



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

case no: 2884/2022P

In the matter between:

BONGA AUBREY KHAMBULE

FIRST APPELLANT

FANA NGCOBO

SECOND APPELLANT

KHETHUKUTHULA MTHALANE

THIRD APPELLANT

THOBANI THOBA NKABINI

FOURTH APPELLANT

and

THE STATE

RESPONDENT

ORDER

Appeal from Regional Court, Ixopo (**Mr Squires** sitting as a court of first instance)

1. The appeal against conviction of first, second, third and fourth appellants is dismissed.

2. The appeal against sentence of third and fourth appellants is dismissed.
3. The appeal against sentence of life imprisonment of first and second appellants is upheld.
4. The sentence of life imprisonment on count 2 (Murder) imposed on the first and the second appellants is set aside. It is replaced with a sentence of twenty-five (25) years imprisonment. The sentence of fifteen (15) years on Count 1 to be served concurrently with the sentence of twenty-five (25) years imprisonment on count 2. The effective sentence is twenty-five (25) years imprisonment. The sentence is ante-dated to 3 November 2021.
5. The sentence of fifteen (15) years imprisonment imposed on the first, second, third and fourth appellants for robbery with aggravating circumstances (count 1) is confirmed. The sentence of twenty (20) years imprisonment imposed on the third and fourth appellants on the count of Murder (Count 2) is confirmed. The sentences to be served concurrently. The effective sentence is twenty (20) years imprisonment. The sentence is ante-dated to 3 November 2021.
6. In respect of each appellant, no order is made in terms of s103 (1) of the Firearms Control Act 60 of 2000.

JUDGMENTDelivered:

Mngadi J: (Nirghin J concurring)

[1] The first and second appellants in the exercise of their automatic right, appeal against conviction and sentence. The third and fourth appellants with leave of the trial court appeal against conviction.

[2] The first appellant is Bonga Aubrey Khambule. The second appellant is Fana Ngcobo, and third appellant is Khethukuthula Mthalane. The fourth appellant is Thobani Nkabini.

[3] The appellants were charged before the regional court with four charges, namely, robbery with aggravating circumstances as intended in s 1 of Act 51 of 1977 (the CPA) Count 1; one count of Murder (Count 2) and two counts of house breaking (count 3 & 4). The charge on count one was read with the provisions of s 51(2), 52A and 52B of the Criminal Law Amendment Act 105 of 1997 it being alleged that a firearm was used during the commission of the crime, and the charge in count 2 was

read with the provisions of s 51(1)(2) Parts 1 and 2 of the Criminal Law Amendment Act 105 of 1997 in that (i) the death of the victim was caused by or occurred in committing or attempting to commit, or after having committed or attempting to commit rape or robbery with aggravating circumstances, (ii) the murder was perpetrated by a person or group of persons or syndicate acting on the execution of furtherance of a common purpose or conspiracy. Further, in count 2, the state alleged that the accused acted in common purpose in that at all material times and places the accused persons had a common purpose and acted together in order to achieve the purpose to commit the offence embodied in the preferred charge. All accused persons, it is alleged, (individually) intended the unlawful criminal outcome or foresaw with reckless disregard, its possible realisation.

[4] The appellants who were legally represented throughout the trial when the charges were put to them pleaded not guilty to all charges. They denied having committed the crimes and they denied having been at the places where the crimes were committed.

[5] The learned regional magistrate after hearing evidence in regard to counts 3 and 4 discharged all the accused in terms of the provisions of s 174 of the CPA. At the conclusion of the trial, the court convicted all the appellants as charged on counts 1 and 2. Having found no substantial and compelling circumstances for a court to impose a lesser sentence, sentenced the first and second appellant each to fifteen (15) years imprisonment and to life imprisonment respectively. Having found substantial and compelling circumstances sentenced the third and fourth appellants

each to fifteen (15) years imprisonment on count 1 and 2 twenty (20) years imprisonment in count 2 with an order that the sentences be served concurrently.

[6] The charge in count 1 and 2 arose out of the same incident which took place on 8 October 2017 at eMakhuzeni Location in the area of Ixopo. It is common cause that the incident took place. The issue in dispute is whether the perpetrators were the appellants or not, which meant that the issue was the identification of the assailants.

[7] The State relied on the evidence of three eyewitnesses, namely, Thokozani Dlamini (Thokozani), Senzeni Dlamini (Senzeni) and Nqubeko Nzimande (Nqubeko). Each appellant testified in their defence and no other defence witnesses were called. Nqubeko's evidence tended to implicate the fourth appellant but viewed individually it might not have been sufficient. It is decided not to summarise it not because it is rejected.

[8] Senzeni testified as follows. She resided at eMakhuzeni: On 8 October 2017 she and her family members went to Solokohle to the home of the Madondo family to attend a function. They were related to the Madondo family. On the afternoon at about 17h00, when they were leaving, they waited in the vehicle for the males who were leaving with them. The males did not come. She then went back to the homestead to look for the males. She found that in the kitchen where the ancestral slaughtering took place, there was fighting going on. The deceased Zwelethu Ndwandwe (who was in their company) was fighting with another male person. The

male person fighting with the deceased was not one of the appellants. He was Mxolisi. She pleaded with the males from her family to leave with her. They, including Zwelethu listened and they followed her to where the vehicle was parked. In the kitchen where there was fighting apart from the Mxolisi and Zwelethu and the males in their company, there were other persons as well as the first, second and fourth appellants. There were about 30 people in that structure, it was traditional dance which caused the row. She had earlier, during the course of the day, as she was working serving people seen the first, second and fourth appellants who were together and at some stage causing trouble. They were there the whole day from midday. In the kitchen, these appellants were standing facing the deceased ready to fight with him on the side of Mxolisi. The males in her company she called was the deceased, Thokozani and Lindani Dlamini. The fighting was near the door of the of the structure. Those in her company pulled the deceased away.

[9] Senzeni testified that they then got into the vehicle and they drove to eMakhuzeni. They were about seven (7) in the vehicle. On the way when at eMakhuzeni she alighted to go to her home. The rest of the people proceeded in the motor vehicle to the home of the deceased. Before she reached her home she quarrelled with a young male, she then decided to follow her relatives, those that had gone to the home of the deceased. She went to the deceased's home. She found her other relatives who had been with her including the deceased sitting in the rondavel. People who were there in the rondavel were Thokozani Dlamini, Lindani Dlamini and Khehla Mbelu, Sehla Dlamini, Biyani Nzimade, Qiniso Mbanjwa, N[...] N[...] and her two children, N[...] N[...] and S[...] N[...]. Those in the rondavel, Lindani, Sehla, Buyani and Qiniso were drinking sorghum beer.

[10] Senzeni testified that whilst there in the rondavel, they heard dogs barking. They decided not to go and check, thinking that the dogs were barking at the cows. They were just chatting. Then a young man light in complexion entered the rondavel. He shouted at them to lie down, referring to them as dogs. Inside the rondavel there was electric lights provided by two electric lights. One light is on the left as you enter. The door was open. He entered and took about two steps into the structure and stopped. She noticed that it was somebody she had seen earlier. He had a firearm in his right hand and carrying a knife in his left hand, pointing a fireman and carrying a knife in ready to stab position. The firearm was a handgun of about 15 cm in length. The males did as instructed and laid down. The females remained seated and kept praying and watching. Senzeni, herself, at the time was carrying Nonhlanhla's child, and Nonhlanhla was carrying her other child. That person light in complexion she identified, was the first appellant. The first appellant fired two shots directly at the roof, a corrugated iron roof. First appellant shouting where is Mzweli (Mzweli is the deceased). The deceased was sitting on a chair pretending as if he was sleeping with his head on his folded arms, bent over his knees. The deceased stood up and went towards the door advancing towards the first appellant. Another person entered and that person stabbed the deceased. She saw that person and she identified him. It was the fourth appellant. She saw the fourth appellant lifting up the knife and plunging it in the flesh of the deceased. She screamed out saying he stabbed him. He stabbed the deceased in the abdomen area. When one stood up he or she would be ordered to sit down. First and fourth appellants shouted at the deceased to take out money. The deceased standing near the door kept saying he did not have money. He and Nonhlanhla shouted at the deceased to take out the

money. When they saw that fourth appellant was about to stab the deceased again, the deceased did not take out the money he kept saying he did not have the money. The first appellant pointed a firearm at Nonhlanhla. She (Senzeni) again pleaded with deceased to please give them the money. The deceased did not take out the money.

[11] Senzeni testified that the first and fourth appellant said, 'come in Fana and finish with this dog, he does not want to give in the money'. First and fourth appellants continued to demand money from the deceased. The deceased continued refusing to take out the money. Lindani Dlamini got up and tried to run out of the house. The first appellant said to Lindani, 'hey you dog, where are you going'. He then stabbed Lindani. She, (Senzeni) told Lindani to sit down because he was going to die. The first appellant stabbed Lindani on the shoulder. Lindani sat down. The first appellant and his companions moved about in the rondavel still demanding that the deceased must take out the money and the deceased was not doing so. They went moving about and they were firing shots at the roof. It was the three of them. The third being the second appellant. Second appellant entered the rondavel. When the first and fourth appellant said Fana come in and finish this dog, she and others implored the deceased to take out the money. The deceased went to the fridge, and he took money from the top of the fridge. The money was in a plastic container. He gave the money to the appellants. She could not recall which appellant took the money. The appellants opened the container which had notes and coins. They took the notes and insulted, accusing of him of giving them school kids pocket money. They threw the coins at those in the rondavel and threw the container and the rest of the coins to the floor. She, (Senzeni) at the stage

deceased gave the appellants the container with money, she closed her eyes and prayed and was crying. At that stage, she did not see who actually took the money in the container and threw coins at them.

[12] Senzeni testified that the appellants told the deceased that the money he had given them was too little. The deceased did not take out any more money. Lindani again for the second time stood up and tried to run out. The fourth appellant went to him and asked him where he was going and he stabbed him and Lindani went down staggering and he fell onto the bench and slouched over. She and Nonhlanhla shouted at the deceased that if he did have more money, he must take it out, so that the assailants can leave. The deceased admitted that there was more money and he was going to get it for them. The other appellant said to the second appellant he must finish this dog. The second appellant lifted the firearm he was carrying and shot the deceased, the deceased fell down. She, (Senzeni) threw the child on the floor and rushed to the deceased, who was in the top area of the rondavel. She heard somebody saying finish off this dog and a shot was fired. She retreated and sat down. She did not see who fired that shot, by then the appellants were behind her. All three appellants were carrying firearms. It was first, second and fourth appellants. Thokozani Mbelu stood up and tried to run away. She heard someone saying, 'you where are you going, come back', the door then closed. The fourth appellant stood up. He came to her. He assaulted her with fists and asked her where was the money. She told him she did not know, as she was not staying in that home. He asked her what is that they were cooking. She told him she did not know. Nonhlanhla responded and she said they were cooking chicken feet. The fourth appellant went to the stove and opened the pot. He came back and he assaulted

her (Senzeni) saying why were they cooking this nonsense. He hit her repeatedly with a hot pot and slammed her against the wall. They said she must take out the money, she told them she did not know where the money was. It was the first and fourth appellants that kept demanding from her saying she must take out the money.

[13] The appellants could not open the door from the inside that had closed. They continued assaulting her. One of the appellants shouted calling "Kay" shouting, calling a person outside. They said he must open the door for them; the door had locked. A person kicked the door from outside and she heard it opening. He came in. She saw that the person who came in, she knew him. It was Khetha the third appellant. He entered the rondavel, but she did not see how far he had entered into the rondavel. She did not notice that because the others continued to assault her demanding money. Although the door had opened, the appellants remained standing inside and firing shots, they stopped assaulting her. They then said to Thokozani Dlamini, 'this is another one that was present at Solokohlo, finish the evidence'. The one who said so fired a shot. She saw Thokozani falling on the floor. Thokozani was her brother. She rushed to him and held him, thinking he had been shot. They came and kicked her. Thokozani told her to keep quiet. Two of the appellants continued to kick her. They demanded her phone; she told them that she had left it at her home. They moved up and down kicking those in the rondavel, demanding the cellular phones and searching their pockets. At that time, she could see that there were four, it was the appellants 1, 2, 3 and 4. They grabbed her by the collar and pulled her up to stand. It was the first appellant who grabbed her, calling her a bitch. The first and fourth appellants continued to assault her demanding money. She eventually said she would take out the money. She said

the money was not in that structure, they must go and get it in another structure. They kicked her and went out with her. There were others outside who also joined and kicked her. She was not able to notice how many were outside. They would kick her; she would fall and roll on the ground. It was first and fourth appellants and those that were outside. She led them to another rondavel used by the deceased and his wife for sleeping. They reached that rondavel, she heard one of them asking Fana if he brought petrol. Fana said he forgot. She grabbed the doorhandle. She lost grip and fell and rolled on the ground. She stood up and opened the door. She switched off the light. She noticed that the rondavel had been ransacked, meaning it is where they started. They did not come into the rondavel. She then heard them saying, let us leave, this dog has switched off the lights. She heard them leaving.

[14] Senzeni described the appellants as she had described them in the statement to the police. The first appellant was tall, light in complexion with an oval shaped face. The second appellant was dark in complexion, round face, and with side burns. The third appellant was tall, skinny and dark in complexion with a round face, she told the police that she knew him, and that they were related although she did not know how. She used to see him if there were extended family gatherings, his name is Khetha. She described the fourth appellant as young, square face and dark in complexion. She told the police that she saw the first, second and fourth appellants during the day at Solokohlo at the Madondo homestead.

[15] Thokozani Dlamini testified as follows: He was in the rondavel at the time of the attack. Earlier in day he was at Solokohlo at Madondo homestead. He saw the

first, second and fourth appellants at the Madondo homestead earlier that day. He was able during the attack to identify them. Thokozani described the attack as described by Senzeni. He knew third appellant before the incident because he was his relative, they were cousins, they were close when they were schooling. The third appellant opened the door from outside and went out with the other appellants.

[16] It is significant that Thokozani being a brother of Senzeni did not describe the relationship between them and the third appellant as described by Senzeni. Senzeni never said that third appellant was their cousin. Thokozani said after the door locked, third appellant kicked the door and got in up to about a metre from the door, and they then all went out. This differs from Senzeni's evidence that third appellant, after kicking the door, he entered and remained inside with the other appellants. Senzeni was not particular about what the third appellant did in the rondavel after he had entered. Both Senzeni and Thokozani did not see third appellant at the Madondo homestead. There was no evidence of when before the attack both Senzeni and Thokozani last saw the third appellant.

[17] The appellants testified. They testified that they were at Solokohlo at the Madondo homestead on the day in question. They denied that at any stage they were together. They denied that they were present when the deceased fought with Mxolisi. They denied that earlier in the day at the Madondo homestead they caused trouble. First, second and fourth appellants stayed in the same area. They were together when they were arrested at night saying they had gathered to go hunting.

[18] Thokozani and Senzeni were honest witnesses. It is admitted that earlier in the day they were at Madondo homestead where there was a function. The appellants admitted that they were in the function during the day. They had attended the function, and they spent most of the day at the function. They did not testify that they left the function earlier than the time when Senzeni and her party left the function. It is not disputed that there was on that evening an attack in the home of the deceased by a number of assailants. During the attack persons were assaulted and the deceased was shot and killed. Both Senzeni and Thokozani were present in the rondavel during the attack. Senzeni and Thokozani could not shield the persons that attacked them by saying it was somebody else. They can only be mistaken about the identity of the assailants.

[19] Thokozani and Senzeni had ample opportunity and there was good visibility to identify first, second and fourth appellants. They corroborated each other in their identification of the first, second and fourth appellants and in the role played by each of them during the attack. The attack took place in a confined space in a well-lit area. There were only three assailants in the rondavel, most of the time. The assailants spent a considerable time with both Senzeni and Thokozani. At some point, the assailants physically mishandled Senzeni which meant they were very close to her. Senzeni on the day of the attack, proceeded to Madondo homestead to verify the names of the assailants. This showed that during the attack Thokozani and Senzeni identified the assailants as the people they had seen earlier at the Madondo homestead. There is no possibility that Thokozani and Senzeni could be mistaken about the identity of first, second and fourth appellants as the assailants.

[20] The appellants could not explain how knowing each other, they could not at any stage be together during the whole day at the Madondo homestead. Thokozani and Senzeni directly implicated first, second and fourth appellants but it was never put to them where was each of them during the time of the attack. In their evidence the appellants avoided giving any details, namely- who was with them at the Madondo homestead; when and with whom each of them left the Madondo homestead; what were the movements of each of them after leaving the Madondo homestead, where and with whom was each of them during the time of the attack. The first appellant who testified that he was at his home but did not call any witnesses to support that claim.

[21] It is significant that first, second and fourth appellants admit that they were present in the ceremony at the Madondo homestead. It is incomprehensible that Thokozani and Senzeni having had ample opportunity to identify the assailants during the attack could mistake the assailants for the people they had earlier on the same day seen at the Madondo homestead. It is also significant that both Senzeni and Thokozani saw the first, second and fourth appellants together at Madondo homestead and they were still together during the attack. The deceased at Madondo homestead had some altercation with a person who was part of the appellants' group and later when he was attacked was assailants similar to the persons he was earlier involved in a confrontation with.

[22] The discrepancies and improbabilities in the version of the first, second and fourth appellants justified the decision by the trial court finding their version not be reasonably possible true. The trial court correctly found the identification by Thokozani and Senzeni of first, second and fourth appellants as assailants to be reliable and credible.

[23] The evidence of Thokozani Dlamini, Senzeni Dlamini and Nqubeko Nzimande confirmed that the third appellant was present at the scene although he only came into the kitchen after being called by one of the intruders to come and open the door. Both Thokozani and Senzeni knew the third appellant as their relative. The third appellant although he remained outside, he knew and associated himself with his co-assailants.

[24] The third appellant in responding to a request to open the door by his co-assailants he performed an act assisting his co-assailants during the commission of the crime. In *S v Mgedezi* 1989 (1) SA 687 (A), it was held that in the absence of proof of a prior agreement, the following is required, the person must have been present at the scene, must have been aware of the attack, he must have intended to make common cause with those who were actually perpetrating the assault, he must have manifested his sharing of a common purpose by himself carrying out some act of association with the conduct of others, he must have had the requisite *mens rea*. The kicking of the door to open it for the assailants is a conduct facilitating the stopping of the attack in the rondavel. The guilt of the third appellant was not proved beyond reasonable doubts.

[25] The regional magistrate on the first and second appellants imposed a sentence of life imprisonment. The court found no substantial and compelling circumstances for a court to impose a lesser sentence. The regional magistrate stated that the only factor it considered which distinguishing the third and fourth appellants from the first and second appellants was the previous convictions. The first appellant has four (4) previous convictions; namely-two being housebreaking for which eighteen (18) months and two (2) years imprisonment respectively were imposed, one possession of drugs for which twelve (12) months imprisonment was imposed and another possession of drugs for which he was cautioned and discharged. The second appellant had two previous convictions; namely-one housebreaking for which eighteen (18) months imprisonment was imposed and one (1) possession of property suspected to be stolen for which a sentence of six (6) months imprisonment with an alternative to pay a fine of five hundred rand (R500.00) which was wholly suspended was imposed.

[26] The previous convictions of the first and second appellants, in view of the crimes they stood convicted, do not in any substantial manner set them apart from their co-perpetrators. It appears to me that a case could have been made to consider a role played by each assailant during the attack to see whether it set that assailant apart from his co-perpetrators for sentence purposes. However, without giving any reasons, the regional magistrate did not embark on that process. This court can only consider the grounds for differentiation considered by the trial court whether they have merit. In my view, the learned regional magistrate erred in his

approach to the previous convictions as substantial distinguishing feature for sentence purposes. The main principle is that there must be uniformity in the sentences imposed. The State in the hearing of the appeal conceded that the differentiation the regional magistrate found cannot be supported. The regional magistrate having found substantial and compelling circumstances for a court to impose a lesser sentence than the prescribed minimum sentence of life imprisonment in respect of third and fourth appellant, it follows that it ought to have so found in respect of the first and second appellant in respect of the count of murder.

[27] The appellants for no reason attacked the deceased and his relatives in the privacy of their home. They acted as a gang and were armed with firearms. They terrorised the entire family for a long period. They exercised extreme violence firing gun shots in a confined space occupied by people. They stabbed and assaulted people for no reason. The victims were not armed and did not resist. They shot, stabbed and killed the deceased. They terrorised the people demanding money. They escaped the sentence of life imprisonment by the skin of their teeth.

[28] The State during the hearing of the appeal conceded that an appropriate sentence to be twenty-five (25) years imprisonment. The appellants were arrested in 2017 and were sentenced in November 2021; they had been in custody awaiting trial for a period of four (4) years. It is our view, that a fair, just and fair effective sentence is twenty-five (25) years imprisonment.

[29] It is ordered as follows:

1. The appeal against conviction of first, second, third and fourth appellants is dismissed.
2. The appeal against sentence of third and fourth appellants is dismissed.
3. The appeal against sentence of life imprisonment of first and second appellants is upheld.
4. The sentence of life imprisonment on count 2 (Murder) imposed on the first and the second appellants is set aside. It is replaced with a sentence of twenty-five (25) years imprisonment. The sentence of fifteen (15) years on Count 1 to be served concurrently with the sentence of twenty-five (25) years imprisonment on count 2. The effective sentence is twenty-five (25) years imprisonment. The sentence is ante-dated to 3 November 2021.
5. The sentence of fifteen (15) years imprisonment imposed on the first, second, third and fourth appellants for robbery with aggravating circumstances (count 1) is confirmed. The sentence of twenty (20) years imprisonment imposed on the third and fourth appellants on the count of Murder (Count 2) is confirmed. The sentences to be served concurrently. The effective sentence is twenty (20) years imprisonment. The sentence is ante-dated to 3 November 2021.
6. In respect of each appellant, no order is made in terms of s103 (1) of the Firearms Control Act 60 of 2000.

Mngadi J

I agree

Nirghin J

APPEARANCES

Case Number: AR 123/22

For the Appellants: Adv B Mbatha
Justice Centre
PIETERMARITZBURG

For the Respondent: Adv T.L. Mlondo

Instructed by: Deputy Director Public Prosecutions
PIETERMARITZBURG

Heard on: November 2025

Judgment delivered on: