THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1109/19

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS: LIMPOPO **APPELLANT**

and

LASABATHA LUCAS MOLOPE **FIRST RESPONDENT**

JACK LETSOALO **SECOND RESPONDENT**

Neutral citation: *Director of Public Prosecutions: Limpopo v Molope and Another* (Case no 1109/19) [2020] ZASCA 69 (18 June 2020)

Coram: CACHALIA, SALDULKER and DLODLO JJA

Heard: 19 February 2020

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Summary: Reservation of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 – accused discharged at the end of the State's case – whether point of law properly reserved – whether conduct of accused fell within the ambit of the

offences of kidnapping and murder committed in furtherance of a common purpose – appeal dismissed.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Sikhwari AJ sitting as court of first instance):

The appeal is dismissed.

JUDGMENT

Cachalia JA (dissenting):

[1] I would uphold the appeal. The two respondents, Lasabatha Lucas Molope (Molope) and Jack Letsoalo (Letsoalo), and three other accused were arraigned in the Limpopo High Court, Polokwane; on two counts of kidnapping and two counts of murder. The charges arose from a series of incidents on 11 October 2017, which culminated in two young men, Thato Present Maake (Thato) and Mmakelesti William Maake (Willy) losing their lives. They were aged 28 and 33 respectively.

[2] The indictment alleged that the five accused and other members of the community of Makgwareng Section, Ga-Molepo Village in Polokwane, believed that the deceased were responsible for a ‘spate of robberies’ in the area. They kidnapped the deceased, took them to a mountain and brutally assaulted them. Thato died on the scene and Willy succumbed to his injuries in hospital two weeks later. The post-mortem report attributed the cause of Thato’s

death to 'multiple blunt force injuries' and Willy's death to 'head and crush injuries due to blunt force trauma'. The murder charge included the allegation that the offence was committed in furtherance of a common purpose.

[3] The two respondents were accused 1 and 2 respectively. Accused 5 fell ill and his trial was separated. The trial proceeded against the respondents and accused 3 and 4. The State led the evidence of two persons, Thabang John Mangena (Mangena) and Malampa Martina Mametja (Mametja). At the end of the State's case the defence applied for all the accused to be discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA). The State did not oppose the application in respect of accused 3 and 4, as there was no evidence that required an answer from them. It did, however, resist the application for the discharge of the respondents on the ground that there was direct evidence implicating them in the commission of these crimes and particularly of their having participated in the assault of the deceased persons.

[4] The trial court (Sikhwari AJ), however, found 'material contradictions' in the State's case and thus ordered the discharge of the respondents on the two main charges of kidnapping and murder. This, despite having found that there was 'sufficient evidence upon which a court may convict on the alternative verdict of assault with intent to do grievous bodily harm against both respondents'. The trial court went on to convict the respondents of the crime of assault GBH – a competent verdict for murder – after the respondents had closed their case and elected not to testify. The judge also said, when sentencing them, that the deceased had been subjected to these assaults 'for a very long time' and significantly, that the respondents had 'initiated' the 'mob justice' that culminated in the two men losing their lives.[1]

[1] The respondents were given lenient sentences of four years' imprisonment, wholly suspended for a period of five years on condition that they did not commit another crime of which violence is an element during this period. They were also declared unfit to possess firearms.

[5] The fact that the trial court made these findings against the respondents and yet discharged them at the end of the State's case on the main counts lies at the heart of the State's contention that it erred in law. The State therefore applied to the trial court to reserve a question of law in terms of s 319 of the CPA.[2]

[6] The State initially applied to reserve two questions of law. These were stated as follows:

(i) At the close of the State case, did the evidence of Thabo John Mangena and Malampa Martina Mametja constitute a prima facie case against the respondents on all counts;

(ii) Did the Honourable Court comply with s 146 by granting a discharge in terms of s 174 on two counts of kidnapping, without giving reasons for doing so?

[7] During the hearing of the application the State withdrew the second question. The judge was satisfied that the question posed raised a question of law as envisaged in s 319 and granted leave to this Court.

[8] The parties then filed heads of argument in this Court. In a nutshell, the State contended that there was prima facie evidence against the respondents on both counts (kidnapping and murder) at the end of the State's case, and that the court was not competent to discharge them merely because there were contradictions in its case. That determination could only have been made, so it

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[2] Section 319(1) of the CPA provides:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.'

contended, at the end of the trial after the respondents had been put on their defence. The respondents on the other hand contended that the trial judge properly exercised his discretion in discharging them and that in any event, even if the judge had erred in his assessment of the facts, this was not a point of law that could legitimately be reserved in terms of s 319.

[9] Before the hearing the parties were invited to submit supplementary heads of argument in the light of this Court's recent judgment in *DPP, Western Cape v Schoeman.*[3] There the court reiterated the rule that before a question of law is reserved under this section three requisites must be met. First, the question must be framed accurately leaving no doubt what the legal point is; secondly, the facts upon which the point hinges must be clear; and thirdly, these facts should be set out fully in the record together with the question of law.[4]

[10] Unless the State does this, the court continued, it may not be possible for an appeal court to establish with certainty what the conclusions made by the trial court on the legal point were. So where it is unclear from the judgment of the trial court what its findings of fact are, it is necessary for the State to request it to clarify its findings. If this is not done, the point of law is not properly reserved.[5]

[11] It is apparent that this injunction was not met. Leaving aside for the moment whether the question posed raised a proper question of law, the facts upon which the point of law were said to hinge were not set out in the State's application. What the State did was to summarise the evidence that was led without setting out the trial court's factual findings. It must be pointed out that the trial court's judgment in the discharge application is not a model of clarity.

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[3] *DPP, Western Cape v Schoeman and Another* [2019] ZASCA 158.
[4] Ibid para 39.
[5] Ibid para 40.

If this was the reason the State was unable to set out the facts, it should have asked the trial court to clarify its findings of fact. It did not do that either. The trial court also had a duty to ensure that its factual findings underpinning the point of law were properly set out. But, regrettably, it also did not do so. Despite this shortcoming, the trial court was content to reserve the question as one of law falling within the ambit of the section.

[12] There would therefore be good reason for this Court to dismiss the application. But I do not think we should adopt this course here. The State's failure to set out the facts in its application or request the trial court to clarify its factual findings is deserving of censure, as is the failure of the trial court to diligently perform its function in this regard. But an appeal court must always consider the possible prejudice to both parties before deciding to dismiss the application on this ground. The merits of the application must unavoidably enter into this assessment.

[13] The State's failure to comply with the requirements of s 319 was not exclusively of its making. It was faced with an unclear judgment by the trial court and its failure to state the facts upon which it reserved the point of law. Secondly, as I shall demonstrate below, it is possible to glean the factual findings of the trial court, which give rise to the dispute over the point of law, without difficulty or contestation. And finally, as I shall also demonstrate, despite the shortcoming in its formulation of the point of law, in substance what we are concerned with here is a dispute over a point of law and not merely dispute over the trial court's assessment of the facts. These factors cumulatively outweigh whatever prejudice the respondents may suffer by allowing the appeal to proceed.[6]

[6] Cf *S v Petro Louise Enterprises (Pty) Ltd and Others* [1978] 1 All SA 571 (T); 1978 (1) SA 271 (T) at 276E-H.

[14] Our focus in the analysis of whether the point of law was properly reserved must be on the trial court's judgment in the discharge application. However it must be borne in mind that the trial court's findings in the discharge application, at the end of the trial and those referred to in the judgment on sentence arise from the same evidence of the two State witnesses. It is therefore proper to have regard to the three judgments to establish the proven facts.

[15] Before establishing the factual findings of the trial court it is necessary to bear in mind the essential elements of the offences of kidnapping and murder committed in furtherance of a common purpose, for which the respondents were discharged. Kidnapping, is the act of unlawfully and intentionally depriving a person of their freedom against their will. Murder involves the unlawful and intentional killing of another person. Where two or more perpetrators perform unlawful acts together in bringing about this result they are said to act in furtherance of a common purpose. Their individual acts must manifest an active association with the common purpose of the group to murder the person, provided that each accused is proved to have the requisite *dolus.* The acts of the group that caused the death of the deceased are then imputed to each accused.[7] These requirements must be borne in mind when assessing whether the proven facts fell within the scope of these offences.

[16] The State's evidence against the respondents was the following: Mangena, the first State witness, met Letsoalo at the Paledi Shopping Mall and accompanied him to Nedbank, located inside the Mall. Mangena was Willy's uncle. Whilst at the bank Letsoalo received a phone call, probably from Molope. Letsoalo and Mangena then left the bank and boarded a taxi where they drove to a place between Ga-Makanye and Ga-Thoka Villages.

[7] *S v Safatsa and Others* [1988] 4 All SA 239 (AD); 1988 (1) SA 868 (A) at 901H-J.

[17] Upon their arrival there in the early afternoon they saw Thato in the company of Molope. Letsoalo then demanded that Thato return the television he had stolen from him. Thato denied having stolen the television and attempted to flee, but Letsoalo apprehended him. The two respondents then began assaulting him with their fists on his face and his body. This sustained assault lasted for about three minutes, until another taxi arrived on the scene.

[18] The respondents thereafter escorted Thato to the taxi and boarded it with him. Mangena also came aboard. From there the taxi was directed to drive to a taxi rank near the Paledi Shopping Mall. Upon their arrival there they all alighted from the taxi. Molope announced, to the other taxi drivers gathered there that they had apprehended – referring to Thato – a television thief. The other taxi drivers then began to gather around Thato threateningly.

[19] Accused 5, who is known as 'Small' arrived on the scene and told Thato menacingly that: 'you are going to take out the television today'. He then walked to one of the taxis parked there and removed a wheel-spanner from it. In the meantime the respondents resumed assaulting Thato. He fell to the ground and they began kicking him. Small then handed the wheel-spanner to Letsoalo, who used it to hit Thato over the left side of his head, causing an open wound from where he started bleeding. At the same time he repeated Small's threat to Thato that he must tell them where he had left the television. Molope insisted that Thato had stolen the television, but he denied this.

[20] Molope would not relent and Thato, under compulsion, said that he had heard that Willy had stolen the television. Still, Molope was not satisfied until Thato gave in and admitted that they both had done so. The respondents then arranged for a taxi to transport them to Willy's home. Mangena, concerned that some harm was to be visited on his nephew, Willy, asked to accompany them,

and did. The taxi left with the driver, the two respondents, Thato, and another person who was described as having a light complexion. Mangena occupied the rear seat.

[21] On route to Willy's home Mangena notified his younger brother, via a 'WhatsApp' message, of the impending danger to Willy. He also overheard Letsoalo phoning another person, Dimakatjo to tell him that they had found the person they had been looking for and that they were on their way to Makgwareng. They arrived there and picked up Dimakatjo. From there they drove to Molope's home from where he collected two sjamboks, a knobkierie and a crowbar. They then drove to Willy's home where they all alighted from the taxi. The driver left thereafter.

[22] The two respondents and Small entered the home. Willy was there with a man by the name Mapiti. Mapiti's mother was also present. They were enjoying a cup of tea when Letsoalo demanded his television from Willy. Willy asked what he was referring to. Letsoalo answered that it was his television that he had stolen from his home the previous evening. The respondents then pushed Mapiti and his mother aside, grabbed hold of Willy and dragged him outside onto a veranda. As they reached a gate, Small struck Willy on the top of his head with the crowbar, causing him to bleed immediately.

[23] The respondents then dragged Willy outside the yard to where Thato was standing. The two respondents then began assaulting Thato and Willy with sjamboks all over their bodies while Small weighed in with a knobkierie. The assault continued until the two helpless men admitted to having hidden the televisions near a dam and a mountain nearby.

[24] Mametja, the second State witness, was Willy's neighbour. She witnessed the incident outside the house. However, she testified that Letsoalo had a crowbar instead of sjambok, as Mangena had testified. Her recollection was that Letsoalo had struck Willy over the head with the crowbar causing him to bleed. She also said the respondents and Small had assaulted the two men indiscriminately with the instruments at their disposal. According to her, the assaults lasted some time until Thato and Willy were taken away. Some community members joined as the two men were led away.

[25] The two helpless men were then marched to the mountain, where the assaults continued, with members of the community joining in. Thato collapsed and died on the scene. Mangena moved to the side and phoned the police. An ambulance arrived and declared that Thato had died. Willy was rushed to hospital where he succumbed to his injuries two weeks later.

[26] The evidence established, at least on a prima facie basis, that both respondents were instrumental in using force to deprive both Thato and Willy of their freedom; that they both participated in their brutal assaults and that they initiated this form of 'mob justice' – to use the trial court's description in its judgment on sentence – which ultimately caused the death of both deceased. Prima facie, therefore, they not only had a case to answer on both the main counts of kidnapping and murder as charged, but the inference that they had the necessary *mens rea* when they committed these crimes was also irresistible.

[27] However, as I have mentioned, they were inexplicably discharged in terms of s 174. Significantly, the essential facts established above were not seriously in dispute. What the defence put in issue was the precise role that each of them played in the chain of events. In this regard it focussed its cross-

examination on the apparent contradictions between Mangena's oral testimony and his statement to the police.

[28] The judge was persuaded that these contradictions were 'material' and thus fatal to the State's case. He identified five such contradictions:

(i) Mangena's statement said that Molope had phoned Letsoalo while they were in the bank, but in his oral testimony he said he did not know who made the call;

(ii) In his statement he identified Letsoalo as having fetched the wheel-spanner from the taxi; he testified however that it was Small did this;

(iii) The written statement made no reference to Dimakatjo, whereas in his oral testimony he pertinently referred to Letsoalo as having phoned him to say that they had found the suspect;

(iv) In his written statement he said that they found Willy and Mapiti at Willy's home, but in his oral testimony he said that Mapiti's mother was also there;

(v) Letsoalo whipped Willy with a sjambok whilst in Willy's home, the statement read; but in his oral testimony he testified that Letsoalo only grabbed Willy, he did not see him whip him at that stage.

[29] For the sake of completeness I mention that the judge referred to Mametja's testimony only to point out that she would have overheard the conversation where Thato told Willy to hand over the television to the respondents, if this were true. But he made no mention of her important evidence that placed both respondents at the scene of Willy's home, observing the assaults and their being taken away to the mountain.

[30] The State persuasively contended that the judge wrongly found the contradictions between the Mangena's oral testimony and police statement to be

material. In fact the finding is perplexing more so because in his judgment convicting the respondents for assault GBH, the judge explicitly found, contradicting his earlier finding, that these contradictions not material 'in so far as the assault GBH charge is concerned'. It is difficult to understand how these contradictions were not material on the assault GBH charge but material on the murder charge. And further in the judgment on sentence, as I have mentioned, he found that 'this mob justice was initiated by accused 1 and 2'. These findings are completely at odds with his findings in the discharge application.

[31] But even if the contradictions were of a kind that could be described as 'material' this was not sufficient to discharge the accused. The threshold requirement for a discharge at the end of the State's case in terms of s 174[8] is whether there is evidence upon which a court might reasonably convict. If there is no evidence the court is entitled to discharge the accused. The fact that there may be contradictions in the State's case, whether material or not, does not in itself give a judge the competence to discharge the accused. The evidence must, in addition, be of a quality that no court might reasonably convict.[9]

[32] The trial judge set out the threshold requirement for a discharge of an accused, without error. He therefore appears to have concluded – but did not explicitly say this – that the material contradictions in the State's case had the effect that there was no evidence upon which a court might reasonably convict. In this he erred egregiously because there was more than adequate evidence for the respondents to answer. At first blush the error seems to be one of fact as to whether there was sufficient evidence justifying the discharge of the respondents at the end of the State's case. This would not afford a proper basis for the reservation of a point of law under s 319.

[8] Section 174 provides: 'If, at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.'
[9] See generally: A Kruger *Hiemstra's Criminal Procedure* (May 2019 online) at 22-75.

[33] I must therefore return to the reserved 'point of law', which in summary is whether the evidence of the two State witnesses constituted a prima facie case against the respondents on all counts.

[34] Ordinarily a question framed in this manner, would only involve an inquiry as to whether the court had assessed the evidence properly in arriving at this conclusion. This would not raise a question of law. But where the question reserved requires an enquiry into the essence and scope of the crime, it is a question of law whether the facts proved brought the conduct of the accused within the scope or ambit of the crime charged.[10]

[35] In the present matter the trial judge did not in his judgment identify the essential elements of the offences of kidnapping or of murder when committed in furtherance of a common purpose. And I think it is doubtful, to put it at its lowest, that trial judge understood, as Botha J, said in *S v Petro Louise Enterprises (Pty) Ltd and Others*[11] 'the precise scope, nature or interpretation of the elements' of these offences. Simply put the judgment does not manifest any indication that the judge understood the nature of the conduct that had to be proved to bring it within the ambit of these crimes. For it is incomprehensible that he could find on the one hand as a fact, and beyond a reasonable doubt, that the respondents had initiated a form of 'mob justice' that involved taking the two deceased persons against their will (kidnapping) and assaulting them with intent to do grievous bodily harm, which resulted in their deaths (murder). But also conclude, on the other hand, that there was no evidence upon which a court might reasonably find them guilty on the two main counts.

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[10] *DPP, Western Cape v Schoeman and Another* (above) para 51.
[11] *S v Petro Louise Enterprises (Pty) Ltd and Others* (above) at 279E-H.

[36] The State therefore formulated its question inelegantly. But the judge did understand that it was properly raising a point of law, and not merely a factual issue disguised as a point of law, as the courts have frequently found in response to the State's invocation of s 319 to contest an acquittal of a criminal accused. The true question raised by the point of law was whether, on the proven facts, the conduct of the respondents prima facie brought it within the ambit of the crimes of kidnapping and murder. Had the question been formulated in this way, which in substance is what the question was aimed at, the answer to this question would have been obvious. There is no doubt that the question raised by the State required an enquiry into whether the proven facts fell within the ambit of the two main offences.[12] That quintessentially raised a point of law. I would therefore have upheld the reservation of the point of law, set aside the order of the trial court discharging the respondents and remitted the matter to high court for retrial on the murder and kidnapping charges.

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A CACHALIA

JUDGE OF APPEAL

Saldulker JA (Dlodlo JA concurring):

[37] I have had the benefit of reading the judgment of my brother Cachalia JA. The facts have been conveniently set out by him and there is no need to repeat same. I, however find myself in respectful disagreement with my brother's reasoning and order for the following reasons.

[38] Section 319 of the CPA provides:

[12] Cf *S v Petro Louise Enterprises (Pty) Ltd and Others* (above) where the court found there was no doubt in the appeal court or the court a quo regarding the elements of the offence with which the accused were charged, nor was there any doubt as to the scope, nature or interpretation of the elements of the offence. The magistrate had found that one of the elements had not been proved. In the circumstance of that case this was a finding of fact, pure and simple.

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused *reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.*'

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.

(3) The provisions of sections 317(2) (4) and (5) and 318(2) shall apply mutatis mutandis with reference to all proceedings under this section.' (My emphasis.)

[39] The provisions of s 319 of the CPA are peremptory and require strict compliance, as its purpose is to limit appeals by the State. It should be mentioned that s 319 has been subjected to a detailed analysis in a number of judgments, both by this Court and the Constitutional Court.[13] Its principles have accordingly been firmly established in our law.

[40] Two decades ago, in *Director of Public Prosecutions, Natal v Magidela and Others*[14] this Court eloquently and commendably set out the position of the relevant law stating that:

'The provisions of section 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. *The first requirement is not complied with simply by stating a question of law. At least two other requisites must be met. The first is that the question must be framed by the Judge "so as accurately to express the legal point which he had in mind" (R v Kewelram 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is*

[13] *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC); See also *Magmoed v Janse van Rensburg and Others* [1993] 4 All SA 175 (A); 1993 (1) SA 777 (A); 1993 (1) SACR 67 (A), and *S v Petro Louise Enterprises (Pty) Ltd and Others* [1978] 1 All SA 571 (T); 1978 (1) SA 271 (T), both of which have received the express imprimatur of the Constitutional Court in *S v Basson*; and *S v Boekhoud* [2011] ZASCA 48; 2011 (2) SACR 124 (SCA).

[14] *Director of Public Prosecutions, Natal v Magidela and Others* [2000] 2 All SA 337 (A); 2000 (1) SACR 458 (SCA) para 9.

dependent (S v Nkwenja en 'n Ander 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (S v Goliath 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, S v Khoza en Andere 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise "on the trial" of a person (*S v Mulayo* 1962 (2) SA 522 (A) at 526-527). *Non constat* that the point should be formally raised at the trial: it is sufficient if it "comes into existence" during the hearing (*R v Laubscher* 1926 AD 276 at 280; *R v Tucker* 1953 (3) SA 150 (A) at 158H-159H). It follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial.' (My emphasis.)

[41] Furthermore the authors Du Toit et al in the *Commentary on the Criminal Procedure Act* state: [15]

'The trial court must refer to those facts in its judgment as part of the reserved question of law (*S v Nkwenja en 'n ander* 1985 (2) SA 560 (A) 567B). Furthermore, whenever the State has a question of law reserved which rests on particular facts, the State must have those facts fully placed on record and in particular as part of the setting out of the question of law.'

[42] All of the above considerations need to be borne in mind in the assessment as to whether a question of law has been properly reserved, and whether it should be answered in favour of the State. The registrar of this Court, on the instructions of the presiding Judge addressed a letter to the State, the contents of which read:

'The presiding judge has directed that the parties' attention be drawn to this Court's recent judgment in *DPP, Western Cape v Schoeman & Another* (904/2017) [2019] ZASCA 158 (28 November 2019). In the light thereof the DPP is requested to consider whether it persists with the appeal. If so, the parties will be required to deal comprehensively with the judgment in their submissions. A response is required from the DPP on or before 13 February 2020.'

[15] E Du Toit et al *Commentary on the Criminal Procedure Act* (2012) at RS 48.

[43] In *Director of Public Prosecutions: Western Cape v Schoeman*,[16] a very recent judgment of this Court, it was pointed out at para 39 that before a question of law may be reserved under s 319 there are certain requirements that must be met, they are:

'First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law.'

And further at para 40 the court said:

'Unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point, which the trial court arrived at, are. Where it is unclear from the judgment of the trial court *what its findings of fact are, it is therefore necessary to request the trial judge to clarify its factual findings. Where this is not done, the point of law is not properly reserved.*' (My emphasis.)

[44] From a careful analysis of all the above considerations, it is clear that none of the requirements of s 319 have been complied with in this matter by both the State and the trial court. The trial court did not frame a question of law in its judgment in the s 319 application for the consideration of this Court, nor did it record the factual findings on which the purported point of law was dependent. The trial court had a duty to set out the relevant facts fully in the record as part of the question of law. As I have said, there must be certainty not only on the factual issues on which the point of law is based, but also regarding the point of law that was in issue at the trial. Regrettably, the point of law is not readily apparent from the record, and thus it cannot be said to have arisen 'on the trial' of a person (see para 9 of *Magidela* above). As is evident from the judgment of the trial court, its factual findings lack clarity and are confusing to say the least. Another relevant factor is that the trial court did not give any

[16] *Director of Public Prosecutions, Western Cape v Schoeman and Another* [2019] ZASCA 158.

reasons for the granting of the s 319 application, which it ought to have done in terms of s 146[17] of the CPA.

[45] There were serious shortcomings in the State's application in terms of s 319, which in my view are insurmountable. An examination of the s 319 application by the State pertinently illustrates that the facts upon which the point of law were said to hinge were not set out in its application. The State merely summarised the evidence of the witnesses without analysing the facts. It failed to set out the trial court's factual findings on which the reserved question ought to have been considered. In the circumstances of this case, where it was not clear what facts the trial court accepted to be the facts proved in this case, it was necessary for the State to request the trial court to clarify its factual findings.[18] Regrettably this was not done. Despite these shortcomings the trial court nevertheless reserved the question as one of law.

[46] Before us, counsel for the State accepted, when questioned by the bench, that it had not properly formulated the question of law as required by the provisions of s 319, and that the question of law was thus defective. Nevertheless, the State persisted with the appeal, contending that the defects were not fatal to its application, if a proper question of law could be reformulated on the basis suggested by the presiding Judge during the hearing, namely in the following terms:

'[W]hether the court could competently discharge the accused at the end of the State's case without enquiring into whether their conduct in assaulting the deceased prima facie brought it within the ambit of the crime of murder committed in the furtherance of a common purpose.'

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[17] '**146. Reasons for decision by superior court in criminal trial**
A judge presiding at a criminal trial in a superior court shall –
(a) where he decides any question of law, including any question under paragraph *(c)* of the proviso to section 145(4) whether any matter constitutes a question of law or a question of fact, give the reasons for his decision.'

[18] See *Schoeman* para 40.

[47] Notwithstanding that it was unable to refer to any provisions of the CPA which allowed this Court to reformulate a defective question of law, the State urged this Court to condone its non-compliance with the provisions of s 319 and uphold the appeal in the interests of justice. In its supplementary heads of argument, the State requested this Court not to dismiss the appeal but to consider two options: that this Court postpone the matter sine die and make an order that the appeal be enrolled only after the trial court has complied with s 319, by stating specifically the question of law that has been reserved; or remove the matter from the roll with an order that the appeal be enrolled only after the court a quo has complied with s 319 by stating in the record precisely which question of law has been reserved.

[48] As the respondents were not in custody, the State contended that the proposed order will not cause substantial prejudice to them. Furthermore, the State submitted that 'the effect of such a proposed order would be a balancing act to ensure adherence to the provisions of s 319 on the one hand, and ensuring that those against whom the State has prima facie evidence, and who have allegedly committed two counts of murder, do not escape re-trial on account of technicality'. In contrast, counsel for the respondents contended that this Court could not reformulate the question of law, and that if this matter were to be remitted to the trial court, it would be prejudicial to the respondents who were no longer in custody.

[49] I have considered the options suggested by the State, but in my view they are not viable. Although the State submits that the respondents will not suffer substantial prejudice, on the contrary, the purpose of the proposed orders is clear. Both options envisage the remittal to the trial court not only to cure the defect in the s 319 application, but also as submitted by the State, to ensure that the respondents do not escape a retrial. The respondents stood trial on serious

charges, and were discharged on the main counts of murder and kidnapping, and convicted on a lesser charge of assault to do grievous bodily harm. In my view, in these circumstances, the possible prejudice[19] to the respondents who received a suspended sentence for assault to do grievous bodily harm, cannot be ruled out.

[50] For the reasons already alluded to, not only was the question of law not accurately framed by the trial court, and the facts upon which the point hinged not clear, but the State also did not properly formulate the question of law. These failures are deserving of censure. In any event, in the context of this case, it is my prima facie view that the reserved question, which in summary is whether the evidence of Mr Mangena and Mrs Mametja constituted a prima facie case against the respondents on all counts, clearly requires an inquiry into the assessment of the evidence by the trial court. This raises in essence a question of fact, rather than one of law. Thus in the final analysis, the requirements of s 319 have not been complied with, and therefore the appeal should fail on these grounds alone.

[51] My brother Cachalia JA agrees that neither the State nor the trial court complied with the requirements of s 319, and that 'there would therefore be good reason for this Court to dismiss the application', on this ground alone. However, in his view, it is not the course to be adopted in this particular matter, as an appeal court must always consider the possible prejudice to both parties before deciding to dismiss an application. In Cachalia JA's view the State's failure to comply with s 319 was not exclusively of its making, as it was faced with an unclear judgment by the trial court, compounded by its failure to state the facts upon which it reserved the point of law. In his view, despite the shortcomings in the formulation of the point of law, the appeal should proceed,

[19] See *S v Basson* fn 3 paras 60-64. See also *Magmoed* fn 3 at 202.

as it was possible to glean the factual findings of the trial court, which gave rise to the dispute over the point of law, without difficulty or contestation. I am in respectful disagreement with this view.

[52] My brother Cachalia JA accepts that there were many aspects of the trial court's judgment that were problematic inter alia: the trial Judge did not identify the essential elements of the offences of kidnapping or murder when committed in the furtherance of a common purpose; it is doubtful whether the trial court understood, as Botha J, said in *S v Petro Louise Enterprises (Pty) Ltd and Others* 1978 (1) SA 271(T), the precise scope, nature or interpretations of the elements of these offences, nor the conduct that had to be proved to bring it within the ambit of these crimes. According to him, all of this led to the State formulating its question inelegantly. He states that in actual fact, had the question been formulated in the following terms: whether on the proven facts, the conduct of the respondents prima facie brought it within the ambit of the crimes of kidnapping and murder, 'which in substance is what the question was aimed at, the answer to this question would have been obvious'. Thus he concludes that 'there is no doubt that the question raised by the State required an enquiry into whether the proven facts fell within the ambit of the two main offences. That quintessentially raised a point of law'. I disagree with this conclusion.

[53] In my view, the trial court's judgment contains many aspects which are troubling. Given the factual circumstances, it is disquieting (and perplexing as my brother Cachalia JA puts it) that the trial court having ruled that there was a prima facie case of assault against the respondents, and having found that they were guilty of those charges, appeared not to have enquired into whether those assaults also amounted to prima facie evidence on the main charge of murder,

nor did it say why that fell short of murder. This reasoning appears to be implausible.

[54] Furthermore, the findings made by the trial court in its judgment on the discharge of the respondents, and their subsequent conviction on the assault counts, lack clarity and are confusing. However, as these aspects do not arise for adjudication before this Court, this Court cannot clarify the reasoning of the trial court. In the circumstances, as the judgment of the trial court is unclear on important aspects, it is difficult, to glean from the judgment, the factual findings which were material to formulating the question of law.

[55] This is a court of appeal, its function is not to seek to discover reasons adverse to the conclusions of the trial judge.[20] The inquiry before this Court is whether the question of law was properly reserved, which question, in view of all the aforegoing, must be answered in the negative. It is true that no judgment is perfect and all embracing, but it does not necessarily follow that, because certain aspects were not mentioned in the judgment, they were not considered. In *Schoeman* at para 39 this Court said:

'The State has a right of appeal only against a trial court's mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly.'

[56] Implicit in the provisions of s 319 of the CPA is the prerogative and the duty of the 'first mentioned court' (the trial court), the high court in this instance, to properly and accurately frame the question of law for consideration by a court of appeal. This Court, being a court of appeal is in no position to formulate the question of law, and then answer it as being properly reserved in favour of the State. And even if it could, there is no factual basis on which to

[20] See *R v Dhlumayo* [1948] 2 All SA 566 (A); 1948 (2) SA 677 (A) about the reluctance to disturb the trial court's findings on questions of fact.

determine the reserved question. More pertinently, to do so, would set a precedent for future defective applications such as these.

[57] Notwithstanding the strict application of the section and the law that has been adopted in this matter, courts have, in the past, albeit with a note of caution, reluctantly allowed the appeal to proceed even though the requirements were not met. I refer to the case of *S v Petro Louise Enterprises (Pty) Ltd and Others* 1978 (1) SA 271 (T),[21] where the court entertained the appeal, even though the magistrate had failed in a material respect to comply with the requirements of formulating a stated case in terms of s 104(1) and rule 67(10) (now ss 310 and 414 of the CPA). However, in the final analysis, Botha J held that the State had reserved a question of fact, and accordingly dismissed the appeal. It is important to re-iterate the caution expressed by Botha J in *Petro Louise*, which in my view is well founded, and equally apposite in the matter before us:

'*Generally speaking, I think that this court will decline to hear an appeal under sec.104(1) – where the magistrate has failed in a material respect to comply with the requirements of formulating a stated case in terms of s104(1) and Rule 67 [now secs 310 and 414 of the CPA], in spite of the unfortunate prejudice and inconvenience that may result to the appellant and the respondent from such a step – which is all the more reason, of course, why magistrates should be meticulous in performing their duties in this regard. In the present case, the stated case is so pronouncedly defective that there would have been ample justification for us to have refused to entertain the appeal. However, when this possibility was mooted at the outset of the argument, counsel for both sides, stressing that the problem was not of their or their clients' making, urged us to be indulgent and to listen to their arguments. We allowed ourselves to be persuaded to do that. The fact that we were prepared to hear the present appeal, in the particular circumstances present here, should not, however, be regarded as a precedent that in future cases of a similar nature this court will be equally indulgent.'* (My emphasis.)

[21] *S v Petro Louise Enterprises (Pty) Ltd and Others* fn 6 at 279E-H.

[58] Following upon the approach by Botha J in *Petro Louise*, a similar note of caution was expressed in *S v Nzimande*,[22] where the high court proceeded to entertain the appeal (on the basis of the question as formulated by the State) even though the case stated by the magistrate was defective and did not comply with the requirements of s 310 of the CPA. The high court said at paras 10 and 11:

'*Several cases are referred to by appellant's counsel which clearly decide that if the casus is not set out properly, the court cannot hear the matter, and applies a rather strict application of the section and the rule . . . Appellant does however go further and refers to the judgment of Botha J in S v Petro Louise . . . In this case Botha J said the following:*

"Generally speaking I think this court will decline to hear an appeal under sec 104 where the magistrate has failed in a material respect to comply with the requirements of formulating a stated case . . . The fact that we were prepared to hear the appeal. . . should not be regarded as a precedent in future cases. . . ."

Although Botha J did not intend his judgment to be used as a precedent, it nevertheless stands as a reported judgment. I for one cannot ignore it. In fact I tend to agree with his approach. The section as it stands is very unsatisfactory in a case where the magistrate does not do justice to it. One or all of the parties involved therein are then prejudiced. This is not in the interests of justice. It seems to me that where a case is of such a nature that the true casus can be gleaned from the record and the heads of argument, there is no reason why a court should not entertain the matter.' (My emphasis.)

The high court then proceeded to entertain the appeal. This was subsequently overturned by this Court on appeal to it by the State, on the basis that the high court had no jurisdiction to entertain the appeal, which fell to be struck off the roll.

[22] *S v Nzimande* 2007 (2) SACR 391 (T) and *S v Nzimande* [2010] ZASCA 80; 2010 (2) SACR 517 (SCA), where the parties were agreed that the stated case did not comply with the requirements of s 310 of the CPA, and the parties urged the court in their interest to entertain the appeal despite the shortcomings, which it proceeded to do. On appeal, this Court said: 'Thus the true complaint of the State was not that the magistrate had committed any error of law, but that he had drawn incorrect inference from the facts. Judging from the evidence, as well as the judgment of the High Court, this complaint may well be valid – an issue on which we do not have to make a finding. Suffice it to say that such error (if it was one) was one of fact, which did not confer the State the right to appeal against the acquittal of the appellant'.

[59] Both the courts in *Petro Louise* and *Nzimande* have expressly cautioned that the fact that they were prepared to hear the appeals should not be regarded as a precedent in future cases. This clearly illustrates that where a question of law has not been properly formulated, the appeals should be proceeded with circumspection, or perhaps not at all. The import of the following dictum in *Petro Louise* at page 576 should resonate:

'*[I]t is important that magistrates who are requested to state a case in terms of s 104 and rule 67 should take great care in complying with the requirements of those provisions, especially in relation to the recital of the facts found and the formulation of the question of law involved. Lack of clarity and precision in drafting a stated case very often can lead to confusion as to the actual issues at stake and cause unnecessary trouble and inconvenience to the Court of appeal. This was pertinently demonstrated in the present case, where a good deal of time was taken up in argument in an effort to glean from the magistrate's judgment those findings of fact which were material to the alleged questions of law*.' (My emphasis.)

[60] To a large extent, the State's real complaint in this matter is that the evidence was assessed by the trial court in such a manner that no reasonable court would have acquitted the respondents on the charges of murder. Undoubtedly this is a serious matter where two young men lost their lives. So viewed, and in light of the evidence as well as the judgment of the trial court, this complaint may justifiably be valid. However, this Court is not sitting in judgment on the factual findings of the trial court, and is in any event precluded from entertaining an appeal from the State on the facts.

[61] I align myself with the sentiments expressed by this Court in *Schoeman* where the following is said at paras 73-74:

'As Corbett CJ pointed out in *Magmoed*, even where there are "strong indications" from the evidence that there were cogent reasons to convict an accused "[t]hese considerations" must not. . . be allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.

Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law.'

[62] The effective prosecution of crime is an important constitutional objective. The State was afforded the right to appeal a question of law to the Supreme Court of Appeal and should have done so properly, considering it had all the resources available to it at its disposal. A basic trawl through the cases would have revealed that the requirements of s 319 are peremptory, and that the question of law must be framed accurately by the State and the trial court for the consideration of this Court. In performing this duty the trial court must be meticulous.[23] Regrettably, this was not done. In my view for all of the above reasons, this appeal must fail.

[63] In the result, the following order is made:
The appeal is dismissed.

H K SALDULKER
JUDGE OF APPEAL

[23] See *Petro Louise* fn 6 para 276; see *Nzimande* fn 22 paras 10 and 11; *S v Kameli* [1997] 3 All SA 230 (Ck) at 239.

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