



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

CASE NO.: CA &R 77/25

Reportable	Yes
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In the matter between:

SIYAMTHANDA RUMBU

Appellant

and

THE STATE

Respondent

ORDER

The following order was issued:

1. The appeal against the conviction is upheld.

2. The appellant's conviction of murder and robbery with aggravating circumstances and his sentences of 20 years and 10 years imprisonment respectively are set aside.
3. The order of the court *a quo* is hereby substituted with the following order:
 - 3.1 The accused is found not guilty in respect of both murder and robbery with aggravating circumstances set out in counts 1 and 2 of the charge sheet.

**REASONS FOR THE ORDER
GRANTED ON 15 APRIL 2026**

NOTYESI AJ

Introduction

[1] The Appellant stood trial in the Regional Court, KwaMaqoma, on three counts. In count 1, he was charged with murder, it being alleged that on or about 2 October 2016, and at or near Tini's Location, Fort Beaufort, in the Regional Division of the Eastern Cape, he unlawfully and intentionally killed one Mzukisi Nikani by stabbing him with a knife.

[2] The charge further alleged that count 1 fell within the ambit of section 51(2) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”), which prescribes a minimum sentence of life imprisonment unless the court finds the existence of substantial and compelling circumstances justifying the imposition of a lesser sentence. In count 2, the Appellant was charged with robbery with aggravating circumstances, as defined in section 1 of the Criminal Procedure Act 51 of 1977, in that on or about 2 October 2016, and at or near Tini’s Location, Fort Beaufort, he unlawfully and intentionally assaulted the complainant, Vuyokazi Duda, and with violence took from her an amount of R400, being her property. The aggravating circumstances alleged were that a knife or similar object was used during the commission of the offence. This count was likewise read with the provisions of section 51(2) of the CLAA. In count 3, the Appellant was charged with assault with intent to do grievous bodily harm, in that on or about 2 October 2016, and at or near Tini’s Location, Fort Beaufort, he unlawfully and intentionally assaulted Nompucuko Qeqe by stabbing her with a knife or similar instrument, with the intent to cause grievous bodily harm.

[3] The Appellant pleaded not guilty to all the charges. He was legally represented throughout the trial and elected to proceed without assessors in terms of the Magistrates’ Courts Act 32 of 1944.

[4] At the conclusion of the trial, the Appellant was convicted on counts 1 and 2 and acquitted on count 3. In respect of count 1, he was sentenced to twenty (20) years' imprisonment, and in respect of count 2 he was sentenced, to ten (10) years' imprisonment, of which two and a half (2½) years were ordered to run concurrently with the sentence imposed on count 1. The effective sentence was twenty-five (25) years' imprisonment.

[5] Aggrieved by the outcome, the Appellant applied for and was granted leave to appeal on 29 April 2025. Leave was granted against conviction only. The appeal was accordingly heard before this Court on 15 April 2026, whereupon the following order was made:

- (a) The appeal against conviction is upheld.
- (b) The convictions of murder and robbery with aggravating circumstances, together with the sentences of 20 years' imprisonment and 10 years' imprisonment respectively, are set aside.
- (c) The reasons for the order would follow.

[6] These are the reasons for the order.

[7] The crisp issue for determination was whether the Appellant was properly convicted by the Regional Court.

Material Facts

[8] The salient facts giving rise to this appeal may be summarised as follows. In discharging its onus, the State called four witnesses. The first witness, Nompucuko Qeque, testified that in the early hours of 2 October 2016, at approximately 03h00, she was asleep at her home when she heard Vuyokazi Duda calling her name. Vuyokazi informed her that Mzukisi was dying. The witness knew the deceased, Mzukisi Nikani, as a person who repaired electrical appliances for her.

[9] The witness immediately went outside to ascertain what had occurred. Upon exiting her gate, she observed the deceased lying on his back near the gate. She called out his name, but he did not respond. At that moment, a person whom she identified as the Appellant suddenly appeared and grabbed her by the front of her clothing. She testified that she knew the Appellant as he resided on a nearby street. The witness further testified that the Appellant was armed with a sharp object, which she estimated to be approximately 15 cm in length. She grabbed the Appellant's wrist in an attempt to restrain him, and a struggle ensued. During the altercation, she was overpowered and fell to the ground, whereupon she called out to her sister for assistance.

[10] She testified that she informed her sister that the Appellant had attacked her. The Appellant then freed himself and fled the scene. Her sister arrived shortly thereafter and assisted her. The police and an ambulance were

summoned. At that stage, the deceased was still alive and complained that he was feeling cold. The witness was unable to state when the deceased passed away. He was subsequently taken to East London for medical attention.

[11] During the scuffle, the witness heard the Appellant say, “You talk too much.” She further testified that she observed two unknown young men standing near the deceased. She was unable to identify them and did not observe them committing any acts of violence. Importantly, they did not interact with her. The witness sustained only a minor graze to her finger when she fell and did not suffer any further injuries. She testified that visibility at the scene was afforded by high-mast lighting situated approximately 100 metres away, which was illuminated at the time. She maintained that she was able to identify the Appellant under these lighting conditions and that her identification was not mistaken. However, she conceded that she did not witness the Appellant stabbing the deceased or committing the robbery. She further stated that she does not know who attacked and killed the deceased, as she found him already lying on the ground.

[12] The second State witness, Victor Banjwa, testified that at approximately 03h00 on 2 October 2016, he was asleep at home with his girlfriend, Andiswa Nonyathi, when she woke him and informed him that someone was crying outside. He advised her not to go outside due to the late hour; however, she nonetheless did so. Approximately three minutes later, she called out his name

repeatedly. He then dressed and went outside. He remained inside the yard, near the corner, from where he observed a group of four men and four women outside. Upon enquiring from his girlfriend as to what was happening, she urged him to come out as they were about to be raped. He was reluctant to leave the yard as he was alone and outnumbered by four unknown men. He recognised the women as persons residing nearby but was unable to identify any of the men. He armed himself with half a brick and threw it at one of the men who was standing over his girlfriend. He then threw another brick towards the group. He also observed a man lying on the ground near the road, bleeding. The witness testified that visibility was poor and that, although there were street lights, they did not provide sufficient illumination to enable identification.

[13] He confirmed under cross-examination that he could not identify any of the four male assailants.

[14] The State further called Vuyokazi Duda. She testified that she knew both the Appellant and the deceased. On the day in question, she had been in the company of the deceased. They had initially been at the home of Nompucuko Qeqe before proceeding to the deceased's home, where they consumed alcohol, including approximately one litre of Paarl Perlé. At about 03h00, they decided to return to Nompucuko's residence. Whilst en route, they were confronted by four men who split into two groups. Two approached the deceased, whilst the other two confronted her. The men demanded money and cellphones. One of

them inserted a knife into her mouth, forced her to the ground, tore her clothing, and robbed her of R400 in cash and tobacco. She testified that she was unable to identify any of the assailants and did not know who had assaulted the deceased.

[15] She further testified that she screamed and called out to Nompucuko Qeqe for assistance. When Nompucuko arrived, the deceased was already lying on the ground. One of the men approached Nompucuko, and a struggle ensued. She heard Nompucuko say, "*Siyamthanda, what are you doing?*" Shortly thereafter, Andiswa emerged and called for Victor, who then came out and threw stones at the assailants, causing them to flee. She then attended to the deceased, whom she found bleeding. Attempts to summon an ambulance were unsuccessful, and the police were contacted. She confirmed that she could not identify any of the perpetrators. Although she had consumed alcohol, she maintained that this did not impair her ability to observe events.

[16] The State also led the evidence of Andiswa Nonyathi. She testified that at approximately 03h00, she heard cries outside and went out to investigate. She observed the deceased lying on the ground, Vuyokazi seated nearby, and a man standing over her. She then observed four men in total: one standing over Nompucuko, one over Vuyokazi, one near the deceased, and another whose precise position she could not clearly describe. Upon going outside, she was accosted by one of the men, who stripped and assaulted her, stabbing her while she called for assistance. After she called her boyfriend, Victor emerged and

threw a brick, whereupon the four men fled the scene. She testified that visibility was poor and that she was unable to identify any of the assailants. She did not observe the Appellant stabbing the deceased.

[17] At the close of the State's case, the Appellant successfully applied for his discharge in respect of count 3. The defence thereafter adduced the evidence of the Appellant and one witness, Asenathi Lowana.

[18] The Appellant testified that on the night in question, he had been at Luke's Tavern in the company of Asenathi Lowana, consuming alcohol. They left the tavern at approximately 02h00 and proceeded towards his home, passing near the residence of Nompucuko Qeqe. As they were passing, he heard Nompucuko say, "Here they are coming." He did not understand the remark and responded by telling her to stop what she was doing. He testified that although he recognised her voice, he could not see her due to poor visibility. He denied any involvement in the offences and disputed that he had killed the deceased or robbed Vuyokazi Duda. He further suggested that Nompucuko falsely implicated him due to a prior incident in which one of his associates had been accused of robbing a member of her family.

[19] The Appellant's version was corroborated by Asenathi Lowana, who confirmed that they had been together at the tavern, that they left at approximately 02h00, and that the Appellant proceeded home thereafter. He denied that the Appellant was involved in the commission of the offences.

The findings of the court a quo

[20] The central issue before the court *a quo* was whether the Appellant had killed the deceased and committed the offence of robbery. Having analysed the evidence, the court *a quo* became satisfied that the evidence of Nompucuko Qeqe was sufficient to place the Appellant at the scene. The court *a quo* was also satisfied that the Appellant was sufficiently identified and placed at the scene of the offences. The court therefore concluded that on the application of the doctrine of common purpose, the Appellant was guilty of both murder and robbery with aggravating circumstances. The court had invoked the doctrine of common purpose at the end of the trial when it was delivering the judgment. The common purpose was not averred in the charge sheet.

[21] The main ground of appeal is that the court *a quo* had erred in its assessment of the evidence and consequently, incorrectly concluded that the guilt of the Appellant had been proved beyond a reasonable doubt. Counsel for the Appellant had submitted that on a proper application of the factors set out in *S v Mthetwa*¹, the identification of the Appellant by the witness, Nompucuko Qeqe, was unreliable. In *Mthetwa*, the court has emphasised that it is not enough for the identifying witness to be honest; what was crucial was that the reliability of the witness's observations should be tested. This depends on various factors, such as lighting; visibility; eyesight; the proximity of the witness; the

¹ *S v Mthetwa* 1972 (3) SA 766 AD.

opportunity for observation, both as to time and situation; the extent of prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of any identification parade; and, of course, the evidence by or on behalf of the accused. The list is not exhaustive. These factors, or such of them as are applicable in a particular case, are not individually decisive, but must be weighed against one another in the light of the evidence and the probabilities.

[22] Counsel for the Appellant had contended that the court had not considered these factors in light of the entirety of the evidence adduced at trial. It was further pointed out that the court ought to have taken into account the allegation that Nompucuko Qeqe had consumed alcohol at the time she identified the Appellant. The primary contention was that the court a quo had unduly preferred the evidence of Nompucuko Qeqe, while disregarding the evidence of the Appellant and that of his witness.

[23] On the contrary, counsel for the State had submitted that the evidence of Nompucuko Qeqe had sufficiently placed the Appellant on the scene at the time of the incident. Relying on the case of *Nkomo & Others v State*², counsel submitted that both the Appellant and Nompucuko Qeqe had confirmed that they knew each other for a long time prior to the incident, and that it was not very dark at the scene, according to Nompucuko Qeqe. Based on those

² *Nkomo & Others v State* (130/2022) [2024] ZASCA 61 (26 April 2024).

considerations, counsel for the State submitted that there was no room for a mistaken identification and, therefore, the identification of the Appellant by Ms Qeque is reliable, so the contention of the State was.

[24] The State conceded that there was no reference to, or indication of, reliance on the doctrine of common purpose in the charge sheet, nor was any application made to amend the charge sheet in terms of section 86 to include such averments. The State further conceded that there was no proof of a common purpose during the trial. In this regard, the State acknowledged that the court *a quo* erred in finding that the Appellant had acted in furtherance of a common purpose with the other unknown assailants.

[25] The State's counsel relied on the authority of *Ntuli v S*,³ where the court *a quo*'s reliance on the doctrine of common purpose on the conviction of the Appellant had been found to amount to a material misdirection and thus entitling the court to interfere with the court *a quo*'s determination of the guilt of the Appellant and accordingly set aside the conviction.

[26] In *Ntuli v S*, the court held that the failure by the State to plead common purpose in the charge sheet, to seek an amendment to the charge sheet at any stage before judgment, or to prove common purpose, deprived Mr Ntuli of the opportunity to properly prepare and present his defence, which is central to the right to a fair trial. The convictions and sentences on counts 6 to 8 were

³ *Ntuli v S* (128/2023) [2025] ZASCA 114 para 15.

accordingly set aside, thereby reducing Mr Ntuli's effective sentence to 15 years' imprisonment for the remaining convictions.

Findings and evaluation

[27] It is common cause that, in convicting the Appellant, the court a quo had relied on the doctrine of common purpose, even though it was neither pleaded in the charge sheet nor proved during the trial, and no amendment to the charge sheet was sought prior to judgment. It is on that basis that the State concedes that the conviction should not stand. This must be examined.

[28] In *Msimango v S*,⁴ the court held:

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

“(3) Every accused person has a right to a fair trial, which includes the right-

(a) to be informed of the charge with sufficient details to answer it.”

⁴ *Msimango v S* (698/2017) [2017] ZASCA 181 (01 December 2017).

[29] In *Msimango v S*, the court further considered, in detail, the right of an accused to a fair trial and remarked:

‘It also stated that the requirement embodied in s 35(3) is not merely formal, but substantive. It goes to the very heart of what a fair trial is. It requires the State to furnish every accused with sufficient details to place him or her in a position to understand the actual charge he or she is facing. In the language of s 35(3)(a), this is intended to enable such an accused person to answer and defend himself or herself in the ensuing trial. Its main purpose is to banish any trial by ambush. This is so because our criminal justice system is both adversarial and accusatory.’

[30] Undoubtedly, it was manifestly wrong for the court a quo to adopt such an approach of relying on common purpose. It was impermissible for the court a quo to invoke the doctrine of common purpose in the circumstances of this case, where the accused had not been informed of that possibility, nor did the evidence establish common purpose. Self-evidently, the court a quo committed a misdirection in this regard. This Court is therefore entitled to interfere with the findings of the court a quo.

[31] In *S v Ntsele*⁵, it was stated that an appeal court can only interfere with the findings of a trial court if it is persuaded that its conclusions are incorrect and not supported by the facts. This is a classic case where the court *a quo* is incorrect in its findings about common purpose.

⁵ S v Ntsele 1998 (2) SACR 178 at d-h.

[32] I agree with counsel for the State. The conviction of the Appellant cannot stand. First, the only evidence presented by the State was that the Appellant was part of a group of four men who subsequently committed the offences. Ms Duda, the complainant in the robbery, testified that the Appellant was not one of the two persons who robbed her. The Appellant was neither seen nor identified as the person who killed the deceased. There was simply no evidence that the Appellant had committed any of the offences set out in counts 1 and 2. There was no suggestion or evidence that the Appellant was acting in furtherance of a common purpose with those unknown assailants or that he was part of an agreement or a participant in their actions.

[33] According to Nompucuko Qeqe, she only emerged from her house after the deceased was already lying on the ground. She did not see anyone stabbing or otherwise harming the deceased. I have already pointed out that there was no evidence that the group was acting in furtherance of a common purpose. Moreover, the State did not charge the Appellant on the basis of common purpose.

[34] The identification of the Appellant is also unsatisfactory. I disagree with the assessment of the evidence by the court *a quo*. Evidence must be assessed as a whole and not in a piecemeal fashion. In *S v Singh*⁶, it was held:

⁶ *S v Singh* 1975 (1) SA 227 (N)

‘Because this is not the first time that one has been faced on appeal with this kind of situation, it would perhaps be wise to repeat once again how a court ought to approach a criminal case on fact where there is a conflict of fact between the evidence of the State witnesses and that of an accused. It is quite impermissible to approach such a case thus: because the court is satisfied as to the reliability and the credibility of the State witnesses that, therefore, the defence witnesses, including the accused, must be rejected. The proper approach in a case such as this is for the court to apply its mind not only to the merits and the demerits of the State and the defence witnesses but also to the probabilities of the case. It is only after so applying its mind that a court would be justified in reaching a conclusion as to whether the guilt of an accused has been established beyond all reasonable doubt. The best indication that a court has applied its mind in the proper manner in the abovementioned example is to be found in its reasons for judgment including its reasons for the acceptance and the rejection of the respective witnesses.’

[35] The court a quo was impressed by Nompucuko Qeqe and preferred her version over that of the defence witnesses. However, the suggestion that the defence evidence contained internal contradictions is not borne out by the record. Nompucuko Qeqe was a single witness who had apparently consumed alcohol, and her identification of the Appellant was not corroborated. The other State witnesses gave materially different accounts of the events. This Court also takes into account that these witnesses had also consumed alcohol throughout the day until approximately 03h00. There was no evidence regarding the impact of such consumption. Nonetheless, this is a factor to be considered in assessing

the risk of mistaken identification and suggestibility. The court a quo failed to consider these factors.

[36] The witnesses contradicted themselves regarding the extent of the visibility provided by the mast light. In these circumstances, this Court cannot safely conclude that the identification by a single witness was reliable.

[37] In *S v Sithole & Others*,⁷ the court restated this salutary warning:

'In the present case the learned magistrate quite correctly reminded herself of what was said in R v Shakelele and Another 1953 (1) SA 656 (T) concerning evidence of identification. It was pointed out in that case that an acquaintance with the history of criminal trials reveals that gross injustices are not infrequently done through honest but mistaken identification. A court must always bear in mind, then, that in all such cases there is an inherent prospect that even an honest witness might mistakenly identify a person. The fact that witnesses who attend identification parades sometimes point out persons who are known not to have committed the offence serves to underline the potential which exists for error.

Where a conviction depends on that evidence alone, a court must quite obviously be satisfied that the witness is truthful. What is perhaps more important, though, is that there must be no reasonable doubt that the witness is not mistaken. In our view that will generally require something more than the mere assertion by the witness that he has correctly identified the culprit, if the inherent risk of error is to be guarded against. It may be that the person concerned is well known to the witness. Or it may be that the person has some distinctive feature. But once one accepts that there is an

⁷ *S v Sithole and Others* 1999 (1) SACR 585.

inherent potential for mistaken identification, which a court is bound to do, it would seem to us that without something more, the mere assertion by a witness that he recognises the offender will seldom suffice.'

[38] I have already outlined the risks of mistaken identification by persons under the influence of alcohol. The time of the incident is also a matter of concern, as is the source of the lighting. The period of observation was not established. There was a lack of corroboration for the evidence of Nompucuko Qeqe. Furthermore, the version of the Appellant and his witness was not meaningfully disputed. All these factors, considered cumulatively, give rise to reasonable doubt.

[39] In *S v Sithole and Others*, the court held:

‘There is only one test in a criminal case, and that is whether the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that an accused is entitled to be acquitted if there is a reasonable possibility that an innocent explanation which he has proffered might be true. These are not two independent tests, but rather the statement of one test, viewed from two perspectives. In order to convict, there must be no reasonable doubt that the evidence implicating the accused is true, which can only be so if there is at the same no reasonable possibility that the evidence exculpating him is not true. The two conclusions go hand in hand, each one being the corollary of the other. Thus, in order for there to be a reasonable possibility that an innocent explanation which has been proffered by the accused might be true, there must at the same time be a reasonable possibility that the evidence which implicates him might be false or mistaken.’

[40] I am not convinced that Nompucuko Qeqe's identification of the Appellant was proved, beyond reasonable doubt, to be reliable. On the other hand, I am satisfied that the Appellant provided a reasonable explanation for his innocence. The evidence of the Appellant, together with that of his witness, was not shown to be improbable or false. In my view, there remains a reasonable possibility that the Appellant's explanation is true. The Appellant's version was that, on the day in question, he was at a tavern with his friend, where they consumed alcohol, and that he returned home at approximately 02h00. If this explanation is accepted, it is possible that he was not present at the scene when the offences were committed.

Conclusion

[41] An accused person bears no onus to convince the court of the truthfulness of his or her explanation. The State, on the other hand, must prove the guilt of an accused beyond reasonable doubt. Where doubt exists as to the guilt of the accused, such doubt must be resolved in favour of the accused. This accords with the right to a fair trial and the presumption of innocence. Has the State proved the guilt of the accused in this case? The answer is a resounding no. In these circumstances, the conviction and sentence on both counts—murder and robbery with aggravating circumstances—cannot stand. The result is that both the conviction and sentence fall to be set aside. It was on this basis that we issued our order on 15 April 2026.

Order

[42] As a result, the following order was issued:

1. The appeal against the conviction is upheld.
2. The appellant's conviction of murder and robbery with aggravating circumstances and his sentences of 20 years and 10 years imprisonment respectively are set aside.
3. The order of the court *a quo* is hereby substituted with the following order:
 - 3.1 The accused is found not guilty in respect of both murder and robbery with aggravating circumstances set out in count 1 and 2 of the charge sheet.

M NOTYESI
ACTING JUDGE OF THE HIGH COURT

I agree:

D O POTGIETER
JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Appellant : *Mr H Charles*

Instructed by : Legal Aid South Africa
Makhanda

Counsel for the Respondent : *Adv T Kaleni*

Instructed by : Director of Public Prosecutions
Makhanda

Heard on : 15 April 2026

Judgment Delivered on : 02 June 2026