accidentally hooked to the leg of the bench** inside the van whilst his hands were cuffed and held above his head, complying with *Botha v Minister of Safety and Security* 2003 (2) SACR 423 (T). It is also the contention made on behalf of the 6th Appellant that the clenching was a mistake.

[88] There is no reason why the 5th Appellant did not remove the cuffs which he put on one hand of the deceased after the 6th Appellant had managed to cuff the deceased's both hands. Also even the cuffing by the 6th Appellant was not properly done in accordance with the Standing Orders that they allege to have complied with. The deceased's hands were cuffed to the front instead of the back. 5th Appellant conceded that it does not take much force to attach or to remove handcuffs hooked to the leg of the bench at the back of the van. In Botha it was held that the standard set as the required norm is:

> (1) Every arrested person should be handcuffed immediately with his hands behind his back. A man so handcuffed was neutralised and did not pose a threat.
>
> (2) There was no discretion in regard thereto, especially with reference to a person such as the arrestee in this case.

[89] There was therefore no compliance with *Botha* as alleged. The deceased was left sitting behind the police van in that position for some time. The 5th Appellant's version, that he was not aware as he was facing the crowd, pushing it back when a shot was fired, when he turned back he could see only the top of the canopy, and the van moving, therefore he did not see the deceased being dragged behind the van, is contrary to what was shown in the live video. In the video all the Appellants are shown being behind the van **for a while** when the deceased was on the ground cuffed to the bench. They all had time to do something, mainly to remove the offending cuffs. The omission by all of them was evidently deliberate and their excuse about the crowd feeble. For instance, if they could get the deceased into the van with the menacing crowd being present, unclenching him was possible and would have been instantaneous. The crowd only started being more noisy and volatile throwing stones when the police van started moving dragging the deceased.

[90] The Appellants argue that a reasonable explanation being in existence, the trial court erred when it found that the Appellants must have been aware of the fact that the deceased is being dragged behind the vehicle when 1st Appellant had testified that he was not in a good state of mind and the dragging obscured by members of the community. It is alleged that the 1st Appellant's testimony was corroborated by the fact that he is not seen in the video footage just before and when the deceased is being dragged. 3rd and 7th Appellants also alleged not to have seen the dragging of the deceased as they supposedly ran to their vehicle that was parked at the garage to protect it from the angry crowd, before the 6th Appellant drove away dragging the deceased. Accordingly, the 5th Appellant alleges to have been controlling the crowd with his back to the police van and his firing of a shot can also be heard which fact was not discredited by the state.

before the 6th Appellant got into the van, started reversing in order to drive away. The deceased was also sitting outside the police van for a while. 2nd Appellant had stated that during the arrest, after the deceased was forcefully put in the police van he wanted to climb out of the van and close the door when he realised that 4th Appellant was already holding the door. He noticed a member of the community that was about to overpower the 4th Appellant, an incident observed only by him and fired a warning shot. He said that is the time the deceased managed to come out and sit behind the police van with his cuffed hands behind his head and the other cuff hooked to the bench inside the vehicle. The deceased had no strength. That is the moment when they could then have put him inside the van and unclenched the inappropriate cuffs. 2nd Appellant's excuse is that when they moved closer to the deceased the crowd made a noise and threatened them. So he was afraid and confused and did not know whether to continue with the arrest or face the crowd. He does not mention wanting to assist the deceased, even though he admitted to have realised by then that the deceased was attached to the van in an improper manner. When he was coming out of the back of the van, he should have been very close to the deceased who was sitting on the ground at the back. He could have assisted the deceased if he had good intentions. He instead conveniently alleges not to remember what happened at that time, as he was frightened, contrary to what is shown in the video. The next thing he could remember was the van moving with him holding the deceased's leg. His version or excuse was correctly found to be unconvincing and not possibly true. It was also not the complete story, what is missing is not only a true version of why he did nothing before the police van started moving but also information on how, why and when did 6th Appellant get hold of the 2nd Appellant's keys to the van. 2nd Appellant was the driver of the van and came in it to the scene. The keys were only mentioned at the police station when they were handed back to him by the 6th Appellant. The police van is also on the video shown to have started by reversing, then stopped, moved forward slowly like crawling then stopped, started moving forward again then stopped before it went. They all had a chance to stop the 6th Appellant from unlawfully dragging the deceased to the police station but because they wanted and agreed with the 6th Appellant's unorthodox manner of removing the deceased from the crowd, they let him drive off whilst the deceased was hanging outside the van which was extremely dangerous and criminal. Their holding his legs does not indicate their disassociation from their collaboration to 6th Appellant's dangerous and criminal manner in which he was transporting the deceased, especially considering 2nd and 8th Appellant's further involvement in the cells and 2nd Appellant's continuing to lie about having walked to the station with the 1st Appellant.

[95] It was held in *S v Nduli & Others* 1993 (2) SACR 501 (A) at p504d-e that:

> Dissociation consists of some of or other form of conduct by a collaborator to an offence with the intention of discontinuing his collaboration. It is a good defense to a charge of complicity in the eventual commission of the offence by his erstwhile associate or associates."

[96] It might be a good defence however in *S v Musingadi* and Others, 2005 (1) SACR 395 (SCA) at para 35, the court in dealing with the defense of disassociation had the following to say:

> "What may be gathered from our case law, however, is that not every act of apparent disengagement will constitute an effective disassociation. Compare

[91] Yet, as mentioned, in the video footage the whole contingent of policemen including 1st Appellant can be seen at the back of the van where the deceased was sitting on the ground whilst being cuffed to the leg of the bench inside the van. They are all standing within the surroundings of the arresting van. As a result all the Appellants including the 6th Appellant were aware of the inappropriate cuffing of the deceased to the bench inside the van whilst he was outside, in contravention of the standing orders. They were also aware of the likelihood of him sustaining injuries that might be fatal if he is dragged behind the van in that precarious position. They all had an opportunity to rectify the situation and guard against the danger that was obviously looming, but (acting in agreement with the clenching or having reconciled with the outcome) the Appellants deliberately, (probably because they perceived the deceased to be an aggressive and stubborn person who was resisting arrest, though unlawful) refrained from rectifying the situation, in contravention of their standing orders. They knowingly and intentionally failed to take any measures to prevent the tragedy. Even the 4th Appellant allowed and associated himself with the dragging of the deceased. His professed noble intention for thereafter following the van in serious doubt. He followed it without flickering his lights for approximately 200 until they were out of Esselen Street. The Appellants' version was therefore correctly found not to be reasonably true that they were not aware either of the dragging or the clenching.

[92] The trial court's conclusion is as a result unassailable. The Appellants, aware of the imminent danger posed by the precarious position of the deceased's cuffing and of being outside the van, had an opportunity to assist the deceased but did not. They do not explain why they did not try to remove the extra set of cuffs that were wrongly clenched to the bench if it happened accidentally. By standing there, watching and omitting to act, they associated themselves with the inappropriate clenching of the deceased and the imminent danger it imposed. The defence's allegations of fear of the rowdy crowd by some of the Appellants does not hold. There is incontrovertible evidence that the crowd was already there on arrival of the Appellants at the scene with the 1st Appellant. They notwithstanding the crowd proceeded to effect the unlawful arrest of the deceased, shoving and bundling him in the police van whilst unlawfully applying undue force despite the presence of the crowd. It couldn't have been much of a challenge to unhook him from the bench or to stop the 6th Appellant from dragging him. Their omission to do something was therefore a continuation of a common deliberate intent to harm the deceased having foreseen and reconciled themselves with the possible outcome consequent from their actions. They thereafter continued to act in association with the intentions and conduct of the 6th Appellant.

[93]` The court a quo is also alleged to have misdirected itself in finding that although 2nd and 8th Appellant attempted to assist the deceased when the van drove off, they both subsequently did not do anything to stop the 6th Appellant. The 2nd Appellant's version was that he shouted at 6th Appellant to stop. Its argued that the court should have found the two Appellants' actions to be indicative of their intention for the deceased not to be dragged or prevent any bodily harm and of having disassociated themselves with the dragging. Their attempt to avoid the deceased being hurt to be regarded as an act of withdrawal from the common purpose.

[94] The 2nd and 8th Appellant had an opportunity just as every Appellant had, to rectify the situation by removing the cuffs that were allegedly stuck to the bench, prior to the van reversing and or accelerating since the 8th Appellant was already holding the deceased's leg

> Snyman: *Strafreg* (4ed) at 267-9. It appears that much will depend on the circumstances: On the manner and degree of an accused's participation; on how far the commission of the crime has proceeded; **on the manner and timing of disengagement; and, in some instances, on what steps the accused took or could have taken to prevent the commission or completion of the crime.** The list of circumstances is not exhaustive. To reduce this composite of variables to a workable rule of law may be artificial, even unwise."

[97] The 2nd Appellant's version is that he took a decision to face the deceased. He grabbed the deceased's leg trying to save him from being dragged and injured. He let go when the van started moving faster, only then shouted for the 6th Appellant to stop. He did not try to stop the 6th Appellant from reversing the van or driving away. The 6th Appellant had started driving and stopped the van two times before he pulled off. He did that driving very slowly. The 2nd Appellant could have then shouted or walked up to the 6th Appellant, like the 7th Appellant did, and told him to stop the car, or wait until the deceased was inside the van. Instead they picked the deceased's legs assisting the 6th Appellant to get away from the scene quicker, minimising the deceased' resistance since the deceased was sitting down on the tarmac. They continued to associate themselves with each other's actions, particularly of the 6th Appellant who was driving the van to the police station in total disregard of the deceased's basic human rights and the danger posed. Their allegation is further negated by their further involvement in the cells, being present when the deceased was further assaulted. 2nd Appellant's allegation that he shouted for the 6th Appellant to stop is just added to coin a defence of having shown compassion so that it can be presumed that they had an intention to disassociate themselves. The 2nd and 8th Appellants' act of lifting the legs did not constitute a disassociation from the agreement. The Appellants had continued to definitely work in cohorts with each other actions.

[98] The 8th Appellant was as involved as all the Appellants in the forceful arrest of the deceased. His version is that he lifted the deceased's leg whilst he was sitting inside the van, to no avail. Even though he realised that the deceased was attached to the van in a wrong way, he did not do anything but when the van reversed slightly, he pushed the deceased against it to prevent an injury to the deceased. He then lifted the deceased's leg when the van started moving. This does not only contradict their evidence of having struggled to get to the deceased because of the crowd but also it is not an act of disassociation but of assistance or support to the 6th Appellant so that he could move or drive away without being hindered by the deceased's sitting on the tarmac and his feet being on the ground. The 6th Appellant had indicated his intentions clearly to transport the deceased when he reversed the van. With his years of experience the 8th Appellant was aware of the possible harm and had reconciled himself with the possible outcome and continued in collaboration with the others with the further assault and mishandling of the deceased at the police station.

[99] In *Sithole* in differentiating the circumstances of *Sithole* and that of *S v Magwaza* 1985 (3) SA 29 (a) AT 418 at para 35, the court stated that:

> "The appellant in disassociating himself to what his co-perpetrators were doing ran away from the scene as soon as he heard the gunshots. He did not wait for them to come out of the yard.

> Put in another way **he did not wait to receive the report on how successfully the others had carried out the 'mandate.' It is important to note that he did not only run away from the scene but that he never went looking for the others to find out what had happened.** He clearly disassociated himself with what the others had done in 'breach of the mandate' of house breaking and theft. (my emphasis)

[100] The 3rd Appellant was aware of the position of the deceased. He said he thought the deceased was cuffed like that so that he can be put properly in the van. At that time the crowd was coming strongly. He realised that the deceased was fastened unlawfully and wanted to fetch a pepper spray to use on the deceased to subdue him to enable them to cuff the deceased properly. Under cross examination he said when he saw that they are busy injuring this person seeing that they were beating him, he warned them but they continued. He was aware that if a person gets dragged he might die therefore not allowed. He admitted that he nevertheless did nothing. He also alleged that at the time the van started moving neither him nor the 7th Appellant were on the scene. He just saw people running after the van. They had left to fetch their police vehicle as the mob had threatened to burn the vehicles.

[101] It is then difficult to make out the real reason for the 3rd Appellant to have allegedly left the scene. He alleged to have left to fetch the paper spray he was going to use on the deceased. He then mentioned the crowd's threat to burn their car that was parked away from there at a garage. The allegation of a threat to burn the vehicle does not make sense since they fetched the car and came back to the scene where the threat was made. Nevertheless the video footage show the 3rd and the 7th Appellant behind the van when the deceased was sitting down on the tarmac at the back of the van. That is the time when it is said he was tired. At the time the 6th Appellant rushed and got into the van. He reversed, stopped, crawled forward and stopped, the 7th Appellant was shown standing near the driver's door of the van talking to the 6th Appellant and the 3rd Appellant was standing behind the 7th Appellant. On being confronted with such a scene, 7th Appellant alleged that he was warning the 6th Appellant of the deceased's precarious situation seeing that he was moving the vehicle. It was therefore clear that all the Appellants were present, aware of the dragging and lying about being absent when it commenced. The trial court was correct not to accept the Appellants' evidence, it lacked lucidity.

[102] The defence's further argument on the dragging of the deceased is that the trial court ought to have found that the state did not prove its case beyond reasonable doubt that all the Appellants except for 6th Appellant, foresaw the possibility of the 6th Appellant under the prevailing circumstances driving away with the Defendant and to have noticed when he started driving away with the deceased hanging from the back of the vehicle and did not associate themselves with the dragging of the deceased.

[103] As indicated the Appellants are depicted standing behind the police van before the deceased is dragged, following their team work in physically handling the deceased to effect the arrest and the inappropriate clenching of the cuff that was on the wrist of the deceased to the bench in the van. They were therefore aware of the 6th Appellant when he started driving. Moreover, the alleged intention of the whole fracas was to take the deceased, after the arrest, to the police station, why would their cooperation be regarded to having stopped prior to the deceased being conveyed to the police station? They continued, since the deceased was still resisting to be arrested in front of a crowd, acting in agreement, to leave him in his precarious position even when the 6th Appellant got into driver's seat of the police

aware of the deceased's precarious position or foreseeing the possible fatal outcome. He went into the van aware that the door was not closed. He, let by the other Appellants, with indifference if the deceased suffers injuries which may cause his death, drove off with the deceased in that position, to punish him for his resistance. They all foresaw the possibility of the deceased sustaining injuries that may result in his death and with disregard of such a possibility, deliberately refrained from preventing the 6th Appellant from driving off with the deceased in that position.

[107] In dealing with the issue of murder in a case involving common purpose the court in *S v Ngobozi*, 1972 (3) SA 476 (A) had the following to say:

> "Each is guilty of murder if he subjectively foresaw the possibility of the execution of their unlawful common purpose causing the death of C, but nevertheless persisted therein, reckless whether the possibility became fact.

On the assault in the cells & fatal injuries

[108] In relation to the allegations of assault that happened in the cell during the detention of the deceased, the defence disagree with the court's finding that no more than a few of the soft tissue injuries could have been sustained during the arrest but the majority sustained during the dragging and later in the cells, alleging that such finding contradicts Skosana's initial testimony that the majority could have been sustained during the deceased's arrest, as the ones sustained during the actual dragging could not have been severe, which is according to them corroborated by 4th Appellant's testimony that the deceased was lifting his feet from the ground during his dragging and therefore could not have sustained serious injuries when **only a sock and the bottom of his jeans were torn**. They argue that the court a quo should have found that the deceased sustained numerous of the injuries from the force used whilst he was resisting arrest and to get him into the van. Also that the blood that was found at the back of the van was from the injuries sustained during such arrest and his loading at the back of the van not from the dragging.

[109] The trial court was also said to have erred when it found contrary to Skhosana's testimony that the majority of the injuries were sustained in the cell, and that the suggested possibility that the deceased could have sustained a head injury as a result of him injuring himself by falling and hitting his head against the concrete bench in the cell amounts to speculation or conjecture, notwithstanding Skosana's evidence being confirmed by the fact that the deceased's blood was found on the edge of the bench and corroborated by the blood spatter expert. They indicated that Ngamlana's evidence was also that the deceased was assaulted at the reception area not in the cell where he was later found lying on the ground when he was left sitting on a bench by Ngamlana and Moyo. This was after the Appellants had allegedly been present in the cell and had left.

[110] In dealing with such a contention, the trial court had considered and acknowledged the cardinal importance of the nature and extent of the injuries sustained by the deceased as found by Skosana, in establishing the possible liability of the Appellants in respect of both the deceased's dragging and assault in the cells. It acknowledged that from the extent of the injuries as listed in the post mortem report, it was clear that the soft tissue injuries were extensive and the blunt force injuries severe. **And that according to Skosana these injuries, separately and conjunctively led to the death of the deceased.** At the same time that

van. The Appellants could not give any cogent reason for their failure to unclench the cuffs from the bench or deceased's wrist which they allege was accidental, or to prevent the 6th Appellant from dragging the deceased. The trial court did not err in inferring from such conduct that they were all acting in association with each other's actions including those of the 6th Appellant in pursuit of a common goal. They all acted contrary to their legal duty to follow standing orders, refrained from the opportunity to rectify their violation and prevent harm. They all were aware or foresaw that the dragging of the deceased in that position would inflict injuries that might be fatal, however they omitted to prevent the 6th Appellant from doing that, who walked to the driver's seat whilst they were watching. It is also not true that they did not notice. The only conclusion is that indeed the Appellants associated themselves with the dragging of the deceased, foresaw that he may sustain injuries but were indifferent as they wanted to punish him for the trumped up charges of resisting a lawful arrest. The fact that they were breaking the law did not matter.

[104] In *S v Motaung* [1990] ZASCA 75; 1990 (4) SA 485 (A), the Supreme Court of Appeal defined common purpose as a 'purpose shared by two or more persons who act in concert towards the accomplishment of a common aim. The practical effect of the application of this doctrine is that "if two or more people, having a common purpose to commit a crime, act together in order to achieve that purpose, then the conduct of each of them in execution of that purpose is imputed to the others' The operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example murder.

[105] Lastly the defence submitted that the trial erroneously rejected the evidence of the 6th Appellant that in the circumstance he found himself in, he did not make the normal observations from the mirrors due to the crowd's menacing attitude, throwing stones and shots being fired and that he was not aware of the deceased's position at the time, as being not reasonably possibly true. The court a quo however correctly considered that the inspection *in loco* conducted confirmed that the 6th Appellant should have been able to observe and see that the deceased was not in the van as in order to reverse he had to use the mirrors to look at the back. The inside of the van was also visible through the front mirror. He also must have heard the shouting by the crowd that was obviously horrified by what they were witnessing. The 7th Appellant was also seen speaking to him whilst he was reversing, allegedly warning him that the deceased was outside the van. He nevertheless drove off.

[106] Furthermore, the 6th Appellant was aware of the deceased's resistance and therefore could not vouch that the deceased was inside the van. In any case it is impossible that he would have driven off without having made sure that the culprit he wanted to transport is securely locked inside the van, which was not the case. The door was also never closed, it is therefore not surprising that the deceased was allegedly accidentally clenched on the bench of the van, which would ensure that he remains attached to it, even if he jumps out. The clenching of the cuff on his wrist to the bench could therefore not have been an accident. It ties in with the Appellants omission to unclench the cuff or do anything about it. The Appellant did not try to put the deceased back in the van even though he was then very tired. They let the 6th Appellant drive away with him like that, not being physically secured inside the police van. 6th Appellant was correctly found to have been disingenuous when he denied being

Skosana had conceded under Mr Wyngaardt's cross examination to the possibility that some of the soft tissue injuries could have been sustained from the force used either during the arrest when the deceased was subdued and secured inside the police van or during the dragging or as injuries that might have been self- inflicted, by the deceased on his own falling and hurting himself in the cell. Skosana has also conceded that some of the severe blunt force injuries to the deceased's head could have been sustained either during the initial arrest scuffle when he was held with his head facing down or at the time when he was forcefully put in the van or when he was dragged his head was hit against the sharp edge of the bench in the cell.

[111] The video footage shows the scuffle during the arrest of the deceased. The court a quo was correct that no more than a few tissue injuries were sustained from that incident . It also took into consideration that none of the Appellants had testified to any injuries nor was any open or bloody wounds observed from the deceased whilst secured to the van before he was dragged. It therefore would be sensible to accordingly infer that the majority of the injuries were sustained by the deceased during the dragging and the assault in the cells, concluding that the fact that blood was observed in the police van as well as in the cell splattered on the walls and the floor, meant that those were the two possible scenario from which the blunt force injuries could have been sustained. (the dragging or when he fell against a sharp edge in the cell).

[112] The court had further correctly indicated, pertaining to **the soft tissue injuries** the deceased could have sustained, that the suggestion by the defence's Wyngaardt and concession by Skhosana, that they might be from having fallen of his own accord, a speculation and conjecture as no evidence was led to that effect that supports such a proposition. Skosana pointed out that deceased **suffered more direct violence referring in this regard to the injuries on the testicles and body that could have been caused by direct evidence like a kick.** Indeed the only evidence that was before court and not factually disputed was that of Ngamlana. Ngamlana as well as the 8th Appellant, perhaps unwittingly, placed all the Appellants in the deceased's cell except for 1st Appellant, even though they all denied having been in the deceased's cell or assaulting him there. The 8th Appellant's statement was accepted by the defence and admitted into evidence. It therefore not true that only Ngamlana places the Appellants in the cells. Ngamlana testified to seeing the Appellants surrounding the deceased and hearing sounds of slapping with the deceased crying. According to him he last saw the deceased sitting on the bench with his body bent forward. In the meanwhile Skhosana indicated that several of the blunt force injuries suffered by the deceased were inflicted by application of direct violence, specifically the injuries on the deceased's private parts, which could only have been inflicted by kicking whilst the deceased was on the floor. **He indicated that the multiplicity of the bruises and open wounds also creates some doubt that the injuries could have been self- inflicted in a single fall.** It therefore augurs with the trial court's logical finding that Skhosana's testimony of a possibility of direct violence and Ngamlana's allegations of the Appellants assaulting the deceased in the cells and the nature of the injuries sustained by the deceased evidently supports an inference that the assault from which the severe soft injuries were sustained took place in the deceased's cell and was inflicted by the Appellants. The blood that was found in the police van and the soft tissue injuries, inter alia, the laceration on right big toe, 2cm laceration right frontal scalp, bruise on his head support a probability of further injuries having been sustained during the dragging of the deceased.

[113] The defence disputed that the only inference that could be drawn from the **circumstantial evidence proven beyond reasonable doubt was that the 2nd,3rd,4th,5th ,6th, 7th and 8th Appellant were indeed in the cells relying on** Ngamlana's evidence. It argued that Ngamlana had a clear motive to implicate the Appellants falsely, as the deceased died under his care and control and he was also not certain as to who was present in the cells when the deceased was allegedly assaulted. It further argued that Ngamlana should have been found not to be a satisfactory witness nor was there corroboration for his evidence, also that the fact that in the indictment the state did not rely on the assault inflicted in the cells indicative of the fact that Ngamlana adapted his evidence being afraid of being criminally prosecuted for his blatant omissions. The court was supposed to find him unreliable and dishonest as by his own admission he lied under oath. Ngamlana was also adamant that the deceased did not sustain any injuries in the presence of the Appellants when he was in the cells.

[114] It is inevitable that the trial court would have been alive to the challenges relating to Ngamlana's evidence and it actually did apply the cautionary rule extensively when dealing with his evidence. It acknowledged that Ngamlana might certainly have a bias or interest since the deceased was injured whilst he was under his control and care, and further that he did contradict himself in some way, specifically with regard to the 9th Accused, who was apparently discharged. However in analysing the instances that were referred to in *S v Mokoena* 1932 OPD 79, upon which the provisions of s 208 should apply, it was acknowledged that the determining factor remains whether taking into consideration the whole evidence led, the court is convinced beyond reasonable doubt. The rule being regarded as a precaution that may well be helpful as a guide to a correct decision but that requires judicious application; see Hiemstra's Criminal Procedure at 24-5. In *S v Webber* 1971 (3) SA 754 (A) at 759D-E, it was pointed out that the requirements as set out in Mokoena should not be applied automatically as formulae. Notwithstanding that mention is made of an interest or bias adverse to the accused or the fact that the witness contradicted himself, **the trial court must nevertheless determine the severity of the prejudice and assess its importance in the light of all the evidence.** It is said the presence of such interest or biased will not necessarily cause the evidence of a single witness to be insufficient. **When however there is a measure of corroboration, even if it is small, it is said one is no longer dealing with a single witness**; see *S v Snyman* 1968 (2) SA 582 (A) at 586-587.

[115] The court a quo did look for corroboration of Ngamlana's evidence notwithstanding the immaterial contradiction and perceived bias in his evidence. As already mentioned Skosana's version of a possible violent infliction of the injuries on the deceased whilst he was on the floor evidenced by the deceased's severe injuries on his testicles, is collaborative of Ngamlana's testimony that the deceased was assaulted in the cells and also that he did fall down then, put up and made to sit on the bench again. Later he was found lying down. The deceased was according to Ngamlana also dragged to the cell as he could not walk on his own and he was crying, that is confirmed by the injuries to his right big toe. Ngamlana's allegation about the presence of the Appellants in the cells is corroborated by the 8th Appellant statement that 1st, 2nd, 4th and 6th Appellants were in the cells. Ngamlana testified to the Appellants' interrogation of the deceased about his blocking of the traffic. He also heard a sound of slapping coming from the cell during that time upon which the deceased fell. When the deceased was forcibly made to sit on the bench, his head was bleeding and was complaining that his head is hot. On the other hand the evidence that was led by the 4th and 6th Appellant that the deceased was fine when he was presented at the cells is contradicted

by Ngamlana's evidence and the injury that was on the deceased's toes and the bottom of his trousers that were torn. The version of the Appellants about their whereabouts were correctly not accepted by the trial court as not reasonably possibly true.

[116] It is also obvious that the Appellants were trying to distance themselves from having been in the cells to avoid being held accountable as the deceased's arrestee, to the deceased's condition and demise in detention, specifically the 1st Appellant. Nevertheless taking into account the whole evidence, though mostly circumstantial, it overwhelmingly points to one inference, that the deceased was surrounded and assaulted by the Appellants in the cells as alleged by Ngomlana. They are placed in the cell by two opposite witnesses, one of them testifying to having seen the Appellants actually interrogating the deceased about the alleged transgression, heard slapping sounds coming from the cell accompanied by the deceased crying, whereupon he fell. He was forcefully pushed to sit on the bench, whilst complaining that his head was hot. Subsequently finding the deceased on the floor his head in a pool of blood and also blood splattered on the wall, having sustained multiple injuries. The expert testified to some of the wounds to have been inflicted by physical direct violence. The only inference that can be drawn is that the injuries could only have been inflicted by the Appellants who were seemingly offended by the deceased's alleged transgression.

[117] When dealing with circumstantial evidence the test to apply is set forth in *R v Blom* 1939 AD 188 at 202 and 203 as two pronged:

> (1) the inference sought must be consistent with the proven facts. If not the inference cannot be drawn;
>
> (2) the proven facts should be such that they exclude every reasonable inference save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is indeed correct.

[118] As against the 1st Appellant, the defence points out that he was found guilty of murder since after the deceased was dragged and taken to the police station, he apparently did not attend to the deceased's injuries and medical assistance. As for the other Appellants, that they were guilty since they further participated in the assault of the deceased at the police station, when there was no allegation in the summary of its evidence that the deceased was assaulted in the police cells.

[119] Furthermore the defence disputes that the assault in the cell is also the determining factor of the Appellant's liability arguing that as it was not mentioned in the charge sheet or the substantial facts that were admitted that the deceased's injuries sustained in the cell could have caused his death. However Ngamlana testified to the assault of the deceased in the cells with the defence failing to object during the proceedings. Instead he was cross examined on that evidence and the defence tried to counter it by denying or explaining some of the factual issues raised regarding the assault in the cells and by also insinuating that the deceased could have sustained injuries in the cell which could have resulted in the deceased's death but such injuries must have been self- inflicted, which attempt was dismissed by the trial court. Skosana on recall ruled out such a possibility, especially since the deceased **suffered a multiplicity of injuries including those on his testicles that he presumed could have only been caused more by direct violence, referring in this regard to the direct evidence like a kick when the deceased was lying down. The splattered blood on the cell**

wall also pointed to the contrary. The Appellants were satisfactorily afforded an opportunity to counter the evidence which was proven beyond reasonable doubt, albeit circumstantially.

[120] The trial court referred to the provisions of s 86 of the Act, which permits the amendment of an indictment on request. In *S v Maqelepo* 1999 (1) SACR 328 (O) the court indicated that 'if the substance of the charge corresponds with the evidence and the difference relates to detail only, there is no substitution. Also that the making of particulars to be more aggravating does not appear to be impermissible, however if the same act is intended a larger *corpus delicti* cannot prejudice the Appellant in his defence and it is submitted that such an amendment would be in order. The trial court nonetheless acknowledged that there was no such application, which it indicated it would have granted anyway since there would not have been any prejudice to the Appellants.

[121] Furthermore on the assault in the cell, the defence argued that not only is there no evidence that proves that the Appellants assaulted the deceased, but also no evidence that there was a prior agreement between the Appellants to do so. The state could only succeed in proving that the accused's liable in terms of common purpose only if it not only proves the Appellants' **presence at the scene** but that they were **aware of the assault** and intended **making common cause** with those executing the assault. They also should themselves have performed some act of association with the conduct of the others and must also have had the requisite *mensrea* (having intended the deceased to be killed or foreseen the possibility of him being killed) and performed his own act of association with recklessness as to whether or not death was to ensue. The state failed to do so and the trial court was materially misdirected in its conclusion that the Appellant's conduct at the police station satisfied the liability requirement of common purpose. The court ought to have found that what was proven by the state was either assault with intention to cause grievous bodily harm.

[122] In *Safatsa S v Safatsa* [1987] ZASCA 150; 1988 (1) SA 868 (A). Botha JA said:

> "In my opinion these remarks constitute once again a clear recognition of the principle that **in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants.**

He further at 898 held that:

> **"This remark [proving causation] has given rise to the question whether, in relation to cases of common purpose, some kind of causal connection is required to be proved between the conduct of a particular participant in the common purpose and the death of the deceased before a conviction of murder can be justified in respect of such a participant. In my view the clear answer is: No."**

[123] In *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) quoting from the headnote.

'Held, further, that, ordinarily, in a consequence crime, a casual nexus between the conduct of an accused and the criminal consequence was a prerequisite for criminal liability. ***The doctrine of common purpose dispensed with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence,*** *the accused would be guilty of the offence. The principal object of the doctrine of common purpose was to criminalise collective criminal conduct and thus to satisfy the need to control crime committed in the course of joint enterprises. The phenomenon of serious crimes committed by collective individuals, acting in concert, remaining a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it was often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a casual prerequisite for liability would have rendered nugatory and ineffectual the object of the criminal norm of common purpose and made prosecution of collaborative criminal enterprises intractable and ineffectual. (Paragraph [34] at 527D-G.) (my emphasis)*

[124] The 8th Appellant confirmed that the Appellants were there in the cells, corroborating Ngamlana's allegations. The pathologist testified to the deceased's death having actually been caused separately **and conjunctively by the trauma from the severe soft tissue and the blunt injuries,** which injuries were sustained by the deceased during his arrest, dragging and assault in the cells. The Appellants were acting in unison when they violently subdued the deceased to effect the unlawful arrest and contrary to the standing orders, proceeded to handcuff him inappropriately with his handcuff clenched to the bench at the back of the police van and his body hanging outside the van . They hence, in agreement with each other's actions deliberately omitted to rectify the situation and to securely put the deceased inside the van prior to letting him be taken to the station. They also omitted to prevent the subsequent dangerous dragging of the deceased by one of their counterpart conscious that the deceased might sustain fatal injuries. The Appellants collaboration continued, persisting to subject the deceased to further unlawful assault in the cells, in the presence of each other. The deceased subsequently succumbed to his injuries. The Appellants were well aware that the injuries they were inflicting or causing to be inflicted on the deceased, may cause the deceased's death. They nevertheless let that continue, indifferent to the outcome and intent on harming the deceased. They also, intent on subjecting the deceased to more inhuman and cruel treatment more so to punish him, and in furtherance of their collaborative purpose deliberately refrained from taking the deceased for medical attention, knowing that the inflicted injuries might cause the deceased's death. The Appellants acted in common purpose with each other's conduct with the necessary criminal intent in the form of *dolus eventualis*.

[125] In cases dealing with consequence crimes such as murder, the liability requirements of a joint criminal enterprise fall into two categories as clarified in *Jacobs v S* [2019] ZACC 4; 2019 (1) SACR 623 (CC); 2019 (5) BCLR 562 (CC) at [48] and [49] that 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. In the latter instance the liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind, consensus being inferred from surrounding**

circumstances. In the same matter Froneman J further said the following which is significant to the doctrine of common purpose:

> "There is no dispute here about the content of the common law. Where there is a prior agreement between parties to a common purpose there need not be presence or participation by each when the fatal assault is administered. **Where no prior agreement is established, presence at or before the fatal blow is necessary.**

[126] In *Safatsa S v Safatsa* [1987] ZASCA 150; 1988 (1) SA 868 (A). Botha JA said:

> "In my opinion these remarks constitute once again a clear recognition of the principle that **in cases of common purpose the act of one participant in causing the death of the deceased is imputed, as a matter of law, to the other participants.**

He further at 898 held that:

> **"This remark [proving causation] has given rise to the question whether, in relation to cases of common purpose, some kind of causal connection is required to be proved between the conduct of a particular participant in the common purpose and the death of the deceased before a conviction of murder can be justified in respect of such a participant. In my view the clear answer is: No."**

[127] The main object of the doctrine of common purpose is to bring into the net and criminalise collective criminal conduct and in the process address societal needs to combat crime committed in the course of joint enterprises in a way in which the unlawful results are brought about. The State is not required to prove the **causal connection between the acts of each participant and the consequence,** for example, murder." See remarks by Theron J in *Jacobs* 19 at para 70:

[128] Having been proven as per Skosana's evidence that the death of the deceased was caused by the respective and collective trauma resulting from the severe soft tissue and the blunt force injuries to which all the Appellants had actively participated in inflicting or by omission assisted to bring about, either jointly or separately in the presence of each other, notwithstanding being conscious of or foreseeing the possibility of the deceased succumbing to such injuries, each acting in association or with a common criminal intent to harm the deceased, indifferent as to whether or not the deceased dies, having reconciled themselves with the outcome, the trial court correctly found the state to have proven the guilt of all the Appellants beyond reasonable doubt that they have acted in common purpose and their conduct to have resulted in the death of the deceased on a doctrine of *dolus eventualis*.

[129] A person acts with intention in the form of ***dolus eventualis* if the commission of the unlawful act or the causing of the unlawful result is not his main aim**, but:

> (a) he subjectively foresaw the possibility that, in striving towards his main aim, the unlawful act may be committed or the unlawful result may be caused, (the cognitive element of the test)

(b) he reconciles himself to that possibility (the conative part of the test)

[130] For the first component it is not enough that the Appellant should (objectively) have foreseen the possibility of fatal injuries as a consequence of his conduct, because the fictitious reasonable person in his position would have foreseen those consequences. That would constitute negligence and not *dolus* in any form.

[131] "Reconcile with the possibility" means that an **accused decides to go ahead with his actions even though he foresees the possibility that the fatal result may follow**. Therefore to the accused, it must have been immaterial whether this result flows from her actions or not: she would **not** be concerned about it or **deterred by the prospect of death** flowing from his act. **He must have been reckless in respect of the prohibited result and consciously accepted the risk**; see *S v Botha* [2019] 1 All SA 42 (SCA).

[132] Due to lack of direct evidence of the existence of the second (conative) part of the test to determine *dolus eventualis* **the finding of the courts** is always **almost based** on whether the second part of the test has been complied with **on deductions or inferences from the facts**. In *S v Pretorius* 2016 (1) SACR 431 (SCA), the requirements of the doctrine where explained as follows:

> [47] "The pertinent issue then becomes whether, **on the primary facts found proved, considering all of the evidence relevant to the issue**, and applying the correct legal test, **the inference has to be drawn that the accused acted with *dolus eventualis*** when he fired the fatal shots. In this regard the following observation of Brand JA in Humphreys is to the point:
>
> > "[L]ike any other fact, subjective foresight can be proved by inference. Moreover common sense dictates that the process of inferential reasoning may start out from the premise that, in accordance with common human experience, the possibility of the consequences that ensued would have been obvious to any person of normal intelligence. The next logic step would then be to ask whether, in the light of all the facts and circumstances of this case, there is any reason to think that the Appellant would not have shared this foresight, derived from the common human experience, with other members of the general population".
>
> [51] **In these circumstances I have no doubt that** in firing the fatal shots **the accused must have foreseen, and therefore did foresee**, that whoever was behind the toilet door might die, but reconciled himself to that event occurring and gambled with that person's life. This constituted *dolus eventualis* on his part, and the identity of his victim is irrelevant to his guilt.

[133] The SCA in *Pistorius* emphasised that the wrongdoer does not have to foresee death as a probable consequence of his or her actions, it is sufficient that the **possibility of death is foreseen which, coupled with a disregard of that consequence**, is sufficient to constitute the necessary **criminal intent**.

[134] As against the 1st Appellant since after the deceased was dragged and taken to the police station, he apparently did not attend to the deceased's injuries and medical assistance, even though he was not present during the assault at the police station he was found to be also as guilty as his counterparts. The deceased was at 1st Appellant's behest assaulted during his arrest and thereafter with the collaboration of the 1st Appellant and the others

dangerously dragged to the police station whereupon the deceased sustained more injuries. They all foresaw the possibility of death ensuing and together with the other appellants was aware of the deceased's subsequent detention and the fact of the injuries they had inflicted on him. He was also informed of the deceased's state and need of medical attention as the arrestee. He consciously, in continuance with his collaboration with the other Appellants did not arrange for the deceased to receive medical attention as they all did, even though he was aware that the deceased might succumb to his injuries, having reconciled with that possibility. The court has also taken into consideration that the final medical finding was that it is the trauma from all the injuries sustained separately and conjunctively that resulted in the death of the deceased.

[135] The principles relating to common purpose are pointedly enunciated in *S v Mgedezi* 1989 (1) SA 687 (A) on page 705 I to 706 C as follows:-

> "**In the absence of proof of a prior agreement**, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in S v Safatsa and Others 1988 **(1) SA 868** (A), only if certain prerequisites are satisfied. In the first place, **he must have been present at the scene** where the violence was being committed. Secondly, **he must have been aware of the assault on the inmates of room 12.** Thirdly, **he must have intended to make common cause with those who were actually perpetrating the assault.** Fourthly, **he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others.** Fifthly, **he must have had the requisite *mens rea*; so, in respect of the killing of the deceased,** he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting 1986 SALj 38 at 39. In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, **the State had to prove all of these prerequisites beyond reasonable doubt.**"

[137] As a result the 1st Appellant had also the necessary intention in the form of *dolus eventualis* in respect of the charge of murder. The trial court therefore did not misdirect itself in its finding that all the surrounding circumstances, holistically considered with all the established facts from which the inferences are sought to be drawn were proven against all the Appellants beyond reasonable doubt.

[138] The Appellants therefore failed to establish the court a quo's misdirection that justifies interference by this court.

[139] Under the circumstances the following order is made.

1. The appeal is dismissed.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur

P MABUSE
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I concur

JANSE VAN NIEUWENHUIZEN

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