



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

**JUDGMENT**

**Reportable / Not Reportable**

**Case no: CC70/2019**

**In the matter between:**

**THE STATE**

**and**

|                           |                  |
|---------------------------|------------------|
| <b>SITHEMBISO HEMENI</b>  | <b>Accused 1</b> |
| <b>CHRISTIAN SOBUTYU</b>  | <b>Accused 2</b> |
| <b>SOLEMZI DUKISO</b>     | <b>Accused 3</b> |
| <b>MAKHOSANDILE YOLWA</b> | <b>Accused 4</b> |
| <b>SONGEZO MATHO</b>      | <b>Accused 5</b> |
| <b>ZUKILE MDINGI</b>      | <b>Accused 6</b> |
| <b>MISIZA MAMZA</b>       | <b>Accused 7</b> |
| <b>MHONGI KIVIET</b>      | <b>Accused 8</b> |
| <b>MICHAEL NDELENI</b>    | <b>Accused 9</b> |

**AMANDA BOOI**

Accused 10

**MTHETHINZIMA ZATHU**

Accused 11

**Coram: Honourable Acting Justice SI Smith**

**Heard: 03 February 2026**

**Delivered: 03 February 2026**

**Neutral citation: The State *versus* Sithembhiso Hemeni & 10 others  
CC70/2019 [2026] ZAWCHC ... (03 February 2026)**

This judgement is delivered electronically by circulation to the parties' legal representatives' email addresses and will be deemed to have been delivered on 03 February 2026.

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## **JUDGMENT**

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### **INTRODUCTION**

[1] The accused are charged with 1 Count of murder, 1 count of attempted murder and 2 counts of kidnapping.

[2] The State alleges that the accused on 01/04/2018 and at or near Kayamandi, Stellenbosch wrongfully and intentionally killed Mawanda Naku by binding his limbs with wire and assaulting him repeatedly by punching and kicking him; by using sticks, belts, golf clubs and a pole to beat him over his entire body and by pouring salt on his wounds.

[3] The State alleged that the murder was committed by a person, group or syndicate acting in the execution or furtherance of a common purpose or conspiracy, and therefor section 51(1) of Act 51 as of 1997, Part 1 of Schedule 2 to the Act is applicable.

[4] In respect of Count 2 the State alleges that accused 1 to 11, at the time and place, stipulated in Count 1, intentionally attempted to kill Siphamandla Tobo by assaulting him repeatedly and in various manners, including beating him with sticks over his entire body.

[5] In respect of Counts 3 and 4 the State alleged that accused 1 to 11 on the date and place mentioned above wrongfully and intentionally deprived Mawanda Naku and Siphamandla Tobo, both adult males, of their freedom of movement by taking and detaining them against their will. The accused all pleaded not guilty. All the accused elected not to give a plea explanation. They were all informed of the minimum sentences applicable in respect of Count 1.

#### **SUMMARY OF THE EVIDENCE FOR THE STATE**

[6] On the morning of 01//04/2018 the Complainant in Counts 2 and 4, Siphamandla Tobo (herein after referred to as Tobo) was confronted by accused 1, 2, 4, 5, 6, 7 and 11, while he was walking from I-Zone Kayamandi. Accused 1 and 2 informed Tobo that they were looking for him and his friend Mawanda Naku (The deceased mentioned in Counts 1 and 3)

[7] They informed Tobo that they have information that Tobo and the deceased knew where the plasma television and laptop, stolen from the house of accused 1 a few days prior, was. Tobo denied any knowledge of the items. He was then assaulted with fists and sticks and taken with force and under threat of assault to the deceased's home.

[8] At the deceased's home, both Tobo and the deceased were assaulted and taken to Tapira's place, where accused 1 thought the items were. The State witness Pindile Nyalambiza is known as Tapira.

[9] On their way to Tapira's place the deceased escaped from the men and ran. He was stopped by accused 3, who just arrived on the scene, and taken back to re-join the group. Accused 3 also joined the group of men. Both Tobo and the deceased was continuously assaulted by the group, now consisting of accused 1 to 7 and accused 11.

[10] By the time they reached Tapira's (stage 2 of the incident) the crowd surrounding Tobo and the deceased grew in number. Both Tobo and the deceased were visibly injured and bleeding.

[11] While waiting on the arrival of Tapira, accused nr 8, 9 and 10 joined the group outside at Tapira's place. The grandfather of Tobo, Frank Tobo (previously an accused, now deceased) joined the group. Frank Tobo joined in the assault of Tobo and the deceased, by hitting them with his walking stick over their bodies and heads. Accused 9 assaulted Tobo and the deceased with the same walking stick. Accused 8 assaulted the deceased with a stick.

[12] While the assault took place Tobo and the deceased were surrounded by community members and could not escape. Accused 10 joined in the group and while they were being beaten, accused the deceased of robbing her, and stabbing her in the past. She threw salt on the deceased.

[13] Constable Uys of the SAPS arrived on the scene. He observed that both Tobo and the deceased were injured and bleeding. The deceased's hands and feet were bound. The deceased was surrounded by the community members who were irate. Constable Uys was informed by community members that they will not release the deceased until they have found the items that were stolen. He was told that he was not welcome and should leave. Constable Uys managed to take Tobo to the SAP

van. Due to the volatile atmosphere, Constable Uys feared for his life and left to take Tobo to Stellenbosch Hospital. He handed Tobo over to the nursing staff and returned to his office. Tobo voluntarily left the hospital without receiving any medical treatment.

[14] As Tobo was removed from the scene by Constable Uys, Tapira arrived. The deceased was unresponsive at first. Tapira shook him and took the wire off his feet. The deceased was then able to stand up and give Tapira further information about the stolen items. The deceased was then taken to Zama Zama by the community members. Accused nr 8 held the deceased by his hands, “towing” (taking the ordinary meaning of the word: pulling or dragging behind one.) him to Zama Zama. At Zama Zama, they were informed that the person identified by the deceased as the buyer of accused 1’s items had passed away some time ago. The deceased was returned to Tapira’s by community members.

[15] Approximately 30 minutes after Constable Uys returned to his office, he was called to Tapira’s again. They managed to retrieve the deceased, who was injured. Before the deceased was taken from the scene, accused 11 was involved in a verbal confrontation with him and slapped him.

[16] The deceased was transported to Stellenbosch hospital; He succumbed to his wounds the same day.

[17] The Pathologist Dr D.K Abrahams’s chief Postmortem findings are as follows;( the likely cause thereof explained by Pathologist Dr Alfonso, in absence of Dr Abrahams who retired in 2023).

- 1.) External signs of extensive blunt trauma over the vertex of the scalp and multiple sites of the scalp. Multifocal subcutaneous haematoma of the scalp also the right temporal muscle. (Caused by blunt force trauma)
- 2.) The brain showed traumatic subarachnoid haemorrhage with contusions (likely caused by an unsupported fall, where the head contacts the ground with maximum force).
- 3.) Multifocal linear tramline abrasions and multifocal areas of contusions of extremities and the torso and back. (Caused by a rod like object – like a broom, pipe or whip)

#### **SUMMARY OF THE EVIDENCE FOR THE DEFENCE**

[18] A few days before the 01/04/2018 accused 1's home was broken into and his plasma television and laptop was stolen. He was informed that Tobo and the deceased had information about where the items are. On 01/04/2018 he met accused 2, 4, 5, 6 and 7 at a tavern, explained the situation. They all decided to go and look for Tobo. Close to Tapira's place they saw Tobo and confronted him. Tobo was uncooperative and did not want to tell the truth. Tobo was threatened with assault and slapped. He was taken to the deceased house. After they collected the deceased, and information that the items may be at Tapira's place, they took Tobo and the deceased to Tapira's. On their way there, the deceased tried to escape by running away. He was stopped by accused 3 who arrived on the scene. The deceased was assaulted by other community members, who then joined the group walking to Tapira's. Accused 3 was then also part of the group. At Tapira's the community members assaulted Tobo and the deceased.

[19] Accused 8, 9 and 10 arrived and formed part of the group. Frank Tobo assaulted Tobo and the deceased with a walking stick. Other members of the community including accused 9 also assaulted Tobo and the deceased with their hands and sticks. The group then took them inside Tapira's tavern to protect them. Tapira was not home. They waited for him to arrive. Tobo escaped Tapira's tavern and ran to a house where he hid. The people of that house assaulted Tobo. He was bleeding when the group retrieved him from them.

[20] The South African Police arrived at the scene and spoke to the community members. Tobo was taken from the scene by the police.

[21] After the police arrived on the scene, accused 1, 2, 3, 4, 5, 6, 7, and 10 left the scene. Accused 9 and 11 had already left the scene. Accused 8 was on the opposite side of the road and saw how the deceased was taken away by the crowd. They returned 10 minutes later. The police arrived and removed the deceased from the scene.

#### **THE FOLLOWING IN COMMON CAUSE**

[22] On 01/04/2018 at Kayamandi, Stellenbosch accused 1, 2, 4, 5, 6 and 7 confronted Tobo and accused him of stealing and having knowledge of where the items of accused 1 is. Tobo was taken to the deceased's house. From there both Tobo and the deceased were taken by the group to Tapira's place. On their way there, the deceased tried to escape. He was caught by accused 3, who then arrived on the scene, and taken to re-join the group. Accompanied by accused 1 to 7, Tobo and the deceased was taken to Tapira's place.

[23] While at Tapira's place, accused 8, 9 and 10 joined the group. Other members of the community also gathered around Tobo and the deceased. They all waited on

Tapira to arrive. Accused 9 beat both Tobo and the deceased with a walking stick. Accused 10 accused the deceased of robbing her and stabbing her. She threw salt at the deceased. Constable Uys removed Tobo from the scene at Tapira's.

[24] Mawanda Maku's cause of death was blunt trauma to the head, torso and extremities and the consequences thereof.

[25] Tobo and the deceased were known by the community as 2 men who committed theft, robbery and housebreaking within the community.

[26] It is not dispute that both Tobo and the deceased were assaulted by members of the community and that both sustained open bleeding wounds.

[27] It is in dispute that the 11 accused acted in the furtherance or execution of a common purpose to kill the deceased, attempted to kill Tobo and deprive them of their freedom of movement by taking and detaining them against their will. In essence it is the defence of accused 1 to 8 and accused 11 that they were incorrectly identified as members of the community who participated in the kidnapping and assault of Tobo and the deceased.

## **APPLICABLE LAW AND ANALYSIS**

[28] Common purpose was not averred in the charge sheet in respect of Counts 2, 3 and 4. In *Ntuli*<sup>1</sup> the accused was convicted applying the doctrine of common purpose. The State neither averred Common Purpose in the charge sheet nor

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<sup>1</sup> *Ntuli v. The State* (128/23) [2025] 2A SCA 114

proved it during the trial. The Court ruled that it violated the accused right to a fair trial.

[29] In the matter at hand, the charge sheet indicates that the State alleges that all the accused committed all 4 of the offences. Furthermore, on the evidence presented by the State during the course of the trial, the State clearly relied on the doctrine of Common Purpose in respect of all 4 Counts. The kidnapping and assault alleged by the State forms part of a continuous act. There is no trial by ambush, which violates the accused's Constitutional Right to a fair trial.

[30] The onus to prove beyond reasonable doubt the allegations in the charge sheet lies with the State. An accused may be acquitted if his or her version of the incident can be reasonably possibly true. Before a court can make a finding on the facts, all the evidence must be evaluated together, and be tested for the probability thereof.

[31] If focus is placed to intently upon separate and individual parts of the evidence, doubt may arise if it is evaluated in isolation. Such doubt may be set to rest when separate and individual parts of the evidence is evaluated with all the available evidence <sup>2</sup>

[32] Kidnapping consists in unlawfully and intentionally depriving a person of his/her freedom of movement <sup>3</sup> The physical or forcible removal of a person is not a requirement as the crime is also committed where a person is imprisoned or concealed where they happen to be. <sup>4</sup>

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<sup>2</sup> S v. Mbuli 2003 (1) SACR 77 SCA

<sup>3</sup> Snyman's Criminal law 7<sup>th</sup> edition – updated 2019 by S.V Hocter at page 417.

<sup>4</sup> Snyman's Criminal law at page 418.

[33] Unlawful deprivation of freedom may be justified by official capacity, for example where a SAPS (South African Police Service) member lawfully arrests someone, or where a citizen's arrest is effected in respect of Section 42(1)'(a) of the C.P.A

[34] The doctrine of Common Purpose is applied to facilitate the conviction for murder of each separate member of a group. If 2 or more people, having a common purpose to commit a crime, act together to achieve that purpose, the conduct of each of them in the execution of that purpose is imputed to the others. <sup>5</sup> Burchell's definition of common purpose: Where 2 or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for a specific criminal conduct, committed by one of their members, which falls within their common design. <sup>6</sup>

[35] Where there is no proof of a previous agreement to commit the offence, there are 5 requirements set out in Mgedezi<sup>7</sup> that must be complied with before a conviction on common purpose can follow.

[36] The requirements set out in Mgedezi were confirmed in the unreported judgment of *The State v Shane Jacobs*. <sup>8</sup> In a later appeal the conviction was confirmed by the full court to the Supreme Court of Appeal. The judgement and order of the full court of appeal stands as no majority decision was reached in this matter in the Constitutional Court <sup>9</sup>

[37] The 5 requirements set out in Mgedezi:

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<sup>5</sup> Criminal Law C.R. Snyman 6<sup>th</sup> edition 2013 (Lexis Nexis) page 257.

<sup>6</sup> Principles of criminal law (4<sup>th</sup> edition) Jonathan Burchell at page 467

<sup>7</sup> Mgedezi 1989 (1) SA 687 (A) 705

<sup>8</sup> *S v Shane Jacobs*. High Court of South Africa, North West Division, Mafikeng- unreported judgement handed down on 9 September 2013 in Case NOCC33/11

<sup>9</sup> *Jacobs and others v. State* [2018] ZACC 4

- 1.) The accused presence at the scene where the violence was being committed.
- 2.) Awareness of the assault on the person, by someone else
- 3.) Intent to make common purpose with the person/persons committing the assault (conscious sharing of a common purpose)
- 4.) A manifestation of sharing a common purpose by performing some act of association with the conduct of the others.
- 5.) The intention to kill.

[38] A passive spectator, tacitly approving of a perpetrator's criminal act, does not justify a finding of active association. There must be "some act" of association.

[39] It is sufficient that intent takes the form of *dolus eventualis*. Therefore if an accused foresaw the possibility that the acts of the participants with whom he or she associates him or herself, may result in Y's death and reconciles him or herself to this possibility, the 5<sup>th</sup> requirement set out in *Mgedezi* has been complied with <sup>10</sup>

[40] Withdrawal or dissociation from the common purpose, may in certain circumstances be sufficient to escape liability. The accused must have a clear and unambiguous intention to withdraw, before it is no longer possible to desist from, or frustrate the commission of the crime <sup>11</sup>

[41] Tobo gave a detailed, chronological and consistent version of the incident that took place on 01/04/2018. During his evidence he became emotional about the death of his friend Mawanda Maku, explaining that he is currently serving long term

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<sup>10</sup> Govender 2023 2A SCA 60

<sup>11</sup> Snyman's Criminal law at page 231

imprisonment as punishment for some of the offences he had committed and that the deceased should not have died at the hands of community members, for his offences.

[42] He testified that he and the deceased were notorious in the community for theft, robbery and housebreaking in the area. He knew, at the time of the incident, all the accused, either by name or by seeing them regularly in the area where they lived. He and the deceased used to hang out at the shop and beg for small change from the community. This part of his evidence was conceded to by most of the accused. There are minor discrepancies in his evidence, but it does not detract from the evidence as a whole.

[43] The other eyewitnesses to the incident observed the taking of Tobo and the deceased to Tapira's place. They laid emphasis on different details as they observed the beating of Tobo and the deceased at Tapira's place.

[44] The core group made up of accused 1 to 7 and 11 took Tobo and the deceased to Tapira's place. It is clear from the evidence of members of that core group that they threatened Tobo and the deceased with violence, and assaulted them, before they reached Tapira's place. They confirm the evidence of the State that the deceased tried to escape, was caught and brought back to the group. Their own evidence confirms that Tobo and the deceased was taken and held at Tapira's against their will.

[45] It was always the intention of the core group to find the property belonging to accused number 1. Accused 1's insistence on finding his items, not only initiated the incident, but also led to a prolong interrogation and assault on both Tobo and the deceased. It was never the group's intention to affect a citizen's arrest or to inform

the SAPS (South African Police Service) that Tobo and the deceased had taken the items. They had ample opportunity to do so when Constable Uys arrived on the scene and spoke to the community. Accused 1 to 7 cannot justify why they left the scene without accused 1's items when the SAPS arrived. The community members took photographs of the incident. Accused 1 thought that it may lead to trouble and left the scene when the police arrived.

[46] The only reason why they left the scene when the SAPS arrived and took Tobo from the scene was to try and disassociate themselves from the offences that were perpetrated against Tobo and the deceased.

[47] The version of the accused that the deceased's wounds were inflicted by members of the community when he tried to escape, is, considering the overwhelming evidence against them, not probable.

[48] The evidence of the accused's that Tobo's wounds were inflicted when he escaped from inside Tapira's tavern, was caught and assaulted by the owners of the house where he hid, is not truthful. If there was an inkling of truth to this version, it would have been an integral part of their defence.

[49] During cross-examination of the state witnesses, this version was not brought to the court's attention. It never formed part of their narrative. The evidence of the State that they could not enter Tapira's place, as he was not present, and that they were outside all the time, was not placed in dispute. During cross-examination it was never suggested to Tobo or any of the other State witnesses that he escaped and was beaten by other people. This narrative only arose when accused 1 started testifying. This narrative was belatedly conjured up by the accused to explain or

justify the assault and wounds inflicted on Tobo. Their lack of credibility is evident from the inconsistency of their narrative.

[50] All the accused were present at Tapira's and saw that both Tobo and the deceased were already wounded and bleeding. The deceased limbs were bound before the police arrived on the scene. At some stage he lost consciousness and was initially unresponsive when Tapira arrived on the scene. The evidence of the accused that Tobo and the deceased was still in good health and only mildly injured is rejected as false.

[51] The kidnapping and assault on Tobo and the deceased had its origin in the determination of the core group to locate the property of accused 1. Their intention was to kidnap and hold captive, and to violently interrogate Tobo and the deceased to confess to stealing and or selling the property of accused 1.

[52] The kidnapping and assault of Tobo cannot be separated from that of the deceased. It was a continuous act involving kidnapping and assault of both Tobo and the deceased. Accused 8, 9 and 10, who arrived on the scene at Tapira's place actively associated themselves with the intention of the core group.

[53] All the accused were present on the scene when Tobo and the deceased were held captive and the assault took place. All of them were aware that Tobo and the deceased were assaulted. All the accused consciously shared a common purpose. Accused 1 to 9 and accused 11 manifested their sharing of common purpose participating in the assault on both Tobo and the deceased, while they were held captive.

[54] Accused 10 was not a passive spectator. Nor did she tacitly approve of the criminal act performed by the other. While the beatings took place, she verbally

accused the deceased of robbing her and stabbing her. She laid her hands on some salt and threw it at the deceased. She performed an act of association with the conduct of rest of the group.

[55] Tobo received no medical treatment for his wounds. He decided to attend to his wounds with the assistance of his friends. The evidence shows that his wounds were serious in nature as he was bleeding from open wounds to his head.

[56] There is no medical evidence to show that his wounds were life-threatening. The evidence also shows that the deceased bore the brunt of assault.

[57] I find that the State has proven beyond reasonable doubt that accused number 1 to 11 in the furtherance of a common purpose:

- 1) Foresaw the possibility that the acts of the participants with whom they associated themselves, may result in the death of the deceased, and reconciled themselves to this possibility.
- 2) Foresaw the possibility that the acts of the participants with whom they associated themselves may result in grievous bodily harm inflicted on Siphamandla Tobo and reconciled themselves to this possibility.
- 3) Removed the deceased from his home and/or held him captive, thereby unlawfully and intentionally depriving him of his freedom of movement.
- 4) Removed Siphamandla Tobo from the place he was and/or held him captive, thereby unlawfully and intentionally depriving him of his freedom of movement.

[58] Accordingly, accused 1 to 11 is convicted of:

Count 1: Murder

Count 2: Assault with the intend to do grievous bodily harm (as a competent verdict to a charge of attempted murder in terms of Section 256 of the CPA)

Count 3: Kidnapping

Count 4: Kidnapping

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**S I SMITH**  
**Acting Judge of the High Court**

**Appearances:**

Counsel for the State: Mr. T Kwetane

Counsel for Accused 1, 4, 5, 9: Mr. W Fischer

Counsel for Accused 2, 3, 6, 7: Ms. S Viljoen

Counsel for Accused 11, 12: Ms. N Abdurahman