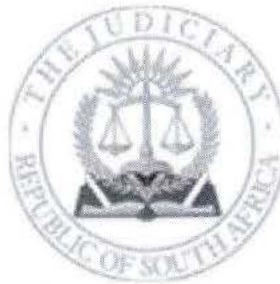


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A208/2023

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES/NO

04 -06-2025
DATE


PD. PHAHLANE
SIGNATURE

In the matter between:

ROBERT SELBY MASIPA

APPELLANT

And

THE STATE

RESPONDENT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected herein and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 03 June 2025.

JUDGMENT

PHAHLANE, J

- [1] This matter comes before this court by way of leave to appeal granted on petition against the conviction and sentence imposed by the Pretoria North Magistrate's Court on 30 October 2021. The appellant who was legally represented during trial proceedings was accused 3. He was convicted on one count of murder read with the provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA") and sentenced to fifteen (15) years imprisonment.
- [2] The conviction of the appellant flows from the incident that occurred on 16 March 2014. The first State witness, Ms Gadifele Daisy Moropa ("Ms Moropa") testified that on this day, she received a report that the deceased was being assaulted on the premises of accused 1. She proceeded to the house of accused 1 with a neighbour, Ms Maria Maphempeni ("Ms Maphempeni") and upon arrival, they found the appellant standing at the gate. The appellant refused them entry into the yard and informed Ms Moropa that 'accused 1 is angry and he might kill her'.
- [3] They stood at the gate and witnessed the incident as it unfolded. They observed accused 1 assaulting the deceased by kicking him on his body and stabbing him on the head with a garden fork. They also witnessed accused 2 assaulting the deceased. Ms Moropa further testified that at some stage, the appellant opened the gate and left the scene, at which time the deceased was still alive. She left the scene at the same time to go and fetch her phone in order to call the police. She also called the mother of the deceased. She explained that when the deceased's mother arrived, she wanted to enter the yard of accused 1 to approach him, but she ("Ms Moropa") stopped her.
- [4] Ms Moropa's evidence was corroborated by Ms Maphempeni, who added that she also saw a fourth person unknown to her, also assaulting the deceased. She further testified that there was a group of about twenty people who were standing outside the premises and observing the assaults on the deceased.
- [5] The evidence of these two witnesses that accused 1 and 2 are the ones who assaulted the deceased, and that the appellant was standing at the gate during the assaults is further corroborated by the appellant.

- [6] The appellant testified that on the day of the incident, he was in the company of accused 2 when accused 1 arrived in his motor vehicle. Accused 2 requested accused 1 to take them to the shops. As they were driving, they came across a group of people assaulting the deceased next to the area called "Marry Me", in Morula View. Accused 1 approached them and requested them to hand over the deceased to him so that he could take him to the police station.
- [7] The appellant was under the impression that accused 1 was taking the deceased to the police station but instead, he drove to his house. Upon arrival at his house, accused 1 drove into the yard and closed the gate and said he wanted to interrogate the deceased to find out how the deceased broke and gained entry into his own house. Accused 1 started assaulting the deceased as he (the appellant) was standing at the unlocked gate.
- [8] He explained that as he was standing at the gate, a group of people gathered around wanting to enter the premises of accused 1 to attack the deceased but he prevented them from further attacking the deceased. Ms Maphempeni corroborates this version that there were people outside the yard of accused 1.
- [9] The appellant further explained that after accused 1 had assaulted the deceased, he informed them that he was taking the deceased to the police station.
- [10] In convicting the appellants, the trial court rejected the version of the appellant as not being reasonably possibly true and held that the appellant actively associated himself with the actions of accused 1 by preventing people from entering the yard and not assisting the deceased. The trial court further held that the appellant had common purpose with his co-accused and stated that "the State did not have to prove common purpose on the part of a participant in a common purpose who did not do the deed or the killing". (underlining added for emphasis)

- [11] The trial court further held that the guilt of the appellant had been proved beyond a reasonable doubt and convicted the appellant of murder with *dolus eventualis* without elaborating or giving the reasons thereto.
- [12] With regards to conviction, it appears from the grounds of appeal and the appellant's heads of argument that the appeal is against a finding of fact and the law. The appellant contends that the trial court erred in finding that the respondent has proved its case against him beyond a reasonable doubt, thereby rejecting his version as not being reasonably possibly true.
- [13] The appellant further contends that the trial court misdirected itself in finding that he had the intent to kill in the form of *dolus eventualis* while the respondent failed to prove that he foresaw the possibility that the deceased could die. Furthermore, that the trial court misdirected itself in finding that he had common purpose to commit murder, when it was never put to him that the respondent would be relying on the doctrine of common purpose, and when no evidence was placed before the court to prove same.
- [14] It is trite law that a court appeal will not interfere with the trial court's decision regarding a conviction, unless it finds that the trial court misdirected itself as regards its findings or the law¹. Even so, there are well-established principles governing the hearing of appeals against findings of fact. In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong².
- [15] As a court of appeal, this court must determine what the evidence of the State witnesses was as understood within the totality of the evidence led, including the evidence led by the defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied

¹ R v Dlumayo and Another 1948 (2) SA 677 (AD) at 705-6.

² See: S v Hadebe and Others 1997 (2) SACR 641 (SCA) at 645e-f; S v Monyane and Others 2008 (1) SACR 543 (SCA) at para 15; and S v Francis 1991 (1) SACR 198 (A) at 204e.

the law or applicable legal principles correctly to the said facts in coming to its decision.

- [16] While section 35(3)(a) of the Constitution³ provides that **“every accused person has a right to a fair trial, which includes the right to be informed of the charge with sufficient detail to answer it”**, section 84 of the Criminal Procedure Act 51 of 1977 dealing with the essentials of a charge requires that the charge(s) put to the accused must set out sufficient particulars so as to inform the accused exactly what he is being charged with, and to know what he would be pleading to.
- [17] It is common cause that the record of the trial proceedings does not reflect how the charge was put to the appellant and how the appellant pleaded to the offence charged. Consequently, it is unclear whether the appellant was informed that the State would be relying on the doctrine of common purpose or whether the trial magistrate warned the appellant in that regard.
- [18] A perusal of the charge sheet on all the days which the appellant appeared before the learned magistrate, and before the trial proceeded, also does not reflect that the State was going to place any reliance on common purpose. By the same token, there are no annexures attached to the transcribed record of the proceedings to reflect that the State intended to rely on common purpose.
- [19] It is clear from a thorough reading of the record, that the issue of common purpose was never put to the appellant at any stage during the trial, nor was it put to him during cross-examination. However, it is evident that the issue was raised by the magistrate for the first time during argument by the prosecutor.
- [20] A perusal of the judgment of the trial court does not reflect that the trial magistrate had explained the principles of common purpose to the appellant. It is for this reason that the respondent, in argument on appeal, conceded that the magistrate should have warned the appellant of the said principle and submitted that in the absence of

³ Act 108 of 1996.

any evidence having been led to show that there was common purpose, the respondent will accept that the magistrate misdirected himself.

- [21] In light of the above concession, it was submitted on behalf of the appellant that since no averments were made by the respondent that the State would rely on common purpose, the trial court misdirected itself because there are no facts from which to infer that there was a common purpose between the appellant and accused 1 and 2. It was further submitted that no evidence of a prior agreement or a common purpose to assault or kill the deceased was presented by the State, particularly when regard is had to the initial concession made by the respondent that from the evidence presented, there was no prior agreement between the appellant and his co-accused to murder the deceased.

- [22] The court in ***Tshabalala v The State; Ntuli v The State***⁴ stated that a prior agreement is a liability requirement where people act in the furtherance of a common purpose and held that:

"[49] It is trite that a prior agreement may not necessarily be express but may be inferred from surrounding circumstances. The facts constituting the surrounding circumstances from which the inferences are sought to be drawn must nevertheless be proved beyond reasonable doubt. A prior agreement to commit a crime may invoke the imputation of conduct, committed by one of the parties to the agreement which falls within their common design, to all the other contracting parties. Subject to proof of the other definitional elements of the crime, such as unlawfulness and fault, criminal liability may in these circumstances be established"

⁴ [2019] ZACC 48.

- [23] Having regard to the above principle, it is undeniable that there is also no evidence that the appellant associated himself with or conducted himself or even participated in any manner that suggest that he had a prior agreement with the others to kill the deceased.
- [24] As indicated above, it is trite that at the beginning of the trial, there should be certainty on the case the accused is supposed to meet, and the charge(s) must be made clear so that the accused can decide how to plead. Failure to inform the accused about the doctrine of common purpose has the consequence of violating the accused's right to a fair trial as the accused may not be aware that his actions or the actions of those, he is associated with, could lead to criminal liability based on the actions of the group.
- [25] It is therefore imperative that the State must explicitly state its intention to rely on common purpose, and it must provide the accused with sufficient information about the specific actions and intent that will be used to prove that common purpose existed. This ensures that the accused adequately prepares his defence. The court in *Mtatsi and Another v S*⁵ was faced with a similar problem where there was never any indication that the State would rely on the doctrine of common purpose. The court stated that section 35(3)(a) of the Constitution which provides that the right to a fair trial includes the right to be informed of the charge with sufficient detail to answer it, is explicit. It held that for the appellant not to be furnished with sufficient details of the charge, indeed prejudiced him and violated his right to a fair trial. It further held that finding the appellant guilty on the basis of common purpose resulted in a gross travesty of justice.
- [26] This court referred with approval, to the decision in *S v Ndaba*⁶ where the court established the principle that the State must explicitly allege and prove common purpose in its indictment or summary of substantial facts when relying on this legal basis for criminal liability. This court stated that:

⁵ (A120/2019) [2024] ZAGPPHC 1038 (7 October 2024) at para 34.

⁶ 1981 (3) SA 803 (C).

“The allegation of common purpose has to be made by the State in the indictment, or at least in the summary of substantial facts furnished to the accused.”

- [27] Regarding the State’s failure to make the averment in a charge sheet that it will be relying on common purpose, the Supreme Court of Appeal in ***Msimango v S***⁷ held that:

[14] It is common cause that in convicting the appellant on count 3, the regional magistrate relied on the doctrine of common purpose even though it was never averred either in the charge sheet or proved in evidence. It was impermissible for the regional magistrate to have invoked the principle of common purpose as a legal basis to convict the appellant on count 3 as this never formed part of the state’s case.

[15] Undoubtedly, the approach adopted by the regional magistrate of relying on common purpose which was mentioned at the end of the trial is inimical to the spirit and purport of s 35(3)(a) of the Constitution of the Republic of South Africa, Act 108 of 1996 (the Constitution) under the heading ‘Arrested, detained and accused persons’. In fact, it is subversive of the notion of the right to a fair trial which is contained in s 35(3)(a) of the Constitution which provides in clear terms that:

‘(3) Every accused person has a right to a fair trial, which includes the right – (a) to be informed of the charge with sufficient details to answer it.’

- [28] Having regard to the above principle, I concur with the appellant’s submission because common purpose cannot be established through speculative or flimsy inferences, but it must be supported by credible evidence of agreement or active association. The mere fact that the appellant happened to be present at the crime scene, and was

⁷ (698/2017) [2017] ZASCA 181; 2018 (1) SACR 276 (SCA) (1 December 2017) at para 14 & 15.

standing at the gate, cannot serve as a basis for holding him liable for the crime committed by accused 1 and 2.

[29] I therefore align myself with the decision in *Mtatsi* and *Msimango*, and I am of the view that the appellant's rights to a fair trial were violated. A consideration of the surrounding circumstances and the evidence presented does not show the existence of a prior agreement to hold the appellant liable based on common purpose. Consequently, I am of the view that the trial court misdirected itself in its findings on the facts and holding that the appellant had common purpose with his co-accused.

[30] This brings me to the second aspect of common purpose which relates to active association, disassociation, and the trial court's finding that 'the State did not have to prove common purpose'. As indicated above, the trial court held that the appellant did not disassociate himself from the assault that was perpetrated on the deceased. This finding in my view, was a mistake in law.

[31] For a person to be actively associated with common purpose, such common purpose must first be established. This means that before it can be said that a person did not disassociate himself from the actions of others, he must have associated himself *first* – with the actions of others to form a common purpose with them. The difficulty lies with the application of the legal principles, that is, the doctrine of common purpose to the proved facts.

[32] In this regard, the trial court was obliged to consider – in relation to each individual accused whose evidence could properly be rejected as false, and in particular, the appellant – if there were proved facts or evidence by the State against the evidence of the appellant, in order to assess whether there was a sufficient basis for holding the appellant liable on the ground of active participation in the achievement of a common purpose. Furthermore, the trial court was obliged to consider the causal connection between the actions of the appellant, if any, and those of his co-accused, and the offence which was committed rather than accept without any evidence being led, – that the appellant and his co-accused had acted in furtherance of a common purpose.

[33] In light of the above, I concur with the submission made on behalf of the appellant that a person can only disassociate himself after he had formed a common purpose with others to commit a crime, and in this case, there is no evidence that the appellant actively associated himself with the actions of accused 1 and 2 to kill the deceased. In light thereof, the respondent was correct to concede that no evidence was placed before the trial court to prove that the appellant actively participated in the commission of the assault.

[34] The court in *S v Thebus*⁸ explained the doctrine of common purpose as follows:

“[18] The doctrine of common purpose⁹ is a set of rules of the common law that regulates the attribution of criminal liability to a person who undertakes jointly with another person or persons the commission of a crime. Burchell and Milton¹⁰ define the doctrine of common purpose in the following terms:

“Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number which falls within their common design. Liability arises from their ‘common purpose’ to commit the crime.”

Snyman¹¹ points out that “the essence of the doctrine is that if two or more people, having a common purpose to commit a crime, act

⁸ 2003 2 SACR 319 (CC).

⁹ Also known as “common intent” or in Afrikaans as “gemeenskaplike opset” or “gemeenskaplike doel.” This doctrine is said to have been received into South African law from English law and recognised as part of the common law in *R v Garnsworthy and Others* 1923 WLD 17 at 19. In this regard see also Burchell and Milton *Principles of Criminal Law* 2nd ed at 393; Kriegler and Kruger *Suid-Afrikaanse Strafbproes* 6th ed at 404.

¹⁰ *Principles of Criminal Law*, Burchell and Milton 2nd ed, at 393. See also 4th Edition at 457.

¹¹ Snyman *Criminal Law* 4th ed at 261; see also *S v Safatsa and Others* 1988 (1) SA 868 (A) at 894, 896 and 901; *S v Mgedezi* n 9; *S v Banda and Others* 1990 (3) SA 466 (B) at 500-1.

together in order to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others.”

[19] *The liability requirements of a joint criminal enterprise fall into two categories.¹² The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.¹³ In the present matter, the evidence does not prove any such prior pact.*

[35] The appellant testified that when accused 1 approached the mob and requested them to hand over the deceased to him so that he could take him to the police station, he was under the impression that accused 1 would indeed take the deceased to the police station but instead, drove to his house where he proceeded to assault the deceased. At the time, the appellant was standing at the gate. Both Ms Moropa and Ms Maphempeni corroborated the appellant’s evidence that he was standing at the gate during the assaults.

[36] It is trite that in any criminal case, the State has a duty to prove its case against the accused beyond a reasonable doubt. In this case, the respondent did not present any evidence that the appellant inflicted any harm to the deceased, or that he assisted accused 1 and 2, or had instigated them to assault the deceased. Neither is there evidence presented before the trial court to prove that the appellant had participated in any manner to indicate a shared purpose with accused 1 and 2.

¹² Magmoed v Janse van Rensburg and Others per Corbett CJ at 810G:

“[a] common purpose may arise by prior agreement between the participants, or it may arise upon an impulse without prior consultation or agreement.”

¹³ See Kriegler and Kruger n 16 at 405; See also S v Mgedezi n 9 at 705-6 and S v Ngobozi 1972 (3) SA 476 (A).

- [37] To show that it was never the case of the State to rely on common purpose, it is important to note that in addition to not having confronted the appellant about common purpose during cross-examination, the respondent still failed to address the trial court on the issue of common purpose until the trial magistrate requested such an address from the respondent right at the end of the trial in order to invoke the principle of common purpose as a legal basis to convict the appellant. This approach by the trial court clearly contradicts the principles laid down in *Msimango supra*, and what the SCA said should be avoided.
- [38] With that in mind, the respondent correctly stated that the State had no evidence as to how the deceased came to be in the yard of accused 1. The only evidence of the circumstances which lead to the deceased finding himself on the premises of accused 1 is that of the appellant. In my view, the appellant's undisputed explanation of how the deceased was brought to the yard of accused 1 and his evidence that was corroborated by Ms Moropa and Ms Maphempeni that the appellant remained at the gate at the time of the assault, should have been taken into consideration by the trial court.
- [39] It is also my considered view that the appellant should have been given the benefit of doubt because standing at the gate of accused 1 cannot serve as a basis for holding him liable for the crime committed by accused 1 and 2. His explanation was simply that he stopped Ms Moropa from entering the yard because accused 1 was angry and he was afraid that he might kill her.
- [40] It is on record that when the mother of the deceased attempted to enter the yard of accused 1, she was also stopped by Ms Moropa from entering because Ms Moropa held the same view as the appellant – that accused 1 may kill her. What cannot be ignored is the lack of evidence which points to the appellant blocking the gate to prevent the deceased from exiting the yard to escape – to suggest that the appellant had common purpose and intention to kill the deceased with his co-accused.

- [41] The basic principle in determining whether the accused's version is reasonably possibly true was expressed by the SCA in **S v Trainor**¹⁴ as follows:

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety".

- [42] On the other hand, where the State fails to prove its case against the accused and the version of the accused is reasonably possibly true, the court must decide the matter on the acceptance of that version and acquit the accused. The SCA in **Shackell v S**¹⁵ stated the following:

"It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. If the accused's version is reasonably possibly true in substance the court must decide the matter on the acceptance of that version. Of course it is permissible to test the accused's version against the inherent probabilities. But it cannot be rejected merely because it is improbable; it can only be rejected on the basis of inherent probabilities if it can be said to be so improbable that it cannot reasonably possibly be true.... On the acceptance of this version there is no room for a finding of dolus in any

¹⁴ 2003 (1) SACR 35 (SCA); [2003] 1 All SA 435 (SCA) at para 9 (26 September 2002)

¹⁵ (380/99) [2001] ZASCA 72; [2001] 4 All SA 279 (A); 2001 (4) SA 1 (SCA); 2001 (2) SACR 185 (SCA) at para 30 (30 May 2001)

of its recognised forms. It follows that the conviction of murder cannot stand”.

[43] Having regard to the above principle in **Shackell**, there was still no basis to draw an inference that the appellant associated himself with the commission of a crime. To establish common purpose, the State had the duty to present sufficient evidence to support the inference that the appellant was acting in concert towards a common objective. Having failed in that regard, the requisites for a conviction based on common purpose had not been met.

[44] With regards to the trial court’s finding of guilt on the basis of *dolus eventualis*, it was submitted that the respondent failed to present evidence that the appellant foresaw that the deceased might be killed.

[45] Reading through the judgment of the magistrate, it is clear that the legal principle of *dolus eventualis* was never applied by the magistrate. No attempt was made by the magistrate to explain the basis of a finding of murder on *dolus eventualis*. The judgment concluded thus:

“Once again, due to limited time, I am not going to deal extensively with the provisions of dolus. The court will just refer to the matter of Makgatho 2013 (2) SACR 13, Supreme Court of Appeal where Judge Shongwe described dolus eventualis as follows:

.....

After a careful consideration of the totality of the evidence presented in this matter, the court is of the opinion that the guilt of the accused before court has been proved beyond a reasonable doubt. Both accused is accordingly (sic) then convicted on a count of murder, dolus eventualis”

[46] It is difficult to discern the basis on which the trial court based its conclusion to convict the appellant of murder on *dolus eventualis*. Clearly, this was a misdirection by the trial court because throughout the judgment, the concept of *dolus eventualis* was not enunciated. Moreover, it was never put to the appellant at any stage during the trial

that he foresaw that the death of the deceased might occur. Be that as it may, the onus rests on the State to prove its case against an accused person beyond a reasonable doubt. Furthermore, the State had to established that the appellant, through his actions, unlawfully and intentionally, in the form of *dolus eventualis*, caused the death of the deceased, however, that was never proved since there was no evidence at all placed before the trial court against the appellant. Accordingly, *dolus eventualis* cannot find any application in the circumstances of this case because common purpose was not even established.

[47] In the circumstances, I am of the view that trial court's finding amounts to an injustice because the finding of murder on the basis of *dolus eventualis* is not only tenuous, but it is also **not** borne out by the evidence. Consequently, I find that the trial court misdirected itself in convicting the appellant and the appeal on conviction must succeed. It follows that the sentence that was imposed as a result of the conviction of the appellant cannot stand, and it should also be set aside.

[48] Accordingly, the following order is granted:

1. The appeal against conviction is upheld and set aside.
2. The appeal against sentence is upheld and set aside.




PD. PHAHLANE
JUDGE OF THE HIGH COURT

I agree,

APPEARANCES

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Heard on : 06 May 2025

Date of Judgment : 04 June 2025