



**THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Reportable/Not Reportable

Case no: CA&R 25/2025

In the matter between:

NEILLAN DE KOKER

FIRST APPELLANT

CLIVE DE KOKER

SECOND APPELLANT

CLYDE DE KOKER

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *N De Koker and Others v The State* (CA&R 25/2025) (20 March 2026).

Coram: PHATSHOANE DJP and GROENEWALDT AJ.

Heard: 2 February 2026.

Delivered: 20 March 2026.

Summary: *Criminal Law* – Appeal against conviction and sentence – Murder read with s 51(1) of the Criminal Law Amendment Act 105 of 1997 – Sentence of life imprisonment – No demonstrable material misdirection shown – No substantial and compelling circumstances warranting deviation from prescribed minimum sentence – Appeal dismissed.

ORDER

On appeal from: The Magistrates' Court for the Regional Division of Northern Cape, Kimberley (Acting Regional Court Magistrate Padayachee, sitting as court of first instance):

1. The first and third appellants' appeal against their conviction and sentence is dismissed.
2. The first and third appellants are to present themselves at the Kimberley Correctional Centre within 72 hours from the date of this order to commence serving their sentences.

JUDGMENT

Groenewaldt AJ (Phatshoane DJP concurring)

[1] The appeal by Messrs Neillan De Koker, Clive De Koker, and Clyde De Koker, the first to the third appellants, has its origin in the Regional Court, Kimberley (the trial court), where they were arraigned before Magistrate K Padayachee on a charge of murder read with the provisions of s 51(1) of the Criminal Law Amendment Act¹ ("the CLAA"). The first and third appellants are brothers. The second appellant is their father. They were found guilty and sentenced to life imprisonment. This appeal is directed at both their convictions and sentences in terms of s 309(1)(a) of the Criminal Procedure Act² ("the CPA"), which affords them an automatic right to appeal to this

¹ 105 of 1997.

² 51 of 1977.

Court. We have been notified that the second appellant, Mr Clive De Koker, passed away on 2 February 2025. We were further informed that the remaining appellants are on bail pending the outcome of this appeal.

[2] The first appellant raised no less than nine grounds of appeal. In the main, it was contended on his behalf that the trial court erred in finding that he acted in common purpose with the other appellants. It was further argued that the trial court accepted the evidence of Mr Sakhekile Mtirara, a single witness, in circumstances that it ought not to have done so. In addition, the trial court failed to find that there had been discrepancies in the State's case and to make a finding regarding the severe assault on the deceased and the total lack of injuries recorded on the post-mortem report. It was further argued that the trial court failed to make a finding on whether the deceased could have been stabbed before he entered the scene on Evans Street, Kimberley North. It was further contended that the trial court erred in not finding that the first appellant had no intention to kill the deceased. Regarding the sentence, it was argued that the trial court erred in failing to find that substantial and compelling circumstances existed that warranted a deviation from the statutorily prescribed sentence.

[3] The third appellant's grounds of appeal can be summarised as follows. It was argued on his behalf that he had no intention to kill the deceased and had been unaware that the first appellant had a knife in his possession. In any event, so it was argued, the third appellant was not on the scene when the deceased was stabbed. He also did not foresee that the deceased would be killed when the appellants chased after him. It was further argued that the trial court erred in not making a distinction between two separate scenes. First, where the deceased was stabbed in the absence of the third appellant, and second, where the assault occurred. It was further contended that the third appellant's conduct was insignificant in relation to the first appellant's. The trial court's verdict is also assailed on the basis that it found that the appellants acted in furtherance of a common purpose and had the intention to kill the deceased. On the sentence, the third appellant took issue with the purported failure by the trial court to find that there were substantial and compelling circumstances that justified a deviation from the imposition of the prescribed sentence.

[4] The appellants admitted, in terms of s 220 of the CPA, that the first and the third appellants assaulted the deceased with a golf club and a sjambok, respectively. The State led the evidence of Mr and Mrs Mtirara (the Mtiraras), a married couple residing on Evans Street, where the alleged offence is said to have occurred. Mr Mtirara testified that the first appellant produced a knife from the left-hand side of his hip with which he stabbed the deceased on the left-hand side of his chest.

[5] Mr Mtirara described the two scenes. First, where the deceased was stabbed and second, where he was subsequently assaulted. He testified that the deceased ran from the first appellant after the infliction of the stab wound. The first appellant also had a golf club with which he repeatedly assaulted the deceased. According to Mr Mtirara, the first appellant stabbed the deceased whilst a certain Khalied was standing between the first appellant and the deceased. Much was made that he could not have witnessed the stabbing because his view was obstructed. He dispelled that notion.

[6] Mr Mtirara testified that while the first appellant was busy attacking the deceased, a minibus driven by the second appellant arrived on the scene. The second and third appellants alighted from that vehicle. The second appellant kicked the deceased on his head with a booted foot while he was lying down. At some point, Mr Mtirara observed the deceased crawling and asking for some water to drink. During cross-examination, Mr Mtirara testified that he later heard that the third appellant assaulted the deceased with a sjambok, which assault he did not witness. Mr Mtirara also confirmed that his wife was not next to him during the stabbing incident.

[7] Mrs Mtirara did not witness the first appellant stab the deceased. She testified that she was in and out of her house during that fateful morning. She further says that she observed the first appellant repeatedly assaulting the deceased with a golf club whilst the third appellant struck him with a sjambok. She explained that before the assault, the deceased had no injuries.

[8] The first and third appellants testified in their defence. The first appellant intimated that approximately at 09:00 on the morning of the day in question, he and the third appellant and other individuals were walking home after visiting a nightclub the previous evening. A certain Darrion went in search of food, and the others returned

to their homes. When Darrion was not returning home, the first and third appellants went looking for Darrion. Along the way, the first and the third appellants were robbed by four individuals armed with knives, one of whom was the deceased. The deceased was not actively engaged in the robbery but stood aside observing only what happened, but the items collected from the robbery were allegedly given to him.

[9] The first and third appellants went home to report what had transpired. The first and third appellants, accompanied by their father (the second appellant), entered their father's minibus and drove to a police station. They were not assisted as the police officers were changing shifts. They then, armed with a golf club and a sjambok, went in search of the robbers and spotted the deceased. The first appellant alighted from the minibus and chased after the deceased while the second and third appellants followed him in the minibus. The first appellant caught up with the deceased and admitted to assaulting him with a golf club. He denied having stabbed the deceased. The diction the first appellant used for striking the deceased with a golf club repeatedly was that he "wanted to teach him a lesson". The second and third appellants claimed to have arrived on the scene after the assault. The second appellant denied that he ever kicked the deceased. The third appellant acknowledged that he struck the deceased with the sjambok.

[10] During his examination-in-chief, the first appellant, for the first time, raised a plea of self-defence. He claimed that the deceased had a knife while he carried a golf club. He assaulted the deceased out of fear that the deceased would stab him because when he chased the deceased, he noticed that the deceased had put his hand in his side, and he saw a knife on the person of the deceased.

Ad Conviction

[11] It is trite that a court of appeal may only interfere with the findings of a trial court where the court misdirected itself on the facts and/or the law. A court of appeal is also not at large to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity. The trial court is better placed to observe the witnesses and make credibility findings. The appellant in a criminal appeal must satisfy the appellate

court that the verdict was wrong, at least to the extent that the trial court should have had a reasonable doubt as to his guilt.³

[12] Absent any demonstrable and material misdirection, an appellate court would not conclude that the trial court was wrong in its adjudication of the matter. If the findings of fact remain undisturbed on appeal, the ruling that proof beyond a reasonable doubt was discharged becomes inescapable. Similarly, if the trial courts do not misdirect themselves on the facts and law in the application of a cautionary rule, but properly evaluate the evidence, a court of appeal will not readily depart from their conclusions.⁴

[13] The trial court dealt in detail with the versions of the Mtiraras and found that their contradictions were not material. They observed the incidents in a fluid scene from different stages and vantage points. In this respect, the Mtiraras versions differed in that Mr Mtirara had witnessed the stabbing, whereas Mrs Mtirara had not. Insofar as the court a quo found, correctly in my view, that the events occurred in a rapidly moving scene, these discrepancies are to be expected. More so, because it is to be remembered that the evidence is to the effect that there were occasions where Mrs Mtirara was in and out of the house. The fact that the evidence of the two direct witnesses differed regarding certain events lends credence to the observation that they were trustworthy and reliable, as they could easily have adjusted their accounts.

[14] In relation to the contradictions between the evidence of Mr Mtirara and his police statement, it is common knowledge that police statements are frequently not taken with the degree of care, accuracy, and completeness that is desirable.⁵ In *S v Govender and Others* 2006 (1) SACR 322 (E), the Court, expanding on the foregoing observations made in *S v Xaba*⁶ observed further thus:

‘ . . . as was pointed out in *S v Bruiners en 'n Ander* 1998 (2) SACR 432 (SE) at 437h, the purpose of a police statement is to obtain details of an offence so that a decision can be made whether or not to institute a prosecution, and the statement of a witness is not intended to be a precursor to that witness' evidence in court. Quite apart from that, however, there are other

³ *Rex v Dhlwayo and Another* 1948 (2) SA 677 (A) at 705 – 706.

⁴ *S v Leve* 2011 (1) SACR 87 (ECG) para 8.

⁵ *S v Xaba* 1983 (3) SA 717 (A) at 730B – C.

⁶ *Ibid.*

problems associated with police statements. They are usually written in the language of the person who records them. Frequently the use of an interpreter is required and, invariably, such interpreter is also a policeman and not a trained interpreter. The statement, according to my experience, is also usually a summary of what the policeman was told by the witness and is expressed in language or in terms normally used by him and not necessarily the witness.⁷

Accordingly, the court *a quo* cannot be faulted for concluding that Mr Mtirara's statement was taken in haste, was not read back to him, and was incorrectly captured.

[15] Mr Mtirara is a single witness in relation to the stabbing incident. In *S v Mahlangu and Another*⁸, it was held that:

'The court can base its finding on the evidence of a single witness, as long as such evidence is substantially satisfactory in every material respect, or if there is corroboration.'

Mr Mtirara was forthright in his account that he saw the first appellant stab the deceased with a knife. He was also frank to say that he did not witness the third appellant assault the deceased with a sjambok. He clearly testified on what he had observed and did not embellish his evidence. In my view, the trial court was correct in having found his evidence to be satisfactory in all material respects.

[16] The first appellant's version that the stab wound to the chest could have been inflicted elsewhere before he came across the deceased is fraught with difficulties. Mr Mtirara also testified that the deceased had no injuries "whatsoever" before the assault. The first appellant chased after the deceased. The latter must have run so fast that the first appellant requested that Khalied, who stood in the way, apprehend him. It is common cause that the deceased died because of the stab wound. Therefore, it is highly improbable that the deceased would have run at high speed if he had already been injured elsewhere. Immediately after being stabbed, the deceased crawled. The only inference to be drawn, supported by all the objective evidence, is that the deceased was stabbed at the scene by the first appellant.

[17] The fact that the deceased was stabbed with a knife also finds corroboration in the post-mortem report. The pathologist found that a blade of a sharp object penetrated the left chest cavity through the third intercostal space. The blade stabbed

⁷ At 324J-325C.

⁸ 2011 (2) SACR 164 (SCA) para 21.

the upper lobe of the left lung and then penetrated the pulmonary trunk. A large amount of blood was collected in the left chest cavity, which caused the left lung to collapse.

[18] The trial court found that the appellants acted in furtherance of a common purpose in perpetrating the offences. In *S v Mgedezi and Others*⁹ the following requirements were laid down:

'In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.'

[19] As already alluded to, the first and third appellants, together with their father, left their home on the day in question to retaliate against the robbers. On the first appellant's own version, the appellants were furious, and they decided to look for the robbers. He wanted to teach the deceased a lesson. This involves planning and an agreement to cause harm. The type of weapons utilised, the planning of the attack, the severity of the force inflicted, and the fact that the appellants were not inebriated, demonstrate that they subjectively foresaw the possibility of the death ensuing from their conduct, and reconciled themselves with that possibility. In addition, the third appellant associated himself with the acts of the first appellant by assaulting the deceased with a sjambok when he was already seriously injured. The appellants were all at the scene; although they may not have arrived at the same time, they acted in pursuit of their common purpose.

⁹ 1989 (1) SA 687 (A) at 705I-706B. See also *S v Jama and Others* 1989 (3) SA 427 (A) at 436D – G.

[20] The first appellant's belated plea of acting in self-defence ought to be rejected outright. Surely, this ground of justification could have been raised from the outset by the first appellant to dispute the murder charge. It is significant that this defence was not put to the Mtiraras. The knife that the first appellant said he saw the deceased carrying when fleeing was not visible when he assaulted the deceased.

[21] On a conspectus of the evidence as a whole, the appellants' version cannot reasonably possibly be true and was correctly rejected by the trial court as far-fetched and improbable. The appellants' appeal against their conviction must fail.

Ad Sentence

[22] It is trite that sentencing is pre-eminently a matter falling within the discretion of the sentencing court.¹⁰ An appeal court has very limited powers to interfere with a sentence. It would do so where there is material misdirection by the trial court which vitiates its exercise of that discretion.¹¹ The appellants were sentenced to life imprisonment in terms of s 51(1) of the CLAA. The sentences specified in the CLAA are not to be departed from for flimsy reasons. The appellants had to demonstrate that they had substantial and compelling circumstances that would warrant a deviation from the imposition of that form of punishment.¹²

[23] The personal circumstances of the appellants were as follows. The first appellant was 29 years old at the time of sentencing. He was unmarried with two children. He completed Grade 11 at school. He is a first offender and was employed as a driver earning R7 500 per month. The third appellant was 26 years old at the time of sentencing. Similarly, he completed Grade 11 at school. He was employed as a data capturer at the Department of Social Development, earning R3 500 per month. He is unmarried with no dependents.

[24] In *S v Vilakazi*¹³, the Supreme Court of Appeal trenchantly said:

¹⁰ *S v Rabie* 1975 (4) SA 855 (A) at 857D – E.

¹¹ *S v Malgas* 2001 (1) SACR 469 (SCA); 2001 (2) SA 1222 (SCA) para 12.

¹² *S v PB* 2013 (2) SACR 533 (SCA) para 20.

¹³ 2009 (1) SACR 552 (SCA) para 58.

'...In cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy" grounds that *Malgas* said should be avoided. But they are nonetheless relevant in another respect. A material consideration is whether the accused can be expected to offend again.'

[25] The appellants armed themselves and went in search of the deceased. They had time to reconsider their actions, but did not. They resorted to self-help with tragic consequences. This is aggravating. Our country is premised on the rule of law. Acts of vigilantism, such as the present, have no place in our society and cannot be countenanced.

[26] It is apposite to restate the trite principle that a court of appeal does not enjoy an unfettered power to interfere with the sentence imposed by a trial court. The extent of the power to interfere with sentence on appeal was set out as follows in *S v Malgas*¹⁴:

'The mental process in which courts engage when considering questions of sentence depends upon the task at hand. Subject, of course, to any limitations imposed by legislation or binding judicial precedent, a trial court will consider the particular circumstances of the case in the light of the well-known triad of factors relevant to sentence and impose what it considers to be a just and appropriate sentence. A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large. However, even in the absence of material misdirection, an appellate Court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate Court would have imposed had it been the trial court is so marked that it can

¹⁴ 2001 (2) SA 1222 (SCA) para 12.

properly be described as 'shocking', 'startling' or 'disturbingly inappropriate'. It must be emphasised that in the latter situation the appellate Court is not at large in the sense in which it is at large in the former. In the latter situation it may not substitute the sentence which it thinks appropriate merely because it does not accord with the sentence imposed by the trial court or because it prefers it to that sentence. It may do so only where the difference is so substantial that it attracts epithets of the kind I have mentioned. No such limitation exists in the former situation.'

[27] The appellants did not show any substantial and compelling circumstances warranting a departure from the prescribed sentence of life imprisonment. In addition, I am unpersuaded that the sentence imposed is unjust or disproportionate to the crime committed. It certainly does not induce any sense of shock. Accordingly, the appellants' appeal against their sentences ought to fail. In the result, I make the following order:

Order

1. The first and third appellants' appeal against their conviction and sentence is dismissed.
2. The first and third appellants are to present themselves at the Kimberley Correctional Centre within 72 hours from the date of this order to commence serving their sentences.



[REDACTED]

GROENEWALDT AJ
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Appearances

For the 1st & 3rd Appellants:

Instructed by:

Adv J Harmse

Justin Pillay and Associates.

For the Respondent:

Instructed by:

Ms Kruger

Director of Public Prosecutions.