

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Appeal No.: A253/2007

In the appeal between:

LOUIS FRANCOIS PRESCOTT

Appellant

and

THE STATE

Respondent

CORAM:

RAMPAI, J *et* MOCUMIE, AJ

JUDGEMENT:

RAMPAI, J

HEARD ON:

26 NOVEMBER 2007

DELIVERED ON:

13 DECEMBER 2007

[1] The appellant, Mr. Louis Francois Prescott, comes to us on appeal against his conviction as well as sentence. He was found guilty of murder and sentenced to 15 years imprisonment. He also applied for condonation for the late filing of his appeal. This we granted with the consent of the respondent.

[2] The appellant was tried in the Bloemfontein Regional Court together with a certain Mr. Stephanus Willem du Toit. They were charged as accused number 2 and 1 respectively. The charge against them was that they had murdered Noël Robert Manthe in Bloemfontein on 15 October 1997.

[3] The trial from which this appeal originates started on 8 November 1999. Both of them pleaded not guilty before Mr. J. H. Loubser, the regional court magistrate. Notwithstanding their pleas both of them were convicted as charged on the 20th June 2002. On the same day each of them was then sentenced to 15 years direct imprisonment. The appellant is aggrieved by the verdict and the punishment. His co-accused is not before us in these appeal proceedings.

[4] The version of the prosecution was narrated by no less than fifteen witnesses, namely:

- Mr. Jacobus Johannes - police sergeant
- Ms. Lizette Truter – appellant’s partner
- Ms. Noleen Pamela Nicol – appellant’s mother

- Mr. Clifford Lawrence Squires – appellant's stepbrother
- Mr. Ryk Hendrik Myburgh Haupt – victim's fellow employee
- Dr. Robert Gene Book – state pathologist
- Mr. Deon Britz – police inspector
- Mr. Lourens Jacobus Botha – police inspector
- Mr. Pieter Edward Beckman – official photographer and police sergeant
- Mr. Robert John Chapman – police inspector
- Ms. Adeline Scheschi – police captain
- Ms. Ansa Rossouw – police superintendent
- Ms. Charlene Otto – police superintendent
- Ms. Glynes Ann Manthe – victim's ex wife

There was wholesale acceptance of the evidence of all these witnesses by the court below.

[5] Briefly stated the prosecution's case depended largely on circumstantial evidence. None of the 15 prosecution

witnesses gave direct evidence of the incident – in other words, the prosecution did not have any eye-witness. The indirect evidence tendered by the prosecution showed that the victim Manthe was employed as a sales representative by Auto Motor Equipment International in Johannesburg. On the 13th October 1997 the victim left his workplace on business errands to see his business customers. He was driving a Nissan 1400 LDV. On the 14 October 1997 nothing significant was heard of him. He was still out on business as far as his colleagues were concerned.

[6] On Wednesday, 15 October 1997 he called his colleague Mr. R H M Haupt from a rural town to say that he was proceeding to Bloemfontein. That was the last time his colleague heard from him. He was never seen alive again.

[7] On the Thursday, 16th October 1997 Sergeant J J Coetzee found the lifeless body of the victim on the first floor parking area of Kloppers in the central business district of Bloemfontein. On the same day Dr. R G Brooks, the state

pathologist, performed a post-mortem examination on the victim's corpse. His finding was that multiple injuries caused the victim's death.

[8] The appellant's partner, Ms. Lizette Truter, saw blood on the appellant's denim pair of pants, his shirt as well as his pair of tekkies. The appellant told Ms. Lizette Truter that he was involved in a fight on the scene of the murder. The blood-stained denim and shoes of the appellant were seized from Ms. Truter by Inspector L J Botha. Sergeant P E Beckman took photographs "exhibit b" of the scene. He also assembled blood samples. Later on Inspector Chapman sent the blood samples to the forensic science laboratory at Delft in the Western Cape.

[9] In the early hours of the morning on 17 October 1997 the appellant was arrested. On the same day he made a sworn statement in Bloemfontein before Magistrate Joubert. He made the sworn statement in terms of section 217, the Criminal Procedure Act No. 51 of 1977.

[10] Inspector Chapman delivered among others the blood samples collected on the scene and the pieces of the blood-stained pants of the appellant and his friend to the forensic science laboratory in Pretoria. There Captain Sheschi carried out comparative DNA typing tests. The results of the DNA test are set out in “exhibit e”. Her colleague, Captain Rossouw also carried out DNA tests on the wearing apparels – vide “exhibit f” and “exhibit g”.

[11] In the Western Cape superintendent Otto forensically analysed the blood samples extracted from the victim and his two children. She then went further. She also carried a comparative DNA on the one hand – and the clothing pieces of the appellant and his co-accused on the other hand – vide “exhibit l” and “exhibit j”.

Ms. Manthe, the victim’s ex-wife, testified that she was the biological mother of two children Noël Shaun Manthe and Lauren Ann Manthe – and that these children were the biological offspring of the victim. She confirmed that blood samples were taken from the victim’s children.

[12] The appellant gave no evidence. He called no witness. His version that he acted in private defence remained

embedded in the outside statement which he made to Ms. Joubert, the district court magistrate, in Bloemfontein on 17 October 1997 which was handed in by the defence together with certain formal admissions. There the appellant's case rested.

- [13] It is trite law that the prosecution bears the onus of proving all the elements of the crime beyond reasonable doubt. See **S v SINKANKANKA & ANOTHER** 1963 (2) SA 531 (A). An accused person is not required to convince the court about the truth of his version. If the version of an accused person is reasonably and possibly true, then the court has to acquit him.

In the leading case of **REX v DIFFORD** 1937 AD 370 on 373 the court held:

°It is equally clear that no onus rests on the accused to convince the Court of the truth of any explanation he gives. If he gives an explanation, even if that explanation be improbable, the Court is not entitled to convict unless it is satisfied, not only that the explanation

is improbable, but that beyond any reasonable doubt it is false. If there is any reasonable possibility of his explanation being true, then he is entitled to his acquittal, ..”

See also: **S v JOCHEMS** 1991 (1) SACR 208 AD.

[14] As regards circumstantial evidence, the correct approach was enunciated in the well known decision of **REX v BLOM** 1939 AD 188 on 202 where the two cardinal rules of logic were spelt out as follows by Watermeyer JA:

“In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.

(2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.”

[15] Whenever circumstantial evidence is tendered, it must constantly be borne in mind that such indirect evidence is intended to provide a logical basis from which a fact in

dispute may be deduced from the proven objective facts –

Hiemstra: **South African Criminal Procedure**, 5th Edition
by J Kriegler.

- [16] As regards the judicial treatment and evaluation of an outside court statement made by an accused person the law was reiterated in **S v NDULI AND OTHERS** 1993(2) SACR 501 (AD) at 505 f – h per Nienaber JA:

“Once introduced into evidence, an extra-curial statement of this nature must be viewed and evaluated in its entirety, inclusive of assertions and explanations favourable to its author (R v Valachia and Another 1945 AD 826 at 835; S v Felix and Another 1980 (4) SA 604 (A) at 609H-610A; S v Khoza 1982 (3) SA 1019 (A) at 1039A-B; S v Yelani 1989 (2) SA 43 (A) at 50A-F). A statement made by a man against his own interests generally speaking has the intrinsic ring of truth;”

- [17] The law pertaining to the effect of an accused's failure to testify in a case where the State relies on circumstantial evidence, has been stated in many decisions. In **S v**

MAKHUBO 1990 (2) SACR 320 (O) at 322 e – f the court

held per Van Coller J:

“Daar moet ook gewys word dat indien die Staat se saak teen 'n beskuldigde slegs op omstandigheidsgetuienis berus is 'n beskuldigde se versuim om te getuig ook 'n faktor wat saam met ander faktore in ag geneem kan word om 'n afleiding van skuld teen hom te maak. Anders as by regstreekse getuienis teen die beskuldigde, sal by omstandigheidsgetuienis versuim om te getuig nie soveel gewig dra nie, en kan dit ook aan iets te wyte wees wat nie 'n aanduiding is dat hy skuldig is nie. Sien *S v Mthetwa* 1972 (3) SA 766 (A) te 769.”

[18] In **S v FRANCIS** 1991 (1) SACR 198 (AD) at 203 h – i Smallberger JA had this to say about an accused person's election to remain silent:

“While an accused person's failure to testify may in appropriate circumstances be a factor in deciding whether his guilt has been proved beyond all reasonable doubt, this is only so where the State has prima facie discharged the onus upon it. A failure to testify will not remedy a deficiency in the State case such as the absence of apparently credible implication of the accused (*S v Masia* 1962 (2)

SA 541 (A) at 546E-F).”

[19] In **S v BOESAK** 2001 (1) SACR 1 (CC) at par 28 Langa DP, as he then was, said the following about an accused person’s fundamental right to silence during criminal proceedings:

[28] In effect, this is a finding that in the absence of contrary evidence or any suggestion of a forgery the evidence was sufficient to prove the authenticity of the letter. That is a finding as to the weight of the evidence and the inferences that can properly be drawn from it. Whilst the evidence to the contrary need not be the evidence of the accused, there can be no quarrel with the principle that the absence of contrary evidence is relevant to the evaluation of evidence relied upon by the State for a conviction in a criminal trial. It follows therefore that in reaching its conclusion, the SCA was entitled to have regard to the absence of an allegation or evidence to the contrary raising the issue of forgery.”

[20] As regards the doctrine of common purpose the circumstances of a particular incident and the actions of an accused person in the absence of evidence showing conspiracy between two or more co-accused the applicable

principles were set down in **S v MGEDEZI AND OTHERS** 1989 (1) SA 687 (A) at 705i - 706a per Botha JA.

[21] The court held as follows in **S v MAXABA EN ANDERE** 1981 (1) SA 1148 (AD) at 1155 e – g:

„°i!waar daar deelneming aan 'n misdaad is, elkeen van die deelnemers voldoen aan al die vereistes van die betrokke misdaadoms krywing voordat hy as mededader skuldig bevind kan word. Moord is 'n gevolgs misdaad. Indien die Staat mededaderskap wil bewys, moet hy bewys, nie alleen dat elke deelnemer die nodige opset gehad het om die slagoffer te dood nie, maar ook dat sy aandeel bygedra het, daadwerklik of psigies, tot veroorsaking van die dood.”

[22] On appeal the court does not lightly interfere with the observations and evaluation of oral evidence made by the trial court. **REX v ABELS** 1948 (1) SA 706 (O) and **S v FRANCIS** 1991 (1) SACR 198 AD at 204 c – e.

[23] The essence of the dispute between the prosecution and the defence revolves around the critical question as to

whether the appellant's actions were juridically responsible for the victim's death. In an endeavour to find an answer to these question three crucial aspects of the available evidence required thorough scrutiny. The first aspect is the impact of the circumstantial evidence. The second aspect is the impact of the appellant's extra-curial statement. The third aspect is whether the appellant made common cause with anyone to murder the victim.

[24] In the first place the appeal has to be considered against the backdrop of the indirect evidence. Let me make one pertinent remark right from the onset. At this juncture the indirect evidence will be separately evaluated. Its merits and demerits will be exclusively scrutinized as if the appellant did not make any extra-curial statement in the form of exhibit "C". When the statement is left out of the equation what remains is a very compelling case of objective facts that the appellant had a case to answer at the end of the prosecution case.

[25] The appellant came home in the early hours (03h30) of the

morning of 16 October 1992. Ms. Truter observed that the appellant's shirt, pants and shoes were blood-stained. She questioned him about it. She gathered from him that he was involved in a fight before he came home. In the early hours of the same morning Sergeant Coetzee drove to the inner city in response to a call. On the first floor of a parking zone belonging to Kloppers he found the victim's corpse. The corpse was soaked in blood. There were patches of blood on the roof on the floor and on the wall in the vicinity of the corpse. Not so long afterwards Ms. Truter arrived at her workplace. At or about 18h00 she heard about a man found dead at Kloppers near her workplace. Later in the evening of that same day she arrived home, and told the appellant about the dead man and enquired from him whether there was any connection between the scene where he was involved in a fight and the scene where the dead man was found. The appellant's answer was in the affirmative.

[26] The court *a quo* said the following about the approach it had to adopt in dealing with the circumstantial evidence:

Die enigste ander aspek waaroor die Hof nog verder moet beslis is of die Staat bo redelike twyfel bewys het dat beskuldigde 1 en 2 die persone is wat die oorledene gedood het. In die verband is daar geen getuienis van enige persoon wat die voorval gesien het nie. Die Staat maak derhalwe van omstandigheidsgetuienis gebruik. Wanneer daar met omstandigheidsgetuienis gewerk word dan moet die Hof na die totaliteit van sodanige getuienis kyk by oorweging van welke afleiding gemaak moet word. “Vergelyk in die verband **R v DE VILLIERS** 1944 AD 493 op 508.”

There is no doubt that the court *a quo* adopted the correct procedure.

[27] From there the trial court proceeded to list a whole range of proven facts – vide page 217 : 21 – page 221 : 9. The court then commented as follows at page 221 : 16 – 22:

Dit is geykte reg dat die bewese feite sodanig moet wees dat dit alle ander redelike afleidings uitsluit behalwe die een dat die beskuldigdes 1 en 2 die persone is wat die oorledene gedood het. Dit is belangrik om daarop te let dat ‘n afleiding slegs redelik is as dit in ooreenstemming met die bewese feite is. Die Staat moet dus nie elke

moontlikheid wat daar mag bestaan uit te skakel nie.”

The law does not require the state to eliminate every possible inference, which may be remotely consistent with the proven facts. It is only the most reasonable and compelling of all the possible inferences that is consistent with the proven objective facts which really counts. It is only that kind of an inference which is reasonably legitimate to be drawn.

- [28] The appellant was involved in a physical fight on the roof parking of Kloppers. His shirt, pants and shoes were tainted with blood. A forensic sample of his pair of jeans “exhibit F2” was analysed, and tested in the forensic science laboratory at Delft in the Western Cape. A comparative analysis between the foreign blood sample detected on the appellant’s pair of jeans on the one hand and the known blood samples of the victim’s children was conducted by means of DNA tipering forensic science method. The DNA testing was done by superintended Charlene Otto. The results of the DNA tipering tests

revealed that the foreign blood on the appellant's pair of jeans consisted of the same genetic matter as that of the victim's children.

[29] From the above forensic conclusion, the only reasonable and compelling inference which can legitimately be drawn from all the proven objective facts, was that the foreign blood detected on the appellant's denim cloths as sampled by means of exhibit "F2" was therefore the victim's blood. Mr. Pretorius, counsel for the appellant, correctly conceded that such conclusion was inescapable. Needless to add that the trial court reached precisely the same conclusion. In my view the circumstantial evidence presented against the appellant in this case was of such a forceful and compelling quality that it alone justified the verdict that the appellant was guilty of murdering the victim as the trial court found.

[30] The indirect evidence placed the appellant on the scene. It showed that he was involved in the fight with the victim. It also suggested, and this is very important, that he was

probably responsible for one or more of the multiple bodily injuries the victim sustained during the course of such fight. In the absence of any explanation, written or oral, the guilt of the appellant on a charge of murder could legitimately and reasonably have been inferred from the proven objective facts. There could have been no sound grounds for any attack of such adverse inference.

[31] In the second place I turn to consider whether, in view of the appellant's extra-curial statement, it could correctly be found that the appellant was criminally responsible for the killing of the victim.

[32] Mr. Pretorius argued that the appellant did not merely place himself on the scene of the fatal incident, but that he also gave a sound explanation both for his physical presence and physical participation in the incident. He contended that the appellant's explanation about the course of events on the scene and about the nature as well as the degree of his physical involvement was not only probable but also reasonably and possibly true, **REX v DIFFORD** *supra*.

Accordingly he vigorously advanced the submission that the court *a quo* misdirected itself in concluding otherwise.

[33] But Mr. Botha disagreed. He forcefully contended that the appellant's explanation was ambivalent in the sense that some of his averments were true but others false. He contented that the aspects of the explanation which were at variance with the proven objective facts stood to be rejected outright as improbable and not reasonably and possibly true, **S v YELANI** 1989 (2) SA 43 (AD) at 50 a – f. He submitted that the court *a quo* did not misdirect itself in the manner it analysed and evaluated the appellant's statement.

[34] The crux of the appellant's explanation was that he was attacked and assaulted by the victim and that he defensively did what he did in order to repel the aggressive violent and offensive attack. The offensive attack was endangering his life – he stated. The court *a quo* rejected the appellant's explanation of private defence as improbable and false. At p 223: 10 – 21:

“Beskuldigde 2 wil hê dat die Hof moet glo dat die oorledene hom aangeval het en twee maal in die gesig op sy oog en neus geslaan het. Hy doen egter geen beserings op nie. In verband met sy knie sê hy eers aan die Landdros, in Bewysstuk C, bladsy 3 paragraaf e, dat hy geen beserings het nie, ek haal aan “net my knieë is seer van al die drinkery”.

In die verklaring self sê hy egter dat sy knie uitgehak het toe hy na die oorledene geskop het en hom mis geskop het. Dit is duidelik dat hierdie weergawe van beskuldigde 2 met inagneming van die veelvuldige beserings wat die oorledene opgedoen het so onwaarskynlik is dat ek nie enige huiwering het om dit as vals te verwerp nie.”

[35] I am in respectful agreement. It is objectively strange that the appellant sustained absolutely no injuries in the fight with the victim, the man he wanted the court *a quo* to believe was not only aggressive but also very strong and courageous. The strange and baffling feature of the appellant’s explanation is the appellant’s friend, Stephanus who, according to the appellant, was overpowered outclassed and outboxed by the victim, had virtually no

single injury to show for the thorough beating he allegedly received from the alleged aggressive, violent and powerful victim who had the guts to fight two comparatively young men. I pause to point out that the victim was 46 years old, the appellant 23 years old and his friend, Stephanus, much younger. He was only 20 years old. Unlike the appellant and his friend, Stephanus, the victim's corpse shows that he was thoroughly and brutally assaulted.

[36] Dr. R G Book testified that the victim sustained all in all 47 injuries and that he was struck the minimum of 32 times. These proven objective facts quietly tell a story completely different from the story the appellant tries to sell. The story is hard to sell. The court *a quo* declined to buy it. I am not persuaded that the appellant's contention is one which on appeal, we can uphold.

[37] The objective picture which emerges from the entire web of indirect evidence strongly militates against the appellant's claim that he was in the defensive mode when he hit and kicked the victim. The scene of the murder and the

photographs there taken and those taken at the morgue give “exhibit c” a whole new dimension. The court was entitled to dichotomise the appellant’s statement by accepting some aspects which were in keeping with the proven objective facts and by rejecting other aspects which were at odds with such facts – **REX v VALACHIA AND ANOTHER** 1945 AD 826. In my view the exculpatory portions of the appellant’s statement were rightly jettisoned by the court *a quo*.

- [38] The trial court after dismissing the appellant’s explanation concluded by saying the following:

“Die Hof bevind as ‘n feit dat die enigste redelike afleiding wat gemaak kan word wat in ooreenstemming is met die bewese feite, is dat beskuldigde 2 en hierdie ander persoon gesamentlik die oorledene aangeval en hom doodgeskop het.”

I agree. The introduction of the statement did not at all have any adverse impact on the probative value and evidentiary weight of the proven objective facts. Instead of

diminishing them the introduction of such statement positively enhanced the value and the weight of the proven objective facts in a significant way.

[39] There was no substance in the appellant's contentions that he was so intoxicated that he was possibly incapable of assaulting the victim so brutally. He was not as heavily intoxicated as all that in my view. Details of precisely how much he had consumed are very sketchy. However, some of his actions were quite remarkable. They tend to suggest that he was still very much capable of thinking and acting like a normal person in control of himself. He was able to kick the victim down, a feat which his friend had failed to achieve. He was able to see that his friend's shoes were tainted with the victim's blood. Apparently his friend did not realise that. He was able to return to the scene to ascertain the gravity of their criminal actions. I have a suspicion, and it is a very strong suspicion, that he and his friend anxiously returned to the scene to erase possible incriminating objects. We know a belt was found on the roof of the parking area. It was bloodstained. It is not

unthinkable that an object with which the victim was repeatedly struck was probably removed from the scene and disposed of. On the scene he realised that the victim was dead.

[40] He clearly appreciated the wrong he had done just as he had right from the beginning. From there he went home. He soaked his bloodstained clothes in water. His shirt, which was white in front, was obviously bloodstained unlike his jeans and shoes because they were not white. It is not surprising the shirt mysteriously disappeared. The appellant had a motive to dispose of such a highly incriminating article. The bloodstained clothes of his friend were also washed at an awkward hour of the morning. It seems the two friends had colluded to destroy incriminating evidence as quickly as possible.

[41] It must be pointed out that the two friends were supposed to have fetched Ms. Truter from her workplace. They did not. Instead they went straight home from the scene. It does not seem to me that they had forgotten to do so. I get

the distinct impression that the appellant did so on purpose. He probably wanted to clean himself or wash his tainted clothes in Ms. Truter's absence. But the plan did not work out. She was already home when he got there. She immediately spotted the bloodstains and confronted him then and there. About sixteen hours or so later she came back from work and told him a dead man had been found on the scene and advised him to report the incident to the police. Two significant observations emerging from all this are: First the appellant did not volunteer to tell Ms. Truter about the incident. Second, he did not volunteer to go to Captain Laux.

[42] To contend that because he told Ms. Truter about the incident and also to contend that because he intended to report the incident to the police coupled with his intoxication serve as credible safeguards of his reliability as regards his explanation are hollow contentions. The argument sounds like an attempt to justify self-corroboration. In my view he was quite capable of doing what was done to the victim and fully appreciating the possible consequences his criminal

actions notwithstanding his intoxication.

[43] The appellant did not testify during his trial. He chose to exercise his right to remain silent. He called no witness to give evidence on his behalf. He closed his case and abided by his extra-curial statement. In **S v FRANCIS** 1991 (1) SACR 198 (AD) at 203 h – i the court held per Smallburger JA that where the prosecution has *prima facie* discharged the onus that an accused person has *prima facie* committed a crime, such an accused's failure to testify may be taken into account in ultimately deciding whether his guilt has been proved beyond reasonable doubt. Where, for instance, there is apparently no credible implicating evidence against an accused, his failure to testify will not remedy such a material deficiency in the prosecution's case.

[44] On behalf of the appellant it was submitted to us on appeal that his silence was of no consequence in determining whether his guilt had been proved beyond reasonable doubt because the circumstantial evidence on which the

prosecution case depended was of such a nature (weak quality) that it could not correctly have been held that all the *facta probanda* were proved beyond reasonable doubt.

[45] On behalf of the prosecution it was submitted that the facts in the instant case were truly representative of a class of appropriate cases where the failure to testify fortified the prosecution's case against the silent accused.

[46] About the appellant's failure to testify, the court below commented:

„Wanneer verder in ag geneem word dat bekuldigde 2 in die aangesig van hierdie getuienis teen hom ook verkies het om nie (sic) getuig nie is dit 'n verdere factor wat die Hof by die getuienis in die geheel moet oorweeg.”

[47] The appellant's contention is premised on the argument that that his statement adversely and materially weakened the substantive force, in other words, the probative value of the circumstantial evidence tendered against him. I do not

want to dwell on this contention any longer - save to repeat the earlier finding that I have already made. The acceptance of the inculpatory averments together with the rejection of the exculpatory averments contained in the appellant's statements materially strengthened and supplemented an already strong *prima facie* case against the appellant at the conclusion of the prosecution case.

- [48] Such a *prima facie* case exclusively emerged primary from the indirect evidence. I have earlier pointed out that counsel for the appellant conceded the forceful evidential impact of such circumstantial evidence. Apart from saying that the record shows that the concession was fully justified and was very properly made, I will not refer further to the impact thereof on such circumstantial evidence. But this point I have to make. Here, unlike in **S v MAKHUBO** *supra* the case against the appellant did not entirely depend on circumstantial evidence. There was more to it. The statement of the appellant itself provided more ammunition. The effect of such additional matter was quite devastating to the defence case. The appellant's silence in

these circumstances carried the same weight as in the case of direct evidence containing credible implication of an accused in all material respects. In the instant case it was not convincingly argued that any material deficiency existed in the circumstantial evidence. Inferentially the appellant's wearing apparels were bloodstained primarily during the cause of the vicious assault of the victim and perhaps secondarily while he and his friend were dragging the victim who was profusely bleeding. However, to suggest that because there was no direct evidence as to precisely how and at what stage the appellant became tainted was indicative of the absence of *facta probanda* is a thin argument.

[49] Nobody was in a better position than the appellant to come forward in order to explain that he was innocently stained.

There comes a moment in a criminal trial when facts compel an innocent man to speak up. In **S v BOESAK** 2000 (1) SACR 633 (SCA) Smalberger JA *et al*/ said:

At par [46] “It is trite law that a court is entitled to find that the State has proved a fact beyond reasonable doubt **if a prima facie case has been established and the accused fails to gainsay it**, not necessarily by his own evidence, but by any cogent evidence. We use the expression 'prima facie evidence' here in the sense in which it was used by this Court in *Ex parte The Minister of Justice: In re R v Jacobson & Levy* 1931 AD 466 at 478 where Stratford JA said at 478:

' "Prima facie" evidence in its more usual sense, is used to mean prima facie proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the prima facie proof becomes conclusive proof and the party giving it discharges his onus.'

[50] A *prima facie* inference which flows from a *prima facie* case can be rebutted by the real facts since an inference is a deduced fact. The learned judges continued further:

At para [47] “Of course, a prima facie inference does not necessarily mean that if no rebuttal is forthcoming, the onus will have been satisfied. But one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal, **is**

where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation. In the present case the only person who could have come forward to deny the prima facie evidence that he had authorised, written or signed the letter, is the appellant. His failure to do so can legitimately be taken into account.”

A year later in **S v BOESAK** *supra* Langa DP writing for the unanimous court approved of the above decision of the SCA.

[51] Moseneke J at paragraph 56 in **S v THEBUS** 2003 (10) BCLR 1100 (CC) put it as follows:

“... there is no obligation to testify. The fact that she or he is not obliged to testify does not mean that no consequences arise as a result. If there is evidence that requires a response and if no response is forthcoming, that is, if the accused chooses to exercise her or his right to remain silent in the face of such evidence, the court may, in the circumstances, be justified in concluding that the evidence is sufficient, in the absence depend on the quality of the evidence and the weight given to that evidence by the Court.”

As I see it, a response was certainly required from the appellant by the good quality of the evidence and the credibly strong evidence tendered. But it never came.

[52] It was also contended on behalf of the appellant that the appellant did not make common cause with his erstwhile co-accused to murder the victim as the court *a quo* found. This was the appellant's third attack of the conviction. His actions, so argued Mr. Pretorius, fell short of the requirements of the doctrine of common purpose as enunciated in **S v MGEDEZI AND OTHERS** 1989 (1) SA 687 AD at 705i – 706c.

[53] But Mr. Botha countered this argument. He said that the appellant's biggest problem as regards this leg of his challenge was the fact that he did not testify in the circumstances where the might of the evidence presented to the court required an innocent man to speak.

[54] The appellant's contention is not new. It was raised,

considered but rejected at the trial. The court below said the following about the criminal intent it deduced from the medical evidence of Dr. Book:

„Dr. Book het gevind dat daar twee meganismes van dood was, naamlik bloedverlies en swelling en drukking van die brein. Die oorsaak van die oorledene se dood is as gevolg van veelvuldige beserings.

Dit is duidelik dat hierdie aanval op die oorledene 'n uiters gewelddadige en 'n genadelose een was. Volgens die mediese getuienis was daar 'n minimum van 32 houe na die gesig en die kop van die oorledene gerig. Wanneer daar na die aard en omvang van die hoofbeserings gekyk word dan is dit duidelik dat die persoon of persone wat dit toegedien het net een opset kon gehad het en dit is om die oorledene te dood.”

“Die Hof is verder tevrede dat die twee beskuldigdes gesamentlik opgetree het met een gemeenskaplike doel en dat hulle die skuld vorm, *dolus eventualis*, ten minste moes gehad het toe die oorledene gedood is.”

[55] The conclusion was justified. The appellant contended that he did not have the specific intent to murder. He argued

that if that was his friend's intention, he did not share such common criminal intent with him. In this case there was no proven prior conspiracy to kill the victim. Therefore the active conduct of the appellant on the scene needs a careful scrutiny.

The appellant actively participated in the kicking of the victim. He did not do so alone. He kicked him, not once but a few times, according to his own statement. The kicking and, heaven knows what else, was a collaborative criminal enterprise which the magistrate characterised as brutal, gruesome and merciless.

[56] The extremely cruel manner in which the victim was killed underscores the murderous intent of those involved. I want to stress that in his statement the appellant gave a somewhat vague account of what he precisely did and the precise degree of his violent involvement. All we now know is that he brutally, gruesomely and mercilessly kicked the victim a few times if not several times, in addition to other ways he used to hurt him. When the victim was down and out – this selfsame appellant, who now claims he did not intend killing, actively and willingly helped his violent friend to shift the helpless and profusely bleeding victim to a dark spot. It may well be that this was done to ensure that no

passer-by would come along and render immediate assistance to the helpless man. He later returned to the scene with his friend. He stated that they did so in order to check if everything was still fine. They had earlier left the horrific scene behind. What it was that they expected to find still fine is difficult to understand. Together they walked away from a dead man to wash away all the blood.

- [57] The appellant had ample opportunity to tell the trial court more about his precise and true actions and to show how comparatively minimal his violent role was in the entire bloody episode. Instead of doing so he elected to remain silent. His decision carried with it certain adverse repercussions (**S v THEBUS** *supra*). He was present on the scene of extreme violence. He was fully aware of the assault. He performed a number of acts through which he associated himself with the violent conduct of his friend. He surely intended the victim to be killed judging by the crushed face of the victim alone. I strongly believe he did. But even if I am wrong, there can be no doubt that at least he foresaw the possibility of the victim being killed but

performed his aforesaid acts of violent association with recklessness as to whether or not the death of the victim ensued. By actively participating in the assault he undoubtedly demonstrated his intention to make common cause with his friend – **S v MGEDEZI & OTHERS** *supra*.

[58] Two observations are appropriate to make. First his friend was three years younger than him. It is not unreasonable to suspect that the appellant probably played a more active and prominent role than his younger friend. The appellant never intervened to restrain his violent friend from kicking the victim further for 15 long minutes. He stood by and watched like a spectator and never saw it fit to intervene. After the assault he continued to perform further acts of association with the conduct of his friend.

[59] If all this did not boil down to a common purpose venture then nothing will. In my view all the considerations relating to the doctrine of common purpose were present. On the facts there seems to be no valid ground for any differentiation between the actions of the two perpetrators

involved. There is no logical basis for apportioning the blame in a manner as contented by the appellant. Whatever the one actually did, however big or small, was done for and on behalf of the other, all that in the execution of a joint criminal venture. I would therefore uphold the conviction on this ground as well. This disposes of the first leg of the appeal.

[60] I turn now to the second leg of the appeal. In sentencing the appellant the court *a quo* took into account the following mitigating factors:

That he was 28 years old at the time he was punished but 23 years old at the time he committed the crime; that he progressed to Standard 6 at school; that he had a poor childhood; and that he was a first offender.

[61] The court *a quo* also took into account the following the aggravating factors in sentencing the appellant:

The gravity of the crime of murder; the callous manner of this particular murder; the victim's excruciating pains; the general interest of society which required effective and

meaningful punishment for those who kill its members.

[62] The court below was fully aware that section 51 of the Criminal Law Amendment Act No. 105 of 1997 was not applicable at the time the appellant committed the murder. The legislation was not yet in existence. The court regretted the fact that its maximum penal jurisdiction at the time was limited to 15 years imprisonment. This demonstrates just what a dim view of the incident the court below took. This emphasises the horrific nature of this murder.

[63] Counsel for the appellant contended that the court *a quo* misdirected itself by underemphasising the mitigating factors in favour of the appellant. In particular he argued that the court *a quo* failed to appreciate the influence of intoxicating alcohol in this matter. The court did not ignore the evidence of Ms. Truter that the appellant was heavily intoxicated when he arrived home that morning. But because the appellant himself did not testify the court was not able to quantify the extent of his intoxication in a

sensible manner. His actions before, during and after this incident were not really consistent with those of a man who was severely intoxicated.

[64] In **S v KIBIDO** 1998 (2) SACR 213 (SCA) at 216 g – j the court held that it was within the province of a trial court to decide which factors must be taken into account in sentencing an offender and what weight to be attached to each of the factors so considered. Bearing in mind that the appellant had already spent 5 years incarceration, a sentence of 15 years imprisonment exclusive of the incarceration period does seem to be a stiff sentence indeed. But I am not convinced that the stiffness of the punishment in this instance amounts to a misdirection. It must be borne in mind that the sentencing of an offender is a matter which first and foremost resides within the discretionary province of the trial court. On appeal we are not at liberty to interfere with the proper exercise of a discretion on the mere ground that we would have exercised that discretion differently. **S v MAKONDO** 2002 (1) ALL SA 431 (SCA) at 431 e – f. In my view this is the

case where the natural indignation of society counted heavily against the appellant notwithstanding the mitigating factors present, **R v KARG** 1961 (1) SA 231 AD at 236 a –

b. There exists no misdirection to justify any appellate interference. For these reasons I am inclined to uphold the sentence as well.

[65] Accordingly I make the following order:

65.1 The appeal fails *in toto*.

65.2 The conviction and the sentence are confirmed.

M. H. RAMPAL, J

I concur.

B.C. MOCUMIE, AJ

On behalf of the Appellant:

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Instructed by:

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