



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, MAKHANDA)**

Not reportable

Case no. CA&R 155/2025

In the matter between:

MASIBULELE TOM

First appellant

LOYISO SICHOLO

Second appellant

FEZEKILE NDONGENI

Third appellant

and

THE STATE

Respondent

JUDGMENT

LAING J

[1] This is an appeal against conviction and sentence. The appellants were convicted of the murder of Mr Mandilakhe Njali on 1 April 2022 at Braelyn Extension 10, East London, and were sentenced to life imprisonment.

In the court a quo

[2] The state presented the evidence of Mr Mzwanele Mqonqo, who testified that he had been with his girlfriend, Ms Zodwa Vuyoleko, on the day in question. They had encountered the three appellants, who asked them whether they had seen Ms Vuyoleko's brother, Mr Njali. They alleged that he had been causing trouble in the area. A short while later, Mr Mqonqo and his girlfriend came across the appellants again, who were assaulting Mr Njali. He had an open wound on his face, injuries to his legs, and broken fingers. The first and third appellants were wielding lengths of electric cable, the second was using a knobkierie. They told the witness that Mr Njali had stolen a TV, a laptop, and food. Mr Mqonqo attempted to intervene. Ms Vuyoleko ran to call her father, who arrived with her other brother, Mr Baxolele Vuyoleko. They managed to calm the situation. Mr Njali's father asked him what he had done with the items that he had taken. Mr Njali was unable to answer; he had been severely beaten. The witness, his girlfriend, and Mr Vuyoleko took Mr Njali to a nearby hospital where he died soon afterwards.

[3] Under cross-examination, Mr Mqonqo stated that about seven other community members had been present, mostly women. They had been standing at some distance away. Only the three appellants had carried out the assault. The witness said that Mr Njali had been in possession of a backpack at the time, but did not see whether it had contained any stolen items. He agreed that Ms Vuyoleko's father had shouted at Mr Njali, accusing him of stealing. He denied, however, that Mr Njali's family had assaulted him or that other community members had joined in.

[4] Ms Vuyoleko corroborated much of Mr Mqonqo's testimony. They encountered the three appellants while walking to Ms Vuyoleko's home. Later, they saw Mr Njali and told him that the appellants were looking for him. When they heard that the appellants had found Mr Njali, they went to investigate and found him being assaulted. Ms Vuyoleko differed from Mr Mqonqo in relation to what weapons each of the appellants had used, but she confirmed that they had been armed with a stick and lengths of electric cable. They had chased Ms Vuyoleko away. She went to fetch her father, who arrived about 30 minutes later with her brother. The appellants said that Mr Njali had stolen various items. Ms Vuyoleko's father asked Mr Njali what he had done with the items but Mr Njali had been unable to speak. Approximately 20

members of the community were present, standing at some distance away. Ms Vuyoleko was adamant that the appellants, no-one else, had assaulted Mr Njali.

[5] Ms Vuyoleko's father, Mr Dongisiswe Thabakaswe, testified that his daughter had come to his home to inform him that Mr Njali was being severely assaulted. They proceeded to the scene, where Mr Thabakaswe found Mr Njali lying on the ground with foam coming from his mouth. He did not see who had assaulted him. He asked his son, Mr Baxolele Vuyoleko, to take Mr Njali to hospital.

[6] Testifying in his own defence, the first appellant said that the local community had been summoned to a meeting on the date in question. They had discussed the rampant crime rate in the area and named Mr Njali as a suspect. By chance, he happened to have been in the nearby vicinity. Members of the community confronted him and demanded that he open a backpack that he was carrying. They discovered various lengths of electric cable. Some of the community members began to hit Mr Njali. His sister, Ms Vuyoleko, arrived, together with her boyfriend and her son. She accused Mr Njali of theft and struck him on the head and on the body with a piece of plank. Ms Vuyoleko's son also assaulted him, saying that he had stolen his cellphone. The first appellant said that he had been part of a crowd of onlookers, demanding that Mr Njali tell the truth. Shortly afterwards, Mr Vuyoleko arrived, followed by Mr Thabakaswe. They, too, began to beat Mr Njali, calling him a thief. Mr Thabakaswe expressed his gratitude to the community that Mr Njali was still alive. The first appellant denied that he had participated in the assault. He refuted the state witnesses' version of events, saying that they were guilt ridden because of their involvement in the incident.

[7] During cross-examination, the first appellant admitted that he had demanded from Mr Njali the details of the items that he had stolen so that they could be recovered. Mr Njali had no visible injuries before Ms Vuyoleko and other family members arrived. He denied that the remaining appellants had been involved in the assault.

[8] The second appellant corroborated most of the first appellant's version. He denied having assaulted Mr Njali. He said that community members had assaulted

Mr Njali with sticks and 'switches' before Ms Vuyoleko had arrived with her boyfriend, her son, and other members of the family. They joined in the attack, which became more intense. Mr Vuyoleko trampled on Mr Njali's head, asking him why he was stealing other people's possessions. The second appellant said that he had asked Mr Njali why he did not simply say where he had concealed the items that he had stolen. The second appellant refuted the version provided by the state witnesses, suggesting that they had implicated the appellants because they had 'sold out' Mr Njali.

[9] The third appellant provided further corroboration. He said that Mr Njali had refused to cooperate when requested to open his backpack; this had led to the assault. He denied having been involved. The attack on Mr Njali became more serious after Ms Vuyoleko, her son, and other family members joined in. Mr Vuyoleko stood on Mr Njali's throat. Mr Thabakaswe later thanked the community members for having left Mr Njali alive. The third appellant said that Ms Vuyoleko had implicated the appellants because she knew them from elsewhere; she had only just arrived in the community and did not know many people. Mr Mqonqo implicated the appellants out of loyalty to Ms Vuyoleko.

Judgment

[10] In a brief judgment, the court a quo referred to the post-mortem report, observing that Mr Njali had suffered multiple long bone fractures. He had been beaten to death. The court dealt with the doctrine of common purpose, stating that the key issue was whether the appellants had actively associated themselves with the killing of Mr Njali. It rejected, unhesitatingly, the possibility that Mr Njali's family members had been responsible. Whereas family members may sometimes act violently against another, said the court, they would not go so far as to kill a brother or a son. Furthermore, the court did not accept that a community could watch family members kill one of their own and then do nothing when three innocent members of the community were charged. The court convicted all three appellants.

[11] Regarding sentence, the court a quo emphasised that members of a community should not be allowed to take the law into their own hands. It acknowledged, inter alia, the findings set out in the pre-sentence reports before deciding that there were no substantial and compelling circumstances to justify a departure from the prescribed sentence. It imposed life imprisonment.

On appeal

[12] The appellants have an automatic right to appeal. Regarding conviction, counsel referred to *S v Van der Meyden*,¹ where Nugent J stated that a trial court's conclusion must account for all the evidence; none of it may simply be ignored.² Similarly, in *S v Chabalala*,³ the Supreme Court of Appeal, per Heher AJA, held that the proper approach was to weigh up all the elements that pointed towards the guilt of the accused against all those that indicated his or her innocence, properly considering inherent strengths and weaknesses, probabilities and improbabilities on both sides, and then decide whether the balance weighed so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt. A trial court must avoid the temptation to latch on to one seemingly obvious aspect without assessing it in the context of the full picture presented in evidence.⁴ Counsel contended that the court a quo had erred in its assessment and rejection of the appellants' evidence. It erred in finding that the state had proved its case beyond reasonable doubt.

[13] In contrast, counsel for the state pointed out, with reference to *S v Francis*,⁵ that the powers of a court of appeal to interfere with a trial court's findings of fact were limited. In the absence of any misdirection, a trial court's conclusion was presumed to be correct because it had the advantage of seeing, hearing, and appraising a witness. It was only in exceptional cases that a court of appeal would be

¹ 1999 (1) SACR 447 (W).

² At 450A–B.

³ 2003 (1) SACR 134 (SCA).

⁴ At para 15.

⁵ 1991 (1) SACR 198 (A).

entitled to interfere with a trial court's evaluation of oral testimony.⁶ This was reiterated in *S v Hadebe and Others*.⁷ In the absence of a demonstrable and material misdirection on the part of the trial court, its findings of fact must be presumed to be correct and will only be disregarded if the recorded evidence showed them to be clearly wrong.⁸ Counsel argued that the court a quo weighed the evidence of the state witnesses against that of the appellants, correctly considering the matter in its totality. Furthermore, counsel asserted, with reference to *Director of Public Prosecutions, Limpopo v Molohe and Another*,⁹ that simply because the court did not refer to certain aspects in its judgment did not mean that these were not considered.

[14] I am inclined to agree with the state. From the record, it is apparent that the court a quo engaged closely with the testimonies of the various witnesses, seeking clarity where necessary and placing questions of its own to satisfy its understanding of the events that occurred. Whereas the judgment was noticeably terse, there is no indication that the conclusion reached was not based on the evidence presented. There is, in the absence of a demonstrable and material misdirection, no reason to interfere with the court's findings of fact. In that regard, it is highly improbable that the main perpetrators of the assault, as vicious as it was, were Mr Njali's own sister, brother, and father — as well as Ms Vuyoleko's 11- or 12-year-old son. For the family to have brutally beaten one of their own in full view of the community members present, thanking them for having spared Mr Njali before loading him into a motor vehicle and taking him to a local hospital, is entirely implausible.

[15] The state witnesses were consistent in their testimonies that the three appellants, nobody else, had assaulted Mr Njali and caused the injuries that led to his death. This evidence on its own was sufficient to discharge the onus — irrespective of who inflicted the fatal wound. The doctrine of common purpose was correctly applied. If there had been any basis upon which to reject the state witnesses' evidence, then the doctrine was still capable of application, even on the appellants' version. Where there is no prior agreement to commit a criminal act,

⁶ At 204C–E.

⁷ 1997 (2) SA 641 (SCA).

⁸ At 645E.

⁹ 2020 (2) SACR 343 (SCA), para 55. See, too, *S v Barendse and Another* 2023 JDR 1714 (WCC), para 21.

liability arises from an active association with and participation in an offence, accompanied by the necessary intention.¹⁰ The erstwhile Appellate Division listed the requirements in *S v Mgedezi and Others*.¹¹ These can be summarised as follows within the context of the present matter: (a) X must have been present at the scene where the assault was committed; (b) X must have been aware of the assault on Y by somebody else; (c) X must have intended to make common cause with the person or persons committing the assault; (d) X must have manifested his or her sharing of a common purpose by performing some act of association with the particular conduct of the others; and (e) X must have intended to kill Y.¹²

[16] On the appellants' version, Mr Njali had acquired a reputation as a troublemaker (a *phara phara*). The community wished to call him to account. The appellants were present when the community confronted Mr Njali and they were most certainly present at and aware of the assault that followed. From their ability to recall what was said to Mr Njali, how he responded, what was retrieved from his backpack and the explanation that he gave, how community members began to hit him with sticks and switches, and the injuries that he sustained, it is simply improbable that the appellants never participated. At the very least, the first and second appellants demanded that Mr Njali tell the truth and reveal the whereabouts of the stolen items. This was done so that they and other young men in the community could retrieve them. The first and second appellants undoubtedly intended to make common cause and to share a common purpose with the community members present to bring about instant justice. Whereas there was no evidence that the third appellant spoke to Mr Njali, there was, nevertheless, every indication from his testimony that he, too, associated himself with the attack and shared the same common purpose. He was at the scene from the beginning until the end and could describe it in fine detail. If he had any qualms about making common cause with the others, then he would have unambiguously stepped away from the scene and disassociated himself from the attack. He did not. The third appellant's failure to have done so amounted to a manifestation of his having shared a common

¹⁰ S V Hooror *Snyman's Criminal Law* 7 ed (2020), at 227–8.

¹¹ 1989 (1) SA 687 (A), at 705I–706C.

¹² Hooror, *ibid*.

purpose with the others to ensure that justice was meted out — on the community's own terms.

[17] For the appellants to have shared a common purpose to kill, it was unnecessary for intention in the form of *dolus directus* to have been present.¹³ In *S v Papu and Others*,¹⁴ a full bench confirmed, per Chetty J, that *dolus eventualis* was sufficient. All that was required was for the appellants to have foreseen the possibility that the conduct of the community members with whom they associated could have resulted in Mr Njali's demise — and that they reconciled themselves to such possibility. The unhappiness of the community members at the meeting beforehand, together with the sheer ferocity of their assault upon Mr Njali, using sticks and switches, would undoubtedly have given rise to the foreseeability of his death in the minds of the appellants. Their decision to have remained at the scene and to have continued their participation in the attack, irrespective of the nature or extent of their individual roles, was enough. They accepted the possibility that Mr Njali could have been killed.

[18] It was, however, the court a quo's finding that the three appellants alone carried out the assault. For the reasons already explained, this must be presumed to be correct. The record does not demonstrate that such finding was clearly wrong and that it must be disregarded. I am not persuaded that this is an exceptional case, warranting interference.

[19] Turning to sentence, counsel for the appellants cited *S v Fazzie and Others*,¹⁵ where the erstwhile Appellate Division, per Van Winsen AJA, confirmed that the determination of sentence was pre-eminently a matter of discretion for the trial court. Where it is clear, however, that the trial court ought to have had regard to certain factors but failed to do so, or that it ought to have assessed the value of such factors differently from how it did, then this would constitute a misdirection, entitling a court of appeal to consider sentence afresh.¹⁶ Counsel submitted that the court a quo should have found that there were substantial and compelling circumstances. These

¹³ Hoor, op cit, at 229.

¹⁴ 2015 (2) SACR 313 (ECB).

¹⁵ 1964 (4) SA 673 (A).

¹⁶ At 684A–C.

were apparent from the evidence, especially the uncontested fact that they were all first offenders.

[20] Counsel for the state referred to *S v Malgas*,¹⁷ where the Supreme Court of Appeal, per Marais JA, reiterated that a court of appeal cannot, in the absence of a material misdirection, approach the question of sentence as if it were the trial court. It cannot substitute the sentence arrived at simply based on preference. This would usurp the trial court's discretion.¹⁸ Counsel mentioned several aggravating factors in the present matter: Mr Njali never placed anyone's life in danger; he had no chance of defending himself against the appellants, who were armed and who outnumbered him; the appellants beat him to death, using excessive blunt force to break several of his bones in the process; they displayed a total disregard for human life; the appellants took the law into their own hands, instead of reporting suspected criminal activities to the police; and they showed no remorse for their actions, blaming Mr Njali's own family for his death. Vigilante justice, said counsel, must not be tolerated.

[21] Shortly after the decision in *Malgas*, the Constitutional Court, in *S v Dodo*,¹⁹ emphasised the concept of proportionality regarding the period of incarceration to be imposed for the offence committed. The court stated that an 'offence' comprised all the factors relevant to the crime itself, as well as the personal circumstances of the offender. To warrant the deprivation of his or her freedom, it was necessary to show that the period of incarceration was reasonably required to curb the offence and to punish the offender. It must be proportionate to the offence.²⁰ In *S v Vilakazi*,²¹ several years later, the Supreme Court of Appeal confirmed the relevance of the principle. The period of incarceration must be proportionate to what the offender deserved, no less and no more. A prescribed sentence cannot be assumed, *a priori*, to be proportionate in any case and must be determined upon consideration of the circumstances. The essence of *Malgas* and *Dodo* was that disproportionate

¹⁷ 2001 (2) SACR 1222 (SCA).

¹⁸ Para 12.

¹⁹ 2001 (1) SACR 594 (CC).

²⁰ Para 37.

²¹ 2009 (1) SACR 552 (SCA).

sentences must not be imposed; courts were not vehicles for injustice.²² The court went on to hold, however, that:

'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.'²³

[22] In the present matter, the appellants were all in their mid- to late 30s at the time of sentence. Both the first and second appellant have children who stay with their respective mothers; they contribute towards their maintenance. The third appellant has no dependents. Neither the first nor the second appellant completed secondary school; the third appellant passed grade 12. All the appellants were employed as construction or general workers, earning incomes commensurate with such positions. None had any previous convictions.

[23] There was, overall, nothing remarkable about the personal circumstances of any of the appellants. Against this must be balanced the brutal killing of Mr Njali, involving 'multiple long bone fractures', as the post-mortem report described his injuries. He would have died an agonising death, in full view of the community members present but ultimately alone and at the mercy of the appellants. Whereas the frustration and anger of a community in the face of rampant crime and apparent apathy on the part of the police may explain the context in which the killing occurred, vigilante or mob justice can never be condoned. For a community to assume responsibility for administering its own notion of justice to individuals suspected of criminal activities invites the anarchy and terror that characterise a society in which the rule of law no longer operates. In the present matter, with reference to the *Zinn* triad,²⁴ the nature of the crime and the interests of society considerably outweigh the personal circumstances of the appellants. The prescribed sentence was not disproportionate to the offence.

²² Para 18.

²³ Para 58.

²⁴ *S v Zinn* 1969 (2) SA 537 (A), at 540G.

[24] Consequently, I would make the following order:

The appeal against conviction and sentence is dismissed.

JGA LAING
JUDGE OF THE HIGH COURT

I agree.

SG POSWA
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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