



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: A151/2023

In the matter between:

**KELLY MALIZANA
THANDOWANI MBOTO
HOWARD MBOTO
VICTOR MBADA**

and

THE STATE

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

RESPONDENT

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 21 JANUARY 2025

NZIWENI, J

Introduction and Background

[1] On the morning of 07 February 2014, the body of a 25-year-old male (“the deceased”) was found at Lwandle taxi rank, hanging from a ledge below the ceiling of a container by a belt tied around his neck. The deceased’s body was found at

around 7: A.M. The deceased's hands were found tied together in front with his shoelaces. The wrists of the deceased were tied by two loops.

[2] The shoes of the deceased were also found inside the container without shoelaces.

The pair of trousers that the deceased was wearing had no belt. There was a typist chair with wheels, not far away from where the body was hanging. Central on the seat of the typist chair were clear footprint marks. It is common cause between the parties that the footprints found on the chair were those of the deceased.

[3] The deceased suffered a laceration to the top of the head, and other abrasions. A spot of blood was found on the stoep in the entrance of the container where the body of the deceased was found.

[4] The deceased was last seen alive an hour or so before the discovery of his body- when he was taken away from his home by the appellants and accused one ("erstwhile co-accused"). He was alive when the appellants brought and placed him inside the container at the taxi rank. The appellants at the time were taxi owners and members of 'KUPA' which was part of Community Policing Forum.

[5] During the trial, all the appellants pleaded not guilty, and their defence was a denial.

Only appellants 2 and 4 took the witness stand. The erstwhile co-accused also testified but passed away before he could be cross examined.

[6] This appeal stems from a very lengthy trial that started in 2014. Based on the doctrine of common purpose, all the appellants were convicted on charges of Kidnapping, Assault with intent to do Grievous Bodily Harm and Murder. The Regional Court Magistrate gave judgment on 03 June 2022.

[7] The appellants were arraigned originally as five accused. During the trial, the erstwhile co-accused passed away. Thus, four appellants now seek to appeal against the judgment of the Regional Court Magistrate. This appeal is with leave of the court a *quo*. I, however, propose to refer to the appellants in the same numerical order that they were referred to in the court a *quo*.

[8] The appellants were sentenced as follows. Both appellants two and four were sentenced to an effective 22-year imprisonment. On the other hand, appellants three and five were sentenced to an effective eighteen-year imprisonment. On 15 December 2022, all the appellants were admitted on R5000, 00 bail each, pending their appeal.

[9] The scope of this appeal is ultimately narrower than what was originally sought in the leave to appeal because, all the appellants subsequently abandoned the appeal against their sentences.

[10] There are no eyewitnesses regarding how the deceased died. However, the cause of death is not in issue here. The question in this appeal is whether the court *a quo* was correct to find that the hanging of the deceased was homicidal and not suicidal. In this matter, there is disagreement between the State and appellants' experts. The decision of the court *a quo* that the deceased's death was homicidal is based on circumstantial evidence.

[11] The grounds upon which the appeal is premised are:

- The court *a quo* erred and misdirected itself in finding that the State had proven its case beyond reasonable doubt.
- The court *a quo* erred and misdirected itself in its evaluation of the evidence as follows:
 - In relying upon the evidence of Atini Nyotini and Luniko Nyotini despite:
 - 1 The various internal contradictions contained in their respective evidence; and
 - 2 The various contradictions between the versions of such witnesses; and

3 Their versions in respect of the alleged attack upon the deceased with knobkerries not being consistent with the injuries found by either pathologist.

- In relying on the disputed evidence of Dr Anthony, specifically:

1 In accepting Dr Anthony finding that the deceased could not have committed suicide;

2 In accepting Dr Anthony's finding that, as a scientific fact, the deceased could not have climbed on the typist chair to commit suicide, as chair was unstable;

3 In finding that Dr Anthony was at all qualified to express an expert opinion regarding the physical properties of the typist chair despite:

4 Her expertise being in the discipline of pathology and not applied mathematics, physics or industrial design; and

5 Her having not undertaken any reconstruction of the scene; and

6 Her having performed no test upon the chair.

- In rejecting the evidence of accused 2 and accused 4;

- In rejecting the evidence of Dr Liebenberg insofar as it was disputed, specifically in rejecting her opinion that:

1 On the probabilities, the deceased died on account of a suicide; and

2 Injuries found on the body of the deceased did not support the version that the deceased had been viciously attacked using knobkieries.

- In finding that the accused kidnapped the deceased, and specifically that:

1 The accused did not carry out a citizen's arrest as provided for in section 42 (1) (a) of the Criminal Procedure Act 51 of 1977 ("the Act"):

2 In the alternative, in the event of it being found that the accused did not comply with the strict requirements of the aforementioned section, in not finding that the accused did not have the intention to kidnap the deceased unlawfully.

3 In finding that the accused acted in common purpose to commit any crime.

[12] The key issues in this appeal are therefore whether the court a *quo* was correct in convicting the appellants. Generally speaking, brevity is a virtue, but I consider that it is incumbent upon this Court to do a thorough review of the court a *quo*'s proceedings to put the entire matter in context. In doing so, I do not intend to unduly extend the length of this judgment. Thus, I do not intend summarising the evidence of the various witnesses in this judgment in detail, as their evidence is a matter of record. I shall only refer to some of the salient features thereof and not all the witnesses.

Brief facts of the matter before the regional Court

[13] It is common ground that the appellants on the morning in question between 5: A.M. and 6: 00 A.M. went to the place of the deceased. They found the deceased still sleeping with his two brothers.

[14] Athini Nyotini, the brother of the deceased gave the following evidence before the Regional Court: On the morning in question, they heard a sound of someone knocking and then after heard a person kicking the door open. However, during cross examination by Mr Kirsten [appellants' attorney during the trial] he testified that he did not hear a knock first but the kicking of the door. His brother then turned on the electric light.

[15] It was his testimony that the appellants did not yell whilst they were outside the dwelling. The second appellant then entered their house and he was in possession of a knobkierie. The second appellant enquired about the whereabouts of the deceased. At first, they responded that they did not know where the deceased was, even though the deceased was sleeping on the floor.

[16] The second appellant then threatened to hit them with the kierie he had in his possession. They then revealed the whereabouts of the deceased. Appellants

number two, three, four and five then joined the second appellant inside their house. The deceased accused was in a taxi parked outside.

[17] Only appellants two and three were armed with kierries. They took the deceased outside and in the process, they were assaulting him with the knobbed head of the kierries. During cross examination, he testified that it was appellants two and four who assaulted the deceased with knobkerries. And they assaulted him all over his body. He did not see blood or an open wound on the deceased. The deceased was crying out for help and was taken into the taxi. According to Nyotini, whilst the appellants were taking the deceased away, the second appellant threatened to kill them. When he was recalled, he testified that the appellants said they were going to kill the deceased. It was his testimony that when he testified earlier that the appellants said they were going to kill them he had made a mistake.

[18] A few minutes later, the appellants returned to fetch them as well, but a certain lady told the appellants that they were not involved. And it was only the deceased that cut the Telkom cables. When they [the appellants] came back, the deceased was inside the taxi looking afraid and had a swollen face. The appellants left again with the deceased. They did not report the incident to the police. Barely an hour after that a policeman came and informed them that the deceased committed suicide by hanging himself.

[19] He testified that he is aware of an organization called KUPA in Nomzamo in Strand. According to him, KUPA is a community organisation associated with the police and they protect the interest of the community. According to him, KUPA assaults people suspected of having committed a crime.

[20] Another brother of the deceased, Luniko Nyotini, testified that he only saw appellants one-three entering his dwelling and dragged the deceased away. They assaulted the deceased whilst he was sleeping. As they were taking the deceased away, they assaulted him on his head. They were assaulting the deceased simultaneously with objects and with hands. Inside their dwellings, appellants one and three assaulted the deceased with their hands. They dragged the deceased outside and when they got outside, they assaulted him with objects. When they dragged the deceased, the deceased was on his feet. When the policeman came, he did not tell them the deceased had passed away, he only requested the deceased's ID.

[21] Sergeant Basil Felix testified that appellant four came to the police station because he wanted the police to see something. Appellant four did not discuss what the problem entailed but told them that they should observe for themselves. He then went to the taxi rank around 7:30 A.M. At the taxi rank appellant four pointed out a container. The container was closed. They noticed someone who was hanged.

[22] Constable Ntshontsho, the investigating officer of the case testified that KUPA could operate only within certain parameters. According to him if KUPA arrests a suspect, they must not assault the suspect, they must accompany the suspect to the police station.

[23] He also testified that on the day of the incident he was at the house of the deceased at around 09:40 A.M. He testified that when he was at the house of the deceased to investigate his death, he did not notice any blood or blood spatter on the door frame of the dwelling or in the yard of the deceased. It was also his testimony that there was no recent damage on the door in question.

[24] It was his testimony that they also looked in the taxi that was used to transport the deceased and in it they could detect that there was blood, but the blood was washed off. They also went to the taxi rank and on the stoep of the container where the body of the deceased was found, they noticed blood spots.

[25] Luzuko Mafanya, testified that at the critical time he was working at Lwandle taxi rank as a security guard. On the morning of the discovery of the deceased's body, he arrived at work after seven. When he went to the container in question, he found it closed. The burglar door was not locked with a padlock but merely closed.

According to him, the burglar door gets unlocked by the people who worked during the night shift.

[26] He assumed that the burglar door was unlocked by the people who worked the night shift.

[27] Ms Nkosiwana, testified that at the critical time she was working at the taxi rank in question as a security officer. On the morning in question when she arrived at work at 06:20, she noticed that an old office that is normally kept open was closed. After a while the police arrived with appellants two, and four together with the neighbour of appellant two.

[28] Appellant four then told her that there was a child that hanged himself in the old office and that they brought the child to the taxi rank at 5:45 A.M.

[29] It is her testimony that there is a forum made up of community members and members of the taxi rank. She testified that the members of the community would report incidents of crime to the forum instead of the police. According to her, the members of the forum would bring children who have committed delinquencies to the taxi rank. KUPA would then question those children, and the children would be assaulted.

[30] Lt Colonel Nstjonsewe testified that he is a station commander at Lwandle Police Station. According to him, KUPA came into existence due to school gang violence. It was his testimony that KUPA was supposed to be a link with the police if they had information related to gang fights. He testified that KUPA was not allowed to physically intervene, or to take them [fighting factions] or to assault. They were also not police reservists. It was his testimony that they had workshops with KUPA as to what they can do and not do when they assist in fighting crime.

[31] He admitted that KUPA members would effect arrests and hand over suspects to police. He also testified that if an offence was not committed in the presence of KUPA, and they only have information of the offence; they cannot kick house doors in and take someone out of bed and arrests the person. They can't take the person to a taxi rank. If the police are not called and KUPA effect arrest, the suspect should be taken to the police station.

[32] It was his testimony that later KUPA became a substructure of police [Community policing forum], in order to assist the community. And the role of the community police forum was to facilitate engagement between the community and the police, to do neighbourhood watches, mediate dispute between members of the community. According to him, citizen's arrest can only be effected if the offence is committed in the presence of KUPA.

[33] He testified that KUPA was supposed to assist with information gathering but they were not expected to investigate.

Defence case

[34] Appellant two testified that when community members come to them and complain about a person, he would arrest the person and keep the person in a container at the taxi rank. The police would then come and fetch the person from the taxi rank. According to him, this is an arrangement they have with the police and members of the community. He became a member of KUPA at its inception. It is his testimony that he told appellant four, the chairperson of KUPA, about what the deceased was alleged to have done and the words he uttered.

[35] He then reported to appellant four that the deceased was at his house. Appellant four then organised other members and told them that they must be aware that the deceased had a big knife. Appellants four, five and erstwhile co-accused came to get him from his house and he had a broom stick. They arrived at the deceased's house between 5: A.M. and 6: A.M. Appellant three joined them as they arrived at the deceased's house.

[36] At the place where the deceased slept, they told the deceased's mother to knock where the deceased was sleeping and tell occupants to open. When there was no

response to the mother's knocks, he decided to knock himself and directed the deceased to open the door, failing which, they would force the door open themselves and if he did not, they would open it themselves. The door was then opened from inside, and he entered the dwelling with appellant four. Inside, they asked for the deceased and one of the occupants pointed under the bed.

[37] The deceased came out in a hurry from under the bed. In the rush of coming out of the bed, the deceased hit his head against the doorframe. Appellant four grabbed the deceased by his trousers and took him out. The deceased did not have a belt on. Outside, the deceased was trying to loosen himself from appellant four's hold and in the process, he bumped himself against structures.

[38] During cross examination, he testified that they told the deceased that they were placing him under arrest for committing the offence of cutting cables.

[39] They took the deceased into the taxi that was stationary outside his yard. The deceased started to bleed when he was inside the taxi. No one assaulted the deceased with a knobkierie. He however admitted that the deceased sustained the injury on his head in his presence.

[40] The deceased asked them not to take him to the police station and promised to tell them the truth. The deceased told them that he should not be taken to the police station as he was running away from the police.

[41] They told the deceased that they were not going to take him to the police station because he did not damage their things but Telkom things and that only Telkom will take him to the police.

[42] They returned back to the premises of the deceased because the deceased told them that the people they left behind at the dwelling were also involved in the damage of the cable. At the deceased's premises they were told that the deceased was lying and they left again for the taxi rank with the deceased.

[43] At the taxi rank they stopped in front of the container. As the deceased was alighting the taxi, appellant four saw blood on his head. Appellant four then took the deceased to the tap to wash it off. He also saw the fresh blood on the deceased, and he thinks it happened when he struck his head against the doorframe.

[44] After the blood was washed off from the deceased, the deceased was placed in the container. They left the deceased in the container. They closed the door of the

container and latched the door [without a padlock] from outside. As such, the door of container could only be opened from outside.

[45] They then went to a security guard and told him to look after the deceased as they were going to wash themselves. During cross examination he testified that they have a witness that can testify that when they left the deceased in the container the deceased was alive.

[46] They then left. The taxi they used to transport the deceased was then loaded with passengers to ferry them.

[47] They intended to go and wash themselves in order to freshen themselves up and then thereafter, they were going to take the deceased to Telkom. Whilst he was at his house, he received a call from appellant four informing him that the deceased hanged himself in the container.

[48] Mzukisi Zwakala, a taxi driver and a defence witness, testified that at the critical time he was also a member of KUPA. He testified that on the day in question he was working at the taxi rank. The appellants came with the deceased there. He did not notice any injuries to the deceased when he arrived save for a cut on his hand. The appellants called the security guard and told him to keep an eye on the

deceased. They were standing next to the window of the container and when the appellants left, he looked through the window of the container and he saw a boy standing inside the container. Appellant five went with his taxi to Somerset West to offload passengers. He loaded his taxi, ferried passengers and came back. When he came back, he was told that the boy was hanging inside the container, and he looked and saw that the boy was hanging.

[49] In essence, when appellant four took the witness stand, he denied that they killed anyone. He also disputes the medical evidence that the deceased did not die by suicide. Appellant four testified that at the relevant time he was the chairman of KUPA. It was his testimony that if a crime is reported to them and they have the identity of the culprit, it was their responsibility to go and look for the person. And when they find the person, they would keep the person at their offices at the taxi rank as the police refused to keep people if there was no case registered with them.

[50] KUPA was also involved in all sorts of disputes including maintenance of children as they also saw an issue involving maintenance as crime related.

[51] He testified that when they heard from appellant two that the deceased cut cables wires, they decided to look for the deceased to take him to Telkom so that Telkom can open a case and appellant two's phone could be fixed by Telkom. They also

heard the deceased went to the house of the appellant two with a big knife looking for appellant 2.

[52] They then went to look for the deceased. At the place of the deceased, he took a plank to protect himself. Appellant two had a broom stick in his possession. The deceased came out of the bed when they said they were going to take everyone. The deceased came out running under the bed and ran towards the door. The doorframe had planks that were sticking out.

[53] As he was about to catch the deceased, the left side of his head hit the planks and there was no blood on the door frame. He grabbed the deceased on his waist and took him to the taxi that was waiting outside. The taxi stopped by the clinic and the occupants of the taxi told them that the deceased told them that he was not alone. A person from the informal dwelling came out with tekkies and a belt and placed them inside the taxi.

[54] When they arrived at the taxi rank, they noticed that the deceased was bleeding from his head. He then took the deceased to a tap to wash the blood as he wanted to see the depth of the wound. The deceased told him that it was just a cut. The deceased said he has other cases the police are looking for him, they should not take him to the police station.

[55] They told the deceased that they would not take him to the police they would keep him in the container. They left the deceased in the container. Whilst away he heard that the deceased hung himself. As he was driving out of his yard, he saw a police van approaching him at his house. Then the sergeant asked the whereabouts of the container in question. He then asked the sergeant to follow him to the taxi rank. He denied that he went to the police station after they discovered the body of the deceased.

[56] He also testified that Felix was wrong when he testified that he told him that he would not discuss what happened.

The Evidence of the Pathologists

[57] For trial purposes the defence relied upon the testimony of Dr Liebenberg, a pathologist to illustrate that the deceased's death was no homicidal, whilst the State relied principally upon the evidence of Dr Anthony.

[58] Doctor Liebenberg expressed the opinion that if the hanging of the deceased was homicidal, she would have expected to find numerous defensive injuries; the clothing of the deceased not to be neat and the wrists tightly tied. According to Doctor Liebenberg, it is not an unknown phenomenon in a suicide situation, where

a person ties his or her hands to prevent himself or herself from completing the hanging.

[59] She also testified that according to her expert opinion, the deceased tied his own hands together.

[60] Doctor Liebenberg testified that there are two scenarios she tried to extrapolate from the surrounding circumstances at the time of the deceased's hanging. One such scenario involves the deceased being conscious whilst being hanged and the second one involves an instance where the deceased was unconscious.

[61] She testified that the unconscious scenario is debunked by the footprints on the surface of the typist chair. According to her, the footprints on the chair fits in with the kicking of the chair to go into full suspension.

[62] It was also her testimony that the circumstances of the case did not necessarily exclude homicide.

[63] In order to shorten this judgment, it will be necessary to deal in more detail with the testimony of Dr Liebenberg later on in this judgment. (See paragraphs 112-133.)

[64] Doctor Anthony testified that she attended the crime scene on the morning of 07 February 2014. She noted that the deceased was hanging suspended to the ceiling with his face to the wall in a corner of a container at the taxi rank with his own trouser belt. She also observed that the hands of the deceased were tightly tied in front of him with his own shoelaces. She drew the inference that the shoelaces were from the deceased's shoes because she noted his shoes on the scene without shoelaces. During cross examination she admitted that there was a gap between wrists or the palms.

[65] When the defence attorney put forth a proposition to her that the manner in which the hands of the deceased were tied together could indicate that the deceased could have maneuvered his hands and positioned himself to reach the ledge; notwithstanding the fact that they were tied together; she responded by saying she could not give comment to that. Moreso, considering the type of chair involved and with the hands tied up and a head injury.

[66] She also noted that the deceased's bare footprints on the typist chair suggested that the deceased was most likely in a standing position on the chair when he was suspended from the ceiling. According to the pathologist, because the deceased's hands were tightly tied in front of him, for the deceased to be able to get onto the typist chair which had wheels, it would have been impossible for the deceased to

balance himself into a standing position on the chair and then suspend himself to the high ceiling. She testified that the typist chair is an unstable chair because it has wheels.

[67] The pathologist also testified that she found minor abrasion of blunt trauma on the deceased's right ankle and the lower legs. According to her, these injuries could have been sustained during the positioning of his body on the typist chair against resistance.

[68] She also noted abrasions on the right-hand palm and the left posterior wrist that could have been sustained during the tying of the deceased hands against resistances. She testified that the injury could have been caused by anything that caused the skin to scrape off the epidermis. It was her testimony that if the deceased tied his own hands, he would not have had injuries.

[69] When it was put to her that it was the instructions of the appellants that some of the deceased's injuries were sustained through a fall at his [the deceased's] house, the doctor responded by saying that that is possible, but the injuries were not consistent with a fall.

[70] On the neck of the deceased, she found an abrasion that was consistent with hanging. She also observed 40x10 mm laceration that cause a blunt trauma left front back of the skull. According to her, this blunt trauma injury is consistent with an assault with a knobkerrie. She further testified that it is highly unlikely to sustain the laceration just by running against a doorframe. She based this conclusion on the fact that a doorframe is a flat surface.

[71] It was the pathologist testimony that there was no blood in the container where she saw the body of the deceased. She also testified that the injury on the head mostly likely would have bled profusely, but elsewhere. According to her infliction of trauma to the scalp bleeds profusely.

[72] Her postmortem findings were that the deceased died through homicide by hanging not a suicide. That was a brief synopsis of her testimony.

[73] The burden during the trial was with the State to prove amongst others that that the death of the deceased resulted solely from a homicide committed by the appellants with their erstwhile co-accused.

Regional Court's finding

[74] The principal contention by the appellants is that the State evidence is insufficient to support their convictions. The evidence of the State rests mainly on the testimonies of the deceased's two brothers and Dr Anthony.

[75] It is trite now that for evidence to be found to be inherently improbable to the point of being unworthy of belief, such version must have an element of being physically impossible and be clearly unbelievable and false.

[76] The Regional Court was not impressed with the testimonies of both appellants two and four. The learned Magistrate did not consider their testimonies to be credible and probable. The court *a quo* also found that there were contradictions in the testimonies of appellants two and four. The court *a quo* held that the evidence of the appellants was not probable.

[77] Then she proceeded to delineate the instances in the appellants' version that led her to doubt their credibility. For instance, she mentioned that the appellants ought to have taken the deceased to the police station; appellant two as a victim, ought to have registered a case with the police; it is nonsensical to want to contact Telkom

to see the deceased, yet, they knew well that that was the work of the police; and it made no sense that the deceased would commit suicide.

[78] Equally, the Regional Court found the evidence of Zwakala [defence witness] did not take the points in dispute any further.

[79] According to the Regional Court Magistrate, the civil arrest version was a red herring to troubled the waters. And it does not reconcile with the facts of the case.

[80] The Regional Court found that the version of suicide was inherently improbable and rejected it as false because: a short time elapsed between the time the deceased was taken and the time he was found hanging; according to the version of the appellants, the appellant tried to escape and did not want to be taken to the police and it is senseless that the deceased would bind his hands frustrating his attempt to commit suicide.

The contention regarding the space between the deceased's tied hands

[81] The appellants made much of the manner the hands of the deceased were tied. Amongst others it was contended on appellant's behalf that the way the hands of the deceased were tied suggests that the deceased might have been able to manouvre his hands to hang himself.

[82] The tying of the hands was one of the factors that was there for the court a *quo* to determine whether the deceased died by suicide or homicide. First and foremost, the court a *quo* did not assess this factor in isolation. The fact that the hands of the deceased were tied cannot be a random act. Moreover, Doctor Anthony who also visited the crime scene also observed that the hands of the deceased were tied tightly together.

[83] I fully agree with the magistrate that in the circumstances of this case, it is inherently improbable to the point of being impossible that the deceased who wanted to kill himself would tie his hands before he hangs himself. Though the wrists were not tied together, but it is evident from the photographs that the hands were tied tightly together. Based on the evidence led in this matter, it would also be ludicrous to say the least, to suggest or believe that the tying of the hands was an act meant by the deceased to frame others.

[84] If the deceased wanted to take his life, why would he make it difficult for him by tying his hands tightly together. Particularly, if he wanted to hang himself on a ledge suspended on a ceiling, using a typist chair, in an unfamiliar place and unaware as to when the appellants were going to return. Most importantly, the photographs of the scene reveal that the hanging of the deceased was well executed. The photographs don't indicate a clumsy process.

[85] There is even nothing to suggest that there was a staging of the scene. There is nothing in the facts of this case that warranted it to be considered a suicide. In the context of this case, the tying of hands does not correlate with the theory of suicide. In the context of this matter, there is nothing that gives an appearance of suicide.

[86] Thus, the court *a quo* cannot be faulted for rejecting theories suggested by the appellants and accepting the evidence of Doctor Anthony.

Cross examination by the State on uncross examined testimony tendered in a trial

[87] A starting point is to remind ourselves that an accused person has the right to cross examine a witness against him. In this matter, it is common cause that due to the death of the erstwhile co-accused, he could not testify further in the trial. In the circumstances, the Prosecutor could not subject his evidence in chief to cross-examination.

[88] In so far as this ground is concerned, at the heart of the appellants' argument is the contention that the court *a quo* erred in allowing the State to cross to examine appellant two, four and Zwakala, [a defence witness] on uncross-examined evidence. It is further submitted on behalf of the appellants that the court *a quo*

erred in permitting uncross-examined testimony of the deceased accused [erstwhile co-accused] to be used in cross- examination of accused two and four and Zwakala on supposed contradictions with the evidence of the deceased accused, despite objection.

[89] It is quite important to remember the circumstances under which the untested evidence arose. On top of that or perhaps more importantly, the assertion that there were objections to the State being allowed to cross- examine on the testimony that was not subjected to cross examination, is not entirely correct. It is so that Mr Kirsten who appeared on behalf of all the appellants made strenuously and numerous objections when the prosecutor wanted to cross-examine Mr Nkomo, appellant two about the uncross-examined evidence of deceased accused. During the objections by Mr Kirsten, there was many discussions between the court a *quo*, Mr Kirsten, and the Prosecutor.

[90] Then the court a *quo* stated that there can be no objection if the State puts certain aspects and ask appellant two to comment on that. Mr Kirsten then responded as follows:

“In that manner, no Your worship.” Emphasis added.

[91] The court a *quo* during the engagement further explained what it meant. Mr Kirsten answered as follows:

“In that manner, can you please comment and then he gives a comment and then he moves on to the next point, that will not be a problem.”

[92] The court *a quo* then ruled as follows:

“Mr Daimon (sic), I am going to allow you and as I have indicated . . . Not cross-examination as such but you can put the version to him and ask him to comment on that.”

[93] The Prosecutor responded the following:

“Yes Your Worship, that . . . that is what the State actually will do.

Court: okay and no further than that, so you must be careful in that regard”.

[94] After the ruling, the line of cross examination followed the ruling. Appellant two was asked as to whether he agreed or disagreed with the testimony of the deceased accused.

[95] The evidence of the deceased accused cannot be likened to an out of court statement or hearsay evidence or evidence that was given against the appellants. Rather, the evidence of the erstwhile co-accused was oral evidence given under oath.

[96] The right to cross examination is one of the cornerstones of fair trial. The accused has a right to cross examine witness testifying against him or her or any co-accused who testifies. Likewise, in order to ensure a fair trial, the State in terms of section 166 of the Criminal Procedure Act, Act 51 of 1977 ("the CPA"), also has got a right to test evidence of the accused persons.

[97] In this instance, unlike in a case where multiple accused are represented by multiple legal representatives, the multiple appellants in this matter were represented by a single attorney. Thus, Mr Kirsten on behalf of the appellants was not going to cross examine his own client. Put otherwise, he could not challenge the testimony of his own client.

[98] Moreover, no conflict of interest between the appellants was ever brought to the attention of the trial court. Clearly, the erstwhile co-accused was not an adverse witness to his co-accused. In terms of section 166 of the CPA, the appellants could only reexamine the testimony of the deceased accused if it was cross examined by the State.

[99] During the trial, the Prosecutor sought to cross-examine the appellants and Zwakala by exploring and exposing discrepancies between their testimonies and those of the deceased accused. This was a way of discovering the truth and not to prove that the appellants committed the offences. As such, the cross examination was not allowed to prove the truth or the correctness of the contents of the untested evidence.

[100] What does seem to me important is that the evidence of the erstwhile co-ccused was given against the State. And when the erstwhile co-accused testified, no one knew that his evidence will not be subjected to cross examination. It is thus apparent from the circumstances of this case that the State could not be deprived of the right to cross examine an accused person regarding testimony of their co-accused; that was given in open court.

[101] With regard to this case, the fact that direct testimony of a witness in the form of oral evidence in court, was not subjected to examination goes to weight to be accorded to such evidence rather than its admissibility. As a corollary, it affects reliability of the evidence or its probative value.

[102] What this means is that the State [a party] could use it to cross examine in order to test an accused's testimony against the deceased accused' version with whom he shared common interest. But cannot be used by the court to determine guilt or innocence. In other words, such evidence cannot form basis for conviction or acquittal of an accused person. In this respect, I cannot see how this can be an infringement to the rights of the appellants.

[103] Our jurisprudence unequivocally holds that acceptance of evidence that was not tested through cross examination, is in conflict with the requirement of fair trial. I fully align myself with this. This is so because cross examination is a crucial tool to elicit the truth and challenge credibility of a witness.

[104] It is significant to note that the case law does not say that the evidence of a witness who gives complete evidence in chief but thereafter dies or becomes unavailable, before cross-examination, cannot be used in cross examination of the remaining witnesses or accused. But rather the longstanding case law states that such evidence remains untested, and its acceptance would defeat the purpose of cross examination. See *S v Msimango and Another* 2010 (1) SACR 544 (GSJ) (27 July 2009).

[105] In trial proceedings parties present evidence. In this case, when the defence presented the evidence of the deceased accused, it introduced admissible

evidence of a competent witness. It is the task of the trial court to assess whether to accept or reject evidence. Acceptability of evidence relates to whether the trial court will find the evidence credible, relevant and reliable in the determination of the case. The acceptance of evidence, thus, occurs at a certain stage in the proceedings.

[106] While it is now well established that untested evidence is unacceptable, the use of untested evidence during cross examination will not make the untested evidence reliable or acceptable. For that matter, when the State in this matter, cross examined Zwakala and the appellants about what the erstwhile co-accused testified about, that did not mean by any stretch of imagination that the court accepted that evidence.

[107] The analysis in *Msimango*, supra, as in several other cases cited there, is very instructive. Contrary to *Msimango*, where the issue related to acceptability of the uncross-examined evidence, the present case relates to the prosecutor using evidence that was uncross-examined by the State, to cross examine the accused and a defence witness. While I understand and agree with *Msimango*, I find the facts of *Msimango* distinguishable from the instant case.

[108] Plainly, the testimony of the erstwhile co-accused was heard live, direct in court and it is on record. Furthermore, it is important to note that the accused were tried

together and were jointly represented, albeit they were multiple. Besides, the situation in this case differs from that in which multiple accused are represented by separate and independent legal representatives. In view of this, it means that all the appellants during the trial shared a common interest about this matter.

[109] In the circumstances, it was hypocritical of Mr Kirsten who jointly represented all the appellants to object to the accused to be cross examined about the testimony of their erstwhile co-accused. No unfairness is apparent in the trial court in allowing to cross examine the appellants on the testimony of accused who passed away. In any case, in this case, it is the State that did not get an opportunity to cross challenge the evidence of the erstwhile co-accused.

[110] It was certainly not improper for the State to cross examine the appellants about what was said by their erstwhile co-accused.

[111] Most significantly, if regard is had from the judgment of the court a *quo*, the magistrate gave no weight to the uncross-examined evidence of deceased accused. In fact, the judgment shows that the trial court discounted the evidence. Consequently, in the circumstances of this case, I am not satisfied that the trial court, in allowing the State to cross examine the appellants and the defence witness with untested evidence of a deceased accused, was inappropriate.

The contradictions between the deceased's brothers

[112] It has been vehemently contended on appellants' behalf that the testimony of the deceased's brothers should be rejected as non-credible due to contradictions in their evidence. It is further asserted on behalf of the appellants that the testimonies of the brothers are riddled with direct **contradictions** of material facts. As a result, their evidence is undermined by the contradictions in their testimony as to what transpired at the deceased's dwelling when the appellants came to take the deceased away.

[113] The contradictions relate to the fact that the brothers contradicted themselves concerning how many appellants hit the deceased when they came to take him away, the identity of the appellants who entered into the dwelling, the position of the deceased when he was taken away, whether there was someone who pointed the whereabouts of the deceased; the fact Athini testified that the appellants threatened to kill the occupants of the dwelling when they could not find the deceased and how many appellants hit the deceased as they took him to the taxi.

[114] It is so that there are discrepancies in the brothers' evidence. Discrepancies between witnesses is not an extraordinary occurrence. While there is no doubt that

contradictions are a useful indicator designed to determine the truthfulness and credibility of a witness testimony. It is, however, well established that a mere variance or congruity or inconsistency is not the only infallible way to determine whether the truth has been told by witnesses. I even venture to say that this view is in accordance with the well-established principles set out by our courts

[115] It is my view that the trial court was correct not to reject the brothers' evidence as non-credible due to contradictions in their evidence. Memory lapses and contradictions are not inconceivable. With careful reading of the record and the evidence, I have found that the contradictions, are not central to this case. They certainly do not go to the root of the case.

[116] In fact, it is my opinion that the appellants were trying too hard to find contradictions in the case of the State. I thus find that the contradictions are peripheral as such they do not relate significant aspects of this case. In these circumstances, it cannot be said that due to the contradictions in the brothers' evidence, the trial court should have been left with significant doubt as to which parts of their testimonies were truthful.

[117] For that matter, it appears as if the appellants conflate the difference between contradictions and differences in details. As is well known, people will always recount facts and events according to their perspective. As a corollary, it is now

well settled in our law that there is a difference between contradiction and discrepancy. For instance, if one brother says only three appellants entered the dwelling and the other says four entered. There is nothing contradictory or inconsistent about that. This is a matter of different perspectives of witnesses. It would have been contradictory if one of them said no one entered the dwelling.

[118] Another example of this is the contradiction pertaining to which one of the appellants entered the dwelling. There is certainly nothing contradictory about the identification of people who entered the dwelling. Once again, this is a mere difference in details unrelated to the main incident. Our courts have stated on numerous occasions that the power of observations, retention and reproduction differ with individuals.

[119] It follows then that it is crucial for the trial court to be always mindful that errors of observations due to factors such as shock, horror and threat to the life at the time of occurrence; may affect the power of observation and accurate retention of information connected with the recollection of events transpiring at the critical time. It is clear therefore that it is now well settled that contradictions, if they exist, should never be viewed in isolation but should be examined in the context of other evidence and prevailing circumstances at the time of occurrence.

[120] Moreover, I also bear in mind that the appellants did not deny that all of them went to fetch the deceased. I say this because the defence that was put to Lonyiko Nyotini was that the appellants are saying that they went to the dwelling to take the deceased with the intention to take him to the police station.

[121] In this keenness to find contradictions, the appellants' counsel exaggerated the significance of a few contradictions and overlooked the key issue in this case that it is not in dispute that the appellants came with a taxi and took the deceased from his dwelling against his will. This is the gist of the brothers' testimony and the fact that they testified that the deceased was assaulted when he was taken away.

[122] Furthermore, the contradiction in the brothers' evidence can be satisfactorily explained by the fact that the brothers witnessed the incident from different vantage points, the situation was precarious. For that matter, the contradictions are indicative that the brothers did not discuss or rehearse their testimonies. These discrepancies do not undermine the credibility of the brothers. Considering the totality of facts and circumstances and in view of the discussion herein above, it appears that the testimonies of the brothers were worthy of acceptance.

[123] There is no longer any doubt that the trial court, which is best suited to determine the credibility of witness and to draw the necessary inferences, has complete jurisdiction to determine the plausibility of testimony. As long as the inferences

drawn by the trial court are not so unreasonable as to warrant this Court's intervention, its findings are not open to interference. I do not agree with the appellants' counsel that the trial court erred in finding that the credibility of the State witnesses was beyond reproach.

Who killed the deceased?

[124] As far as the appellants' case is concerned, their version is all over the place when it comes to this question. For instance, with the testimony of Zwakala, the appellants wanted to postulate a scenario whereby another person other than the appellants went into the container and killed the deceased. In actual fact, this was put to Zwakala.

Defence expert witness.

[125] As I have already mentioned, the appellants firstly put before the court the *quo* the proposition that the deceased died of suicide and later on during the trial the appellants introduced another theory that the deceased might have been killed by someone else other than the appellants.

[126] The second proposition is without merit and the trial court correctly rejected it.

[127] So far as the appellants' scenario that there may be another person who might have snuck in the absence of the appellants and killed the deceased is concerned, that scenario entirely ignores that Dr Liebenberg's had testified that it was her expert testimony that the deceased tied his own hands to avoid at the last-minute releasing the ligature around his neck. In this regard Dr Liebenberg formed a definite opinion. In so doing Dr Liebenberg pinned the defence colours to the mast. Thus, this evidence of Dr Liebenberg cannot be brushed aside when it suits the appellants. This particular piece of evidence by Dr Liebenberg totally excludes a scenario or theory involving homicide. She conceded that it is a difficult balancing act to have a balance on a typist chair. However, she also testified that from her personal experience, when she hung curtains in her office, she could balance on a typist chair.

[128] Additionally, Dr Liebenberg came up with new evidence that the typist chair had smudge marks from the footprints on the chair, and that fits in with kicking of the chair to go into full suspension.

[129] Dr Liebenberg to a question posed by Mr Kirsten, regarding the facts that it would be pointless to tie the deceased with a loose knot if he was tied against his will, responded by agreeing. There is no testimony on record as to a loose knot. In fact,

there is nothing on record to indicate that the knots were tied loose. The only thing that is common ground between the parties is that the wrists were tied apart, in two different loops. It is rather odd that Dr Liebenberg would give an affirmative answer to something that is not backed up by evidence.

[130] This conclusion is mere speculation. Likewise, the conclusion that the deceased tied his hands. I should not be understood to be saying that an expert witness' opinion as to probabilities is not relevant or necessary. However, the probabilities must be scientifically based and be generally accepted in the specific field of the expert.

[131] Dr Liebenberg testified that looking at the photographs she could tell that the wrists were not tied together because there is a distance between the two wrists. According to Dr Liebenberg, the fact that there is no description of the ligature effect around the wrist, means that no ligature marks were found around the wrists and that in turn supports the view that the ligatures were not tied tightly together around the wrist

[132] Her opinion of suicide was based inter alia on the following premises. The fact that she noted from a photograph a smudged footprint on a chair and that it was her opinion that the deceased tied his hands.

[133] For instance, in response to the court a *quo*'s question, Dr Liebenberg explained that the bases for his opinion that the deceased tied his own hands; was, his own shoelaces were used, the way the ligature was lightly applied and in front of the deceased's body.

[134] The defence expert witness never went to the scene. There are deficiencies in her testimony that make her conclusions and opinion unpersuasive.

[135] The events leading to the death of the deceased cannot be ignored. The evidence in this case is not consistent with the fanciful theory that the deceased had an intention to take his own life. On the other hand, the circumstances are all consistent with homicide

[136] The footprints on the typist chair do not certainly suggest that there was no resistance. For that matter, in the context of this case, whether the deceased should have offered resistance if the hanging was homicidal is neither here nor there. This is so because Dr Liebenberg's opinion in this regard fails to take into account that there were also unknown variables regarding what the four appellants and their erstwhile co-accused did when they were dealing with the deceased.

[137] She also testified that she disagrees with Dr Anthony when she testified that the injury to the head of the deceased was inconsistent with a fall. When she was asked on what bases does she disagree, she responded by saying that she does not have details of the alleged assault. Clearly, the testimony of Dr Liebenberg explains too little and assumes too much.

[138] Dr Liebenberg also testified that this case has all the hallmarks of suicidal as the deceased was under duress, because he was assaulted, abducted and then put in the container and he had the means available to commit the suicide.

[139] Dr Liebenberg further opined that the injuries found by Dr Anthony are not consistent with a sober adult male fighting for his life. Of course, Dr Liebenberg is of the view that, in the context of this case, there should have been more injuries than found in the postmortem. In addition, she testified that the deceased body did not present with defensive injuries. She urged the fact that from the photographs she does not see a life and death struggle. She also testified that it is abnormal that the deceased did not present with chin scrapes that are common when people are scraping against rough surface.

[140] Furthermore, she testified that the clothing of the deceased looked neat for a person who was in a life and death scuffle trying to escape a homicidal assault. When the court asked her that she is asserting as a fact that there was a scuffle, she responded by stating the following:

“I am putting two scenarios. What we know about this person, he is an adult, he is not unconscious from blood, high blood alcohol. There is no reason to say a head injury made him unconscious and I say an adult male that can fight off people trying to hang him will fight to death.”

[141] In response to a follow up question by Mr Kirsten whether the neat prints on the chair would exist if a person was resisting and trying to get off the chair. Dr Liebenberg responded that, with wriggling, squirming, to-ing and fro-ing the chair would upend.

[142] Dr Liebenberg also testified that she also did a search and extracted few academic articles that demonstrates that she is not the only one who has experience with suicidal hanging who tied their hands. She then read extracts from articles that are available from internet. And according to her, the web site is a reputable source. According to Dr Liebenberg, ‘tied hands in hanging case do not equal homicide’.

[143] From the above, it is quite clear that the defence expert witness found the version of a homicide hard to believe. She also testified that a homicidal scenario would have left the scene in disarray. These scenarios postulated by the defence expert are predicated on a theory that the deceased was in control of the situation.

It also somewhat suggests that if there are no defensive wounds or certain types of injuries it can never be homicide. In essence, the defence expert conveys that all people in the deceased's shoes should exhibit certain injuries and the scene should look a certain way. Plainly, an opinion about most hanging homicide is not an opinion about all hanging homicide.

[144] In my view, the defence expert did not provide adequate 'whys and wherefores' to support her opinions. Dr Liebenberg evidence does not evince that she applied a scientifically recognised methodology to come to her conclusions. Instead, it appears as if her conclusions are based on her personal beliefs.

[145] Little wonder towards the end of her testimony, Doctor Liebenberg also testified that she does not exclude homicide, subtle homicide. Surprisingly, she later testified that both suicide and homicide are possible. She also added that she thinks suicide is more probable. She however, also testified that she cannot conclusively say that it was a suicide. This evidence further muddled the understanding of her testimony. Simply put it created a confusion and compounded the ability to follow her testimony. In essence, she presented contradictory evidence.

[146] It is well established now that the conclusions of an expert should be based upon reasonable accurate factual bases. Surely, Dr Liebenberg's testimony concerns

probabilities and predicated upon speculation. There is no indication in her testimony that she used scientific bases in reaching the deductions she made. For instance, Dr Liebenberg opinion was based on an examination of photos. On the other hand, Dr Anthony attended the scene and examined the hands of the deceased, and she formed an opinion that albeit the wrists were tied apart, but the tying of the hands was tight. For that matter, Dr Liebenberg did not testify that she reconstructed the tying of hands based on the available evidence that was present on the scene.

[147] Clearly, the evidence material in this case upon which the conclusions of Dr Liebenberg are based is insufficient to support her conclusions. An expert witness cannot be allowed to guess or to make an opinion based on speculation. Hence, I form the view that to some degree the evidence of Dr Liebenberg is predicated on assumptions that are not warranted by evidence.

[148] It bears commenting upon that in so far as it is suggested by the appellants that the evidence that was presented by the State during trial was insufficient to support the verdict, is not supported by the record. Thus, unmeritorious.

[149] Most notably there is nothing in this case to demonstrate that the court *a quo* in the assessment of credibility of evidence committed an error. It is well established in our jurisprudence that the trial court has a discretion to accept or reject the

testimony of a witnesses. And when that discretion is exercised judicially, it is conclusive on appeal. Similarly, there is nothing in the record to show that the Regional Court Magistrate committed an error in her appreciation of the law and evidence.

Conclusion

[150] In my opinion, on the face of the record, the rejection of the appellants' evidence and the inferences drawn by the trial court were amply justified. Thus, the court *a quo* acted properly in rejecting the appellants version, particularly that of Dr Liebenberg. As a result, the intervention of this Court is not warranted. In the result, I propose the following order:

ORDER

1. Appeal in respect of all appellants is dismissed.

C.N. NZIWENI

JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

M.I. SAMELA

JUDGE OF THE HIGH COURT

Appearances

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