



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

CASE NO. CA&R 56/2025

Of Interest

In the matter between:

NOPINKI NONGOMA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT ON APPEAL

Rugunanan J

[1] On 3 October 2024, at the conclusion of the State's case in its prosecution of the appellant in the Regional Court, Ngcobo, on a charge of murder the appellant, acting through her legal representative, closed her case and did

not testify. She did not call witnesses during the trial and was ultimately convicted. A mandatory sentence of life imprisonment was imposed on 4 October 2024. Her appeal to this Court against her conviction and sentence is prompted by the automatic right in s 309(1)(a) of the Criminal Procedure Act 51 of 1977.¹

[2] The appellant is implicated in the murder of Sindlogothla Dish (the deceased) by events that occurred in Clarkebury on 12 August 2022. The charge alleges that the deceased was assaulted with objects unknown to the State and that the appellant acted in furtherance of a common purpose with other persons. The findings in a report of a post-mortem examination indicate that the deceased sustained a laceration on the head with multiple bruises on the back and front of the upper torso. The cause of death is noted to have been ‘brain damage secondary to head injury by blunt force trauma’.

[3] The appellant pleaded not guilty to the charge. Although not having tendered a plea explanation, she did not dispute the identity of the deceased and the findings in the report. In the conduct of the trial, the presiding magistrate was assisted by two assessors. The State led evidence from two witnesses, Ms Dorothy Dish, the deceased’s grandmother, and Mr Mbingileli Nongoma, the appellant’s husband. Both witnesses were extensively cross-examined but considering that they did not expressly concede or admit anything pertinent to the appellant’s version, the propositions put to them do not amount to exculpatory evidence since the appellant elected to remain silent. Put another way, where an accused person chooses not to testify to rebut the State’s

¹ Leave to appeal under s 309B of the Criminal Procedure Act 51 of 1977 is not a requirement. The automatic right of appeal is in respect of both conviction and sentence - see *S v Ncitha* (987/2024) [2026] ZASCA 53 (15 April 2026). The appeal was initially (erroneously) prosecuted in the Makhanda High Court but by direction of the Acting Judge President, the Honourable Mr Justice Nhlangulela, the appeal was referred for hearing in the Mthatha High Court, being the forum in which it initially should have been prosecuted. The appellant had properly and timeously filed an application for condonation and at the commencement of the hearing of the matter - her oversight and the concomitant delay in prosecuting the appeal were condoned.

evidence against them and only challenges such evidence under cross-examination, the case has to be decided on the version of the State as questions put to a witness during cross-examination do not constitute evidence.²

[4] In principle, an accused person is presumed innocent and has the right to remain silent and not to testify during proceedings. But the fact that the person is under no obligation to testify does not mean that there are no consequences attaching to the decision to remain silent during trial. If there is evidence calling for an answer, and the accused chooses to remain silent, a court may well be entitled to conclude that the evidence is sufficient to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence. In that regard, the prosecution is not relieved of its duty to prove the elements of the offence and hence the guilt of the accused beyond reasonable doubt.³

[5] The issue on appeal is whether in the absence of the appellant's answer to the allegations in the charge, the evidence adduced by the State was sufficient to have proven her guilt beyond reasonable doubt. The focus is essentially on whether the trial magistrate correctly evaluated the State's evidence on common purpose. This involves factual issues as is evident from what follows in this judgment. Tritely, appellate interference with the factual findings of a trial court may occur only if the manner in which the evidence was evaluated, is wrong.⁴

[6] The essence of the doctrine of common purpose is that if two or more people act together for the purpose of committing a crime the conduct of each of them to achieve that purpose is imputed to the others.⁵ The liability

² See *Ndlovu and Another v S* (A851/11) [2014] ZAGPPHC 1054 (20 March 2014) para 31 and the footnote thereto in which reference is made to *S v Kato* 2005 (1) SACR 522 (SCA) at 529e, and *S v Boesak* 2001 (1) SA 912 (CC) at 923E-F.

³ *S v Boesak supra* para 24.

⁴ *Pillay v S* (451/2022) [2023] ZASCA 113 (27 July 2023) para 15; *R v Dhlumayo* 1948 (2) SA 677 (AD) at 678.

⁵ *Jacobs and Others v The State* [2018] ZACC 4 para 128.

requirements for a common purpose fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. Regarding the second requirement, there is no prior agreement or none is proven. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.⁶ For an accused participant in a common purpose to be found guilty of murder, the following prerequisites laid down in *S v Mgedezi and Others*⁷ (*Mgedezi*) must be proven by the State: (a) presence at the scene of the violence; (b) awareness of the assault on the victim; (c) intention to make common cause with those who were actually perpetrating the assault; (d) manifestation of the common purpose by performing some act of association with the particular conduct of the others; and (e) the intention (*mens rea*) to commit the crime.

[7] In relation to the last-mentioned of the requisites, murder, by definition, is a crime of intention. Proof of intention requires a subjective test. An accused's subjective mental state may be inferred from the objective facts proved by the State and from general human experience. In *S v Dladla en Andere*⁸, the test was expressed as follows:

‘By bepaling of die dader subjektief die moontlikheid van die gevolg voorsien het en hom daarmee verenselwig het, sal wel afleidings gemaak moet word op grond van die objektiewe waarskynlikhede, wat op algemene menslike ervaring berus.’

[8] The author Snyman⁹ observes that the court must to the best of its ability try and place itself in the position of the accused at the time of the commission of the act and then try and ascertain what the accused's state of mind was at that

⁶ *S v Mgedezi and Others* 1989 (1) SA 687 (A) at 705I-706B and *S v Mahlangu and Another* [2012] ZAGPJHC 114.

⁷ *S v Mgedezi and Others supra* at 705I-706C; see also Burchell *et al*, *Burchell's Principles of Criminal Law*, Juta 6th ed at 451-452; and C R Snyman, *Criminal Law*, Lexis Nexis 7th ed at 228 and the authorities cited in fn 38 thereto.

⁸ *S v Dladla en Andere* 1980 (1) SA (1) (AD) at 4H.

⁹ C R Snyman, *op cit* at 168.

moment. The author goes on to say¹⁰ that in deciding by way of inference what an accused thought or foresaw at the critical moment a court undoubtedly considers objective factors such as the type of weapon used, the seriousness of the injury or depth of the wound, the part of the body wounded as well as the objective probabilities of the case and general human experience.

[9] The active association requisite in *Mgedezi* ensures that the doctrine is not applied too broadly and serves to curb too wide a liability.¹¹ The corollary is that: (a) the mere presence of the accused as a passive spectator or bystander in the company of others is not sufficient to establish active association and cannot serve as a basis for holding the accused liable for the crime that has been committed; (b) the court must carefully examine the individual role of each participant in a common purpose, and the specific evidence against each participant and not ‘tar each accused’ with the same brush¹² meaning that the State is required to prove that each accused participant had the requisite *mens rea* for the unlawful outcome at the time the offence was committed;¹³ and (c) each participant must have been present when the fatal blow was struck.¹⁴

[10] In summing up the discourse on common purpose, the authors Burchell *et al*¹⁵ citing authority, appositely emphasise:

‘A collective approach to determining the actual conduct or active association of an individual accused has many evidential pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all the prerequisites of guilt. Whether or not

¹⁰ Snyman *op cit* at 169.

¹¹ Snyman, *op cit* at 228; *S v Jacobs* 2019 (1) SACR 623 (CC) at 646g.

¹² See Snyman *op cit* at 228 and the authorities cited in the footnotes thereto; see also Burchell *et al*, *Burchell's Principles of Criminal Law*, *op cit* at 452 and the cases analysed.

¹³ *S v Jacobs supra* at 646h.

¹⁴ *S v Jacobs supra* at 646e.

¹⁵ Burchell *et al*, *op cit* at 452-453 and the cases mentioned.

active association has been appropriately established will depend upon the factual context of each case.’¹⁶

[11] The evidence on record indicates that the assault on the deceased occurred at various places. According to Ms Dish (hereafter ‘the witness’) at about 10 o’clock on the day in question the appellant together with somebody named Lizo and a group of community members unknown in number whom she described as ‘vultures’, visited the deceased. The previous evening a group of people led by someone named Megilile had also been looking for him, but did not find him. The deceased resided in a backyard flat situated on her property. The appellant and Lizo demanded the deceased in connection with alleged housebreakings and thefts committed by him in the community. The appellant together with Lizo and the witness presented themselves inside the deceased’s flat. The other group members stood outside. The witness testified that Lizo assaulted the deceased with a stick several times on his head while the appellant, with open hand, simultaneously slapped the deceased in his face approximately four times. The deceased was then forcefully pushed out of his flat while putting up resistance.

[12] Following the abovementioned incident the unfolding of events appears from the excerpts of the testimony given by the witness. I interject to mention that reference to the accused in the quoted extracts must be understood to be a reference to the appellant:

¹⁶ *Thebus and Another v S* (CCT 36/02) [2003] ZACC (28 August 2003) para 45; see also *S v Le Roux and others* 2010 (2) SACR 11 (SCA) para 17 emphasising consideration of the conduct of the individual accused. See also the authors’ citation of *Dewnath v S* (269/13) [2014] ZASCA 57 (17 April 2014) para 15 whereat the following appears: ‘The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi & others*, makes it clear that:

- (i) There must be a close proximity in fact between the conduct considered to be active association and the result; and
- (ii) Such active association must be significant and not a limited participation removed from the actual execution of the crime.’

[13] Proceeding from the incident that took place in the deceased's flat, the witness, at that time emotionally traumatised and crying, stated:

'They both assaulted pushing the deceased person out and then everyone of that other group that was outside, they assaulted him and even undressed him, the upper body. Everyone was armed. They assaulted him proceeding to the accused's home at that time ... By the time they reached the accused's homestead the deceased was half naked on the upper body.'

[14] While the group proceeded to the appellant's home the witness went on to say that:

'They were just assaulting him simultaneously. Whoever was armed would deliver the blows. ... All over the body.'

[15] The group, including the appellant, made their way to the appellant's home which, according to the witness was at a distance of about sixty metres away. She did not follow but remained on her premises from where she observed that:

'... they drove the deceased to the accused's home and assaulted the deceased person just in the premises of the accused person'.

[16] In response to a question whether the witness was, from that distance, able to see who assaulted the deceased, she responded:

'The people that were there, there were many and I said that due to my state of mind, I could not properly observe ...'

[17] Elsewhere, she elaborated:

'.. they placed him right in front of the houses there and they did as they wished ... some were carrying sticks and some were carrying bush knives ... and they even had utterances that you should kill the dog'.

[18] She explained what happened thereafter:

‘...they loaded [the deceased] into a wheelbarrow and proceeded to the Xtinxi locality. The accused person was amongst that crowd that proceeded to Xtinxi. Only [her] husband was left behind.’

[19] In the narrative elicited from Ms Dish it appears that she did not follow the group to the abovementioned locality but testified that later in the afternoon the group came back and again assaulted the deceased at the appellant’s home. The deceased returned to his place at which stage an uncle of his was present. The deceased was partially naked and had just about taken his last breath.

[20] In the testimony introduced by the appellant’s husband, he estimated the distance between his homestead and the deceased’s to have been two-hundred meters. He narrated that the appellant and two men (who had approached him earlier that morning enquiring of the deceased’s whereabouts) brought the deceased to the appellant’s home. One of the men was Lizo. The appellant’s husband testified that he observed the appellant raise her hand in which she held a ‘switch’ (understood to be a whip) as if to gesture delivery of a blow upon the deceased whereupon the deceased in response to a question about what he had done with items of clothing he was alleged to have stolen, answered that the goods were at Ekteni (i.e. Xtinxi). The husband was clear that the appellant did not strike the deceased or assault him in any manner, but once the deceased had answered the question about the stolen items, the appellant went to Ekteni along with two other persons to retrieve them. Realising that he said this he then immediately retracted and stated that she did not go to Ekteni and remained at home. From a reading of the record it appears that not much detail of any significance was elicited from the husband, the magistrate in any event finding him to have been an unsatisfactory witness who sought to adapt his evidence to avoid incriminating the appellant by suggesting that he made a mistake about her going to Ekteni.

[21] In his assessment of the evidence, pondered in a lengthy judgment obscure of linear reasoning, the magistrate misdirected himself in material respects. It is to be noted that at some point in his judgment the magistrate commented that he may have recorded his notes incorrectly. He found the appellant's husband to have been an unreliable witness but made a factual finding that the husband had said that the appellant was in possession of a stick or that she had probably been carrying a stick. In the absence of explicit and direct evidence, he concluded that the appellant used the stick to assault the deceased at her home. This is not apparent from the husband's testimony and cannot be inferred from Ms Dish's bald assertion that everyone were carrying sticks, particularly if she did not explicitly testify that she saw the appellant armed with a stick.

[22] A further attribute of the magistrate's judgment is his uncritical reliance on the evidence presented by Ms Dish. Preceding what occurred at the appellant's home are the events that took place in the deceased's flat. The version presented by Ms Dish was that the assaults by Lizo and the appellant were simultaneous. The contention that this was improbable was rejected by the magistrate.

[23] In my view the magistrate erred in failing to consider the impracticality and the improbability of a simultaneous assault by the appellant, an unarmed participant, who would have had to bring herself within the striking zone of another participant wielding a stick. Common sense suggests that this construct is not mere conjecture. It raises disquiet about the reliability of the evidence by Ms Dish as well its acceptance by the magistrate especially without clear indications of being properly cognisant of various factors that unequivocally would have affected the weight of her testimony about the events that subsequently followed.

[24] Among these factors are: (a) Ms Dish's age, almost eighty years old, and emotional state at the time; (b) her poor eyesight yet despite her protestation to the contrary she accepted that due to the distance she could not properly observe what occurred at the appellant's home;¹⁷ (c) her acknowledgment that her hearing was poor because of a foreign object in her ear; and (d) her inherent bias towards the appellant due to a history of poor neighbourly relations occasioned by the deceased's delinquency in the community.

[25] To a greater degree which is fundamental to the State's case is its reliance on common purpose. On that level the magistrate's judgment does not exhibit an analysis of the evidence, particularly that of Ms Dish, with the degree of enquiry and attention postulated by the authorities mentioned earlier.

[26] The magistrate concluded that both liability requirements for a common purpose were present. In that regard he grossly erred. He concluded that there was a prior agreement because the group had agreed to meet the previous day. Other than Ms Dish having testified that a group of people led by someone named Megilile presented at her place the previous evening, evidence indicating that the appellant was privy to that group or evidence suggesting that it was the same group of individuals that presented the next day with Megilile among them, is significantly lacking.

[27] In determining the active association, the magistrate adopted a globular approach. This demonstrates a failure to have determined the active association

¹⁷ The fallibility of human observation calls for caution. See *S v Mthetwa* 1972 (3) SA 766 (AD) at 768A-C where the following is said: 'Because of the fallibility of human observation, evidence of identification is approached by the courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested. This depends on various factors, such as lighting, visibility, and eyesight; the proximity of the witness; his opportunity for observation, both as to time and situation; the extent of his prior knowledge of the accused; the mobility of the scene; corroboration; suggestibility; the accused's face, voice, build, gait, and dress; the result of identification parades, if any 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 one against the other, in the light of the totality of the evidence and the probabilities...'

of the appellant as a participant in a common criminal design. Ms Dish's persistent reference to the pronoun 'they' cannot as a collective be singularly attributed to the appellant. It was required of the State to prove the appellant's conduct beyond reasonable doubt and that she had the requisite intent concerning the outcome; and moreover, that the appellant was present when the fatal blow/s were struck. In that regard, and laying emphasis once again on the onus issue, the admission of the findings in the post-mortem report takes the matter no further. In the present factual context the deficiencies in the State's evidence and the magistrate's erroneous evaluation of the evidence strongly suggests that active association was not properly established and that it was too widely imputed to the appellant. In the circumstances, the deficiencies in the State's case did not oblige the appellant testify.

[28] In the result I make the following order:

1. The appeal against the conviction for murder is allowed.
2. The conviction for murder and the sentence of life imprisonment are set aside.

M. S. RUGUNANAN
JUDGE OF THE HIGH COURT

I agree.

M. MHAMBI
ACTING JUDGE OF THE HIGH COURT

Appearances:

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Date heard: 13 May 2026.

Date delivered: 01 September 2026.