



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

Case No: AR 212/2025

In the matter between:

**SIBONGISENI NDLOVU
LUCKY NXUMALO
SIZOLWETHU SIBIYA
MXOLISI HLENGWA**

**FIRST APPELLANT
SECOND APPELLANT
THIRD APPELLANT
FOURTH APPELLANT**

and

THE STATE

RESPONDENT

ORDER

On appeal from: the Regional Court, Pietermaritzburg (sitting as court of first instance):

1. The appeals of the first and second appellants against their convictions on count 5 are upheld.
2. The convictions and sentences imposed on the first and second appellants on count 5 are set aside.
3. In respect of the first and second appellants, it is ordered that the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence imposed on count 1.

4. In respect of the third appellant, it is ordered that the sentences imposed on counts 2, 3, 4 and 5 shall run concurrently with the sentence imposed on count 1.

5. The sentence purportedly imposed on the fourth appellant on count 5 is set aside.

6. Save as aforesaid, the appeals against conviction and sentence are dismissed.

JUDGMENT

Andrews AJ (Nirghin J concurring)

Introduction

[1] The moment a crowd arrogates to itself the powers of arrest, prosecution, adjudication and punishment, the rule of law gives way to the rule of the mob. Courts have a duty to ensure that such conduct is met with an appropriate and unequivocal response.

[2] This matter concerns a disturbing instance of vigilante violence in which members of a community elected to take the law into their own hands. Four men suspected of involvement in criminal activities were apprehended by members of the community, subjected to sustained assaults and denied the protection of a lawful process. Three of those men died. A fourth survived the ordeal and testified at the trial.

[3] The appeal arises from proceedings in the Regional Court, Pietermaritzburg. On 20 January 2025 the first, second and third appellants, who were accused 1, 2 and 4, respectively, in the court a quo, were convicted of three counts of murder, one count of attempted murder and one count of kidnapping. The murder counts related to the deaths of Silindile Mbanjwa (count 1), Bheki Mtshali (count 2) and Siza Ntanzu (count 3). The attempted murder count related to Nduduzo Mbatha (count 4), whilst the kidnapping count related to Mr Mbatha (count 5). The fourth appellant, accused 6 in the court a quo, was convicted of the three murder counts and the attempted murder count, but was acquitted on all three kidnapping counts.

[4] On 24 January 2025 the first, second and third appellants were each sentenced to 20 years' imprisonment on each of the three murder counts, 10 years' imprisonment on the attempted murder count and eight years' imprisonment on the kidnapping count. It was ordered that the sentences imposed on counts 3, 4 and 5 run concurrently with the sentence imposed on count 2, resulting in an effective sentence of 40 years' imprisonment for each of the first, second and third appellants. The fourth appellant was sentenced to life imprisonment on each of the murder counts and 12 years' imprisonment on the attempted murder count. The effect of the sentence imposed on count 5 is addressed later in this judgment.

[5] Leave to appeal against conviction and sentence was granted to the first, second and third appellants on 17 February 2025. The fourth appellant enjoys an automatic right of appeal in respect of the murder convictions.

Factual background

[6] The charges against the appellants arose from an incident during which the complainant, Mr Mbatha, and three other men, namely Mr Mbanjwa, Mr Mtshali and Mr Ntanzi, were accused by members of the community of having been involved in criminal activities in the area. The events culminated in a series of assaults upon the complainant and the deceased, resulting in the deaths of Mr Mbanjwa, Mr Mtshali and Mr Ntanzi, whilst Mr Mbatha survived.

[7] The evidence revealed that, during the course of the day, the complainant and the deceased came under the control of various members of the community and were ultimately taken to the vicinity of the Sibiya homestead where a substantial crowd had gathered. What followed was a prolonged and violent sequence of events involving numerous individuals.

[8] The State's case rested primarily on the evidence of the complainant, Mr Mbatha. He was the only eyewitness who testified regarding the roles allegedly played by the respective accused persons during the incident.

[9] In broad outline, the State alleged that the first appellant was involved in mobilising community members and remained present during the incident; that the second appellant participated in the assault upon Mr Mbatha; that the third appellant was involved in events preceding the assaults and remained present whilst they unfolded; and that the fourth appellant joined the incident at a later stage and actively participated in the assaults.

[10] The evidence further revealed that a large number of community members were present. Witnesses described the situation as tense and volatile. As the events unfolded, the crowd grew substantially and, on the evidence, ultimately numbered about 100 people. Members of the crowd actively participated in assaults upon the complainant and the deceased.

[11] The role played by the complainant's father during the early stages of the incident also featured prominently in the evidence. After being fetched by the first appellant, Mr Mbatha's father attended at the Sibiya homestead where he found Mr Mbatha and Mr Ntanzu already tied together and injured. He assaulted Mr Mbatha before later departing, leaving Mr Mbatha and the deceased in the hands of an increasingly hostile crowd.

[12] At the conclusion of the trial, the regional magistrate convicted the first, second and third appellants on three counts of murder, one count of attempted murder and the kidnapping count relating to Mr Mbatha. The fourth appellant was convicted on the murder and the attempted murder counts and was acquitted on the kidnapping counts. Accused 3 and accused 5 were acquitted on all charges.

Grounds of appeal

[13] The appellants challenge both their convictions and sentences on various grounds. Broadly stated, they contend that the regional magistrate misdirected herself in her assessment of the evidence of the complainant, Mr Mbatha, who was the sole eyewitness implicating the appellants in the commission of the offences. The appellants further contend that the State failed to establish the requirements for liability based on the doctrine of common purpose and that the evidence was insufficient to sustain the kidnapping convictions.

[14] The appellants also challenge the sentences imposed upon them. They contend that the regional magistrate over-emphasised the seriousness of the offences and the interests of society, whilst failing to attach sufficient weight to their personal circumstances, relative youthfulness, prospects of rehabilitation and the circumstances in which the offences were committed.

Issues for determination

[15] The issues arising for determination in this appeal may conveniently be grouped under four broad headings.

[16] The first issue is whether the regional magistrate correctly accepted the evidence of Mr Mbatha as credible and reliable notwithstanding that he was a single witness in relation to the material events and notwithstanding her rejection of portions of that same evidence when acquitting accused 3 and accused 5.

[17] The second issue concerns the convictions for murder and attempted murder. In this regard, it must be determined whether the State proved beyond reasonable doubt that each appellant possessed the requisite *mens rea* and that the requirements for liability based on the doctrine of common purpose were established.

[18] The third issue concerns the kidnapping conviction on count 5. Central to that enquiry is whether the State established beyond reasonable doubt the unlawful and intentional deprivation of the freedom of movement of Mr Mbatha and whether the evidence established participation by the first, second and third appellants in that offence, either directly or through the doctrine of common purpose.

[19] The fourth issue is whether the sentences imposed by the regional magistrate are vitiated by misdirection or are otherwise so severe as to warrant interference by this court.

Applicable legal principles

The approach of a court of appeal

[20] The approach by a court of appeal as set out in *S v Francis*,¹ is explained as follows:

'In the absence of any misdirection the trial court's conclusion, including its acceptance of a witness's evidence, is presumed to be correct. In order to succeed on appeal, [the appellant] must therefore convince the court of appeal on adequate grounds that the trial court was wrong in accepting [the witness's] evidence – reasonable doubt will not suffice to justify interference with its findings. Bearing in mind the advantage which a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that the court of appeal will be entitled to interfere with a trial court's evaluation of the oral testimony.' (References omitted.)

[21] It is well established that an appellate court exercises restraint when reviewing a trial court's factual findings and credibility assessments. An appeal is not a rehearing or a retrial. The appellate court's task is to determine whether the trial court materially misdirected itself on the facts or the law, or whether its conclusions are clearly unsupported by the evidence. In the absence of a material misdirection, the trial court's factual findings are presumed to be correct and will not be disturbed unless they are shown to be plainly wrong. This deference reflects the trial court's advantage in seeing and hearing the witnesses and in assessing their demeanour and evidence in the context of the trial as a whole.²

[22] In *S v Hadebe*,³ the Supreme Court of Appeal reaffirmed that an appellate court may not interfere with a trial court's factual findings merely because it might have reached a different conclusion. Interference is justified only where the trial court materially misdirected itself or where its conclusion is one that could not reasonably have been reached on the evidence.

¹ *S v Francis* 1991 (1) SACR 198 (A) at 204d-e.

² *R v Dhlumayo and Another* 1948 (2) SA 677 (A) (*Dhlumayo*) at 705 – 706.

³ *S v Hadebe* 1997 (2) SACR 641 (SCA) at 645e–f.

[23] The appellate court must therefore identify a material misdirection, or a finding that is plainly wrong, before interfering with the trial court's factual findings or credibility assessments. It is insufficient that another view of the evidence is reasonably possible.

Single witness evidence

[24] The State's case rested substantially on the evidence of Mr Mbatha. The fact that a witness is the sole witness on a material issue does not, in itself, render his or her evidence unreliable or legally insufficient. Section 208 of the Criminal Procedure Act 51 of 1977 (CPA) provides:

'An accused may be convicted of any offence on the single evidence of any competent witness.'

[25] The statutory provision does not dispense with the requirement that the evidence must establish guilt beyond reasonable doubt. The evidence of a single witness must be approached with caution, but the cautionary rule is not a mechanical requirement of corroboration or an independent rule of law.⁴ The court must consider the witness's credibility and reliability, the internal and external consistency of the testimony, the witness's opportunity to observe and recall the events, and any material contradictions or improbabilities. The ultimate enquiry is whether, after the evidence has been weighed in the light of the probabilities and the evidence as a whole, it is satisfactory and sufficiently reliable to sustain a conviction.

[26] In *S v Sauls and Others*,⁵ the Appellate Division emphasised that there is no formula for assessing the evidence of a single witness and that the court must have regard to the witness's merits and the factors that affect credibility. The Supreme Court of Appeal reaffirmed that approach in *Stevens v S*,⁶ emphasising that the evidence of a single witness must be approached with caution, but that the court's task remains to determine whether, despite shortcomings, defects or contradictions, it is satisfied that the truth has been told.

⁴ *S v Ganie and Others* 1967 (4) SA 203 (N) at 206H, as referred to in *Ribisi v S* [2024] ZAGPPHC 1301 para 25. See also *S v Webber* 1971 (3) SA 754 (A) from 757E.

⁵ *S v Sauls and Others* 1981 (3) SA 172 (A) (*Sauls*) at 180E–G.

⁶ *Stevens v S* [2005] 1 All SA 1 (SCA) para 17.

[27] More recently, in *S v Singama*,⁷ the court reiterated that s 208 permits a conviction on the evidence of a single competent witness, but that such evidence remains subject to a careful assessment of its reliability and sufficiency. Accordingly, the question is not whether Mr Mbatha's evidence was corroborated, but whether, considered in its entirety, it was clear, satisfactory and sufficiently reliable to prove the accused's guilt beyond reasonable doubt.

Identification

[28] Identification evidence must be approached with caution because the honesty of a witness does not necessarily establish the reliability of the identification. A witness may give evidence in good faith, genuinely believing that the person identified was the perpetrator, while nevertheless being mistaken.

[29] In *S v Mthethwa*,⁸ Holmes JA emphasised that human observation is fallible and that identification evidence should be assessed with circumspection. Relevant considerations include the lighting and visibility at the scene, the witness's opportunity and duration of observation, the distance between the witness and the person observed, whether the witness previously knew the person identified, and the circumstances in which the identification was made. These factors are not exhaustive.

[30] The court must evaluate the identification evidence in the context of the evidence as a whole. No individual factor is necessarily decisive, and the assessment must be undertaken holistically, having regard to the witness's opportunity to observe, memory, and description of the perpetrator, as well as any inconsistencies or possible suggestive influences. The ultimate question is whether, on the totality of the evidence, the identification is sufficiently reliable to establish the accused's guilt beyond reasonable doubt.⁹

Common purpose

⁷ *S v Singama* [2026] ZAWCHC 83 para 88 onwards.

⁸ *S v Mthethwa* 1972 (3) SA 766 (A) at 768A-C.

⁹ *S v Kapa* [2023] ZACC1; 2023 (1) SACR 583 (CC) paras 34-39.

[31] The convictions on the murder and attempted murder counts were founded substantially upon the doctrine of common purpose. It is trite that the doctrine of common purpose is a mode of imputing criminal liability to persons who, having associated themselves with the commission of an offence, may be held responsible for the conduct of the perpetrators. It does not, however, dispense with the State's obligation to prove, beyond reasonable doubt, every element of the offence charged, including the requisite *mens rea*. The doctrine must therefore be applied with due regard to the individual accused's conduct and state of mind.¹⁰

[32] Where the State relies on active association in circumstances in which no prior agreement has been proved, it must establish that the accused: (a) was present at the scene where the violence was committed; (b) was aware of the assault upon the victim; (c) intended to make common cause with those perpetrating the assault; (d) manifested that shared purpose by performing some act of association with the conduct of the perpetrators; and (e) possessed the requisite *mens rea* in respect of the commission of the offence. These requirements were authoritatively articulated in *S v Mgedezi and Others*,¹¹ and subsequently applied and affirmed by the Constitutional Court in *Makhubela and Another v S*.¹²

[33] The enquiry is directed at whether the accused, through his or her conduct and state of mind, became an associate in the criminal enterprise. Active association may be inferred from the totality of the circumstances, but the inference must be consistent with the accused's guilt and exclude any reasonable possibility that the accused did not share the common purpose. Mere presence at the scene, knowledge that an offence is being committed, or even approval of the conduct of others, is insufficient. The State must prove conduct demonstrating active association, together with the requisite intention in respect of the offence in question.¹³

Mens rea

¹⁰ *S v Thebus and Another* [2003] ZACC 12; 2003 (6) SA 505 (CC) (*Thebus*) para 49.

¹¹ *S v Mgedezi and Others* 1989 (1) SA 687 (A) (*Mgedezi*) at 705I-706C.

¹² *S v Makhubela and Another* [2017] ZACC 36; 2017 (2) SACR 665 (CC) paras 35-38.

¹³ See *Mgedezi* at 705I-706C; *S v Safatsa and Others* 1988 (1) SA 868 (A) at 894D-E and 896A-E; *Thebus* para 49.

[34] The State was required to prove not only participation, but also the requisite fault element in respect of each offence. The applicable principle is that an accused acts with *dolus eventualis* where he or she subjectively foresees the possibility that the prohibited consequence may result from the conduct and nevertheless reconciles him- or herself with that possibility.

[35] The enquiry is therefore both subjective and twofold: first, whether the accused actually foresaw the possibility of the consequence; and, secondly, whether the accused accepted or was reconciled with its occurrence. Objective foreseeability, or what a reasonable person ought to have foreseen, is insufficient. The distinction between *dolus eventualis* and conscious negligence lies in this volitional element: in the former, the accused proceeds despite accepting the possibility of the consequence, whereas in the latter the accused foresees the possibility but remains confident that it will not occur. These principles emerge from the line of authority including *S v Sigwahla*,¹⁴ *S v Ngubane*,¹⁵ and *S v De Oliveira*.¹⁶ More recently, the Supreme Court of Appeal cautioned in *Humphreys v S*,¹⁷ that ‘recklessness’ or objective negligence must not be conflated with *dolus eventualis*, which requires proof of the accused's actual foresight and reconciliation with the possibility of the prohibited consequence.

[36] In relation to the murder counts, the regional magistrate found that the appellants acted with *dolus eventualis*. The concepts of common purpose and *dolus eventualis* are distinct. Participation in the conduct of others does not, without more, establish the intention necessary for a conviction of murder.¹⁸ *Dolus eventualis* is established where an accused subjectively foresees the possibility that death may result from his conduct and nevertheless reconciles himself to that possibility and persists in the conduct.¹⁹

Kidnapping

¹⁴ *S v Sigwahla* 1967 (4) SA 566 (A) (*Sigwahla*) at 570B-E.

¹⁵ *S v Ngubane* 1985 (3) SA 677 (A) at 685E-H and 687A-C.

¹⁶ *S v De Oliveira* 1993 (2) SACR 59 (A) at 65D-I.

¹⁷ *Humphreys v S* [2013] ZASCA 20; 2013 (2) SACR 1 (SCA) para 17.

¹⁸ *Thebus* para 49; *S v Makgatho* [2013] ZASCA 34; 2013 (2) SACR 13 (SCA) para 9.

¹⁹ *Magasela v S* [2025] ZASCA 8 paras 32-34.

[37] Kidnapping consists of the unlawful and intentional deprivation of a person's freedom of movement or, in appropriate circumstances, the unlawful detention of a person against his or her will.²⁰

[38] The essence of the offence is the unlawful interference with another person's liberty. The deprivation need not be of any particular duration. What is required is proof that the complainant's freedom of movement was intentionally curtailed without lawful justification.

[39] As in every criminal prosecution, the State bears the onus of proving each element of the offence beyond reasonable doubt. Where it relies on the doctrine of common purpose, the State must prove not only the unlawful deprivation of liberty, but also the facts establishing the particular accused's criminal liability for that conduct.

[40] The enquiry is necessarily fact-specific. It requires consideration of the circumstances in which the complainant was deprived of his freedom of movement, the identity of the persons responsible for that deprivation, and the extent to which other participants associated themselves with such conduct.

[41] In the present matter, these considerations assume particular significance given the evidence concerning the movement of the complainant and certain of the deceased before their arrival at the Sibiya homestead, the involvement of various individuals at different stages of the incident, and the subsequent participation of a large crowd.

Evaluation

The evidence of Mr Mbatha

[42] The principal attack directed at the judgment of the regional magistrate concerns her evaluation of the evidence of Mr Mbatha. Counsel for the appellants submitted that Mr Mbatha was not a credible witness and that the magistrate misdirected herself in accepting his evidence as reliable in respect of the appellants

²⁰ S V Hooror and C R Snyman *Snyman's Criminal Law* 8 ed (2025) 437-440; See also *S v Hemeni and Others* [2026] ZAWCHC 70 paras 32-34.

whilst rejecting portions of that same evidence when acquitting accused 3 and accused 5.

[43] The criticism was advanced on several fronts. It was contended that Mr Mbatha's evidence contained material contradictions, that aspects of his evidence were inconsistent with the medical evidence, that he was evasive under cross-examination, that his evidence was influenced by prior drug use, and that the magistrate applied the cautionary rule selectively rather than consistently across his testimony as a whole.

[44] It is necessary at the outset to emphasise that the regional magistrate was acutely aware of the fact that Mr Mbatha was a single witness. Her judgment demonstrates a careful appreciation of the caution required when evaluating such evidence. Importantly, she did not accept Mr Mbatha's evidence uncritically. On the contrary, she rejected aspects of it and ultimately acquitted accused 3 and accused 5 on all counts.

[45] In particular, the magistrate expressed reservations regarding Mr Mbatha's evidence concerning accused 5. She found that certain evidence had only emerged after probing during cross-examination and bore the hallmarks of an afterthought. That finding ultimately contributed to the acquittal of accused 5.

[46] The appellants contend that once the magistrate found Mr Mbatha unreliable in respect of accused 3 and accused 5, she was obliged to reject the entirety of his evidence. That submission cannot be sustained. Our law does not require a court to accept or reject a witness's evidence wholesale. A court is entitled to accept portions of a witness's testimony whilst rejecting others, provided there is a rational basis for doing so.²¹ The question is not whether Mr Mbatha proved to be a perfect witness but whether the portions of his evidence relied upon by the magistrate were shown to be sufficiently reliable to support the findings ultimately made.

²¹ *Sauls* at 180E–G.

[47] The magistrate's treatment of Mr Mbatha's evidence reveals a witness-by-witness and allegation-by-allegation assessment rather than a blanket acceptance of everything he said. The fact that she rejected those aspects of the evidence she regarded as inadequate tends, if anything, to demonstrate a cautious and critical approach rather than an uncritical one.

[48] The appellants nevertheless submitted that the magistrate's credibility findings were internally inconsistent. Particular reliance was placed upon the magistrate's observations that certain aspects of Mr Mbatha's evidence emerged only under cross-examination and bore the hallmarks of an afterthought. It was argued that, having made those findings and having identified contradictions in portions of Mr Mbatha's viva voce evidence, the magistrate could not thereafter properly conclude that he was a reliable witness on the remaining disputed issues. The submission, however, overlooks that the magistrate's criticism was directed at specific aspects of the evidence relating principally to accused 5, rather than to the entirety of Mr Mbatha's testimony. The question is not whether Mr Mbatha was a flawless witness, but whether the evidence ultimately relied upon by the magistrate remained sufficiently reliable, notwithstanding the shortcomings she identified.

[49] Counsel's submission appeared to proceed from the premise that, because Mr Mbatha was a single witness, his evidence had to be free from criticism before it could be relied upon. That is not the test. Whilst it has often been stated that the evidence of a single witness should be clear and satisfactory in every material respect, the authorities make it plain that there is no rule requiring a witness to be without fault before his evidence may be accepted. As was emphasised in *Sauls*, the court must weigh the evidence, consider its merits and demerits, and decide whether it is truthful and reliable notwithstanding shortcomings, defects or contradictions. The fact that a court rejects certain aspects of a witness's evidence does not necessarily preclude acceptance of other portions found to be reliable. The true enquiry is whether the evidence ultimately relied upon is satisfactory on the material issues requiring determination.

[50] The true enquiry is therefore whether the criticisms raised by the appellants were of such significance that the magistrate's acceptance of the evidence implicating the appellants constituted a material misdirection.

[51] Having considered the record in its entirety, I am unable to conclude that such a misdirection has been established.

[52] Counsel further relied upon the fact that, during the application for leave to appeal, the prosecutor did not oppose the granting of leave and expressly indicated that another court might reasonably arrive at a different conclusion. That circumstance must not be overstated. The test applicable to leave to appeal is whether there exists a reasonable prospect that another court may differ. The issue before this court is materially different. The question is whether the convictions and sentences are vitiated by material misdirection or are otherwise unsustainable on the evidence. The concession nevertheless occurred against the background of certain difficulties apparent from the record, including inconsistencies in the conviction and sentencing proceedings. Those difficulties require careful consideration by this court but do not diminish its obligation independently to determine whether any identified irregularity materially affected the convictions or sentences ultimately imposed.

Contradictions and inconsistencies in Mr Mbatha's evidence

[53] The appellants submitted that the regional magistrate failed to give adequate weight to numerous contradictions and inconsistencies in Mr Mbatha's evidence. These included alleged discrepancies concerning the assaults perpetrated upon him, the implements used during the assaults, the involvement of certain accused persons, the evidence relating to his father, and omissions in his police statement.

[54] It is trite that not every contradiction or inconsistency renders a witness unreliable. As held in *S v Mkohle*,²² contradictions per se do not justify rejecting a witness's evidence, as they may merely be indicative of error. Human recollection is imperfect, and discrepancies are to be expected where a witness recounts traumatic events occurring over an extended period. The proper enquiry is whether the

²² *S v Mkohle* 1990 (1) SACR 95 (A).

contradictions are material and whether, considered in the context of the evidence as a whole, they affect the witness's reliability on the issues to be decided.²³

[55] The incident in question was not a brief or isolated event. On the evidence, it unfolded over a considerable period, involved numerous participants, multiple assaults and a volatile crowd environment. Mr Mbatha himself was subjected to repeated assaults and witnessed assaults upon the deceased. In such circumstances some inconsistencies in recollection were inevitable.

[56] A number of the contradictions relied upon by the appellants were of a peripheral nature and related principally to the detail of particular assaults rather than the identity of the persons whom Mr Mbatha implicated. The regional magistrate was alive to these shortcomings and expressly acknowledged that Mr Mbatha was not an unblemished witness. The fact that she rejected portions of his evidence demonstrates that she did not approach his testimony uncritically.

[57] Particular criticism was directed at Mr Mbatha's evidence concerning the alleged use of a rubber hammer by the second appellant, as well as the omission of certain details from his police statement. It was submitted that these omissions demonstrated a tendency on Mr Mbatha's part to embellish his evidence.

[58] The omissions relied upon by the appellants were, moreover, not confined to minor details. Counsel pointed to the absence from the complainant's police statement of reference to the alleged blowing of the trumpet by the first appellant, the use of a rubber hammer by the second appellant, the role allegedly played by accused 5 in tying hands, and the later assertion that the fourth appellant assaulted the complainant and deceased with a bush knife. It was contended that these were not peripheral matters but important features of the State's case, which only emerged during the course of the trial. These criticisms required careful scrutiny and formed part of the broader enquiry into the reliability of Mr Mbatha's evidence.

²³ *S v Mafaladiso en Andere* 2003 (1) SACR 583 (SCA) at 593f-594g, and also *Meintjies v S (Appeal)* [2025] ZAWCHC 239 para 15.

[59] While omissions from a prior statement may, in an appropriate case, affect reliability, they do not invariably justify the rejection of a witness's evidence. A police statement is seldom intended to constitute a complete record of all details later mentioned in court.²⁴ The significance of any omission depends upon the nature of the omitted fact and the context in which the statement was made.

[60] The appellants further criticised Mr Mbatha's evidence concerning events involving his father and alleged inconsistencies in this regard. Those criticisms were fully ventilated during cross-examination and were matters which the regional magistrate expressly considered in her assessment of the evidence.

[61] Having regard to the record in its entirety, I am not persuaded that the identified inconsistencies were of such a nature or degree as to render Mr Mbatha's evidence wholly unreliable. Nor am I persuaded that they demonstrate a material misdirection on the part of the regional magistrate. The critical question remains whether the evidence implicating each appellant was reliable notwithstanding those imperfections.

Identification and reliability

[62] The appellants further contended that the regional magistrate failed properly to evaluate the reliability of Mr Mbatha's identification of the various accused persons. Particular emphasis was placed on the fact that the incident unfolded in a chaotic environment involving a large crowd, multiple assaults and considerable confusion. It was submitted that Mr Mbatha's ability accurately to identify the perpetrators was consequently compromised.

[63] The submission must be considered against the totality of the evidence. Whilst it is true that the assaults occurred in circumstances that were both volatile and disorderly, the matter does not concern the identification of strangers observed fleetingly under difficult conditions. The evidence established that Mr Mbatha was acquainted with the appellants prior to the incident. His evidence therefore involved recognition rather than first-time identification.

²⁴ *S v PHK* 2023 (2) SACR 234 (FB) para 19.

[64] Recognition evidence is generally more reliable than identification evidence involving unknown persons, although even recognition evidence must be approached with caution. The fact that a witness knows a person does not eliminate the possibility of mistake. It merely constitutes one of the factors to be considered in assessing reliability.²⁵

[65] The evidence further reveals that the events in question were not momentary. According to Mr Mbatha, the incident unfolded over an extended period and involved a number of separate episodes occurring at different locations. He claimed to have observed the appellants at close proximity and, in several instances, to have interacted directly with them. These are factors that the regional magistrate was entitled to take into account when assessing reliability.

[66] It was nevertheless argued that Mr Mbatha's own circumstances diminished the reliability of his observations. Reliance was placed upon the fact that he was himself being assaulted, that he sustained injuries during the incident and that he admitted to prior drug use. It was submitted that these factors affected both his perception and recollection of events.

[67] These considerations were undoubtedly relevant and required careful scrutiny. They do not, however, lead inexorably to the conclusion that Mr Mbatha was incapable of making reliable observations. The regional magistrate was alive to these concerns and evaluated his evidence against the probabilities, the medical evidence and the evidence of the remaining witnesses before concluding that his identification of the appellants was reliable.

[68] Of particular significance is the fact that the regional magistrate did not simply accept every identification made by Mr Mbatha. As already indicated, she rejected aspects of his evidence relating to accused 3 and accused 5 and acquitted them. This demonstrates that she distinguished between those aspects of the evidence she regarded as reliable and those she did not.

²⁵ *Nkomo and Others v S* [2024] ZASCA 61 paras 17-18.

[69] The question on appeal is not whether another court may have approached the evidence differently. The question is whether the regional magistrate's acceptance of Mr Mbatha's identification evidence was so unreasonable that it constitutes a material misdirection. Having regard to the fact that the appellants were known to Mr Mbatha, the duration of the incident, the opportunities available to him for observation and the magistrate's cautious approach to the evidence generally, I am unable to conclude that such a misdirection has been established.

[70] It becomes necessary, therefore, to examine the evidence implicating each appellant individually in order to determine whether the findings of the regional magistrate were justified on the evidence.²⁶

The first appellant (accused 1)

[71] The case against the first appellant differed materially from that against the remaining appellants. Unlike the second appellant and the fourth appellant, Mr Mbatha did not attribute any direct act of assault upon either himself or any of the deceased to the first appellant. The State's case against him rested primarily upon his alleged conduct before and during the incident, his position within the community and the role he allegedly played in mobilising members of the community.

[72] Mr Mbatha testified that the first appellant stated that 'the dogs must be killed'. The first appellant denied having made any such statement. It was argued on appeal that the magistrate erred in relying upon this evidence because it stood alone and was not corroborated by any other witness.

[73] That submission cannot be upheld merely because the evidence was uncorroborated. As already noted, s 208 of the CPA permits a conviction on the evidence of a single competent witness. The absence of corroboration is a factor to be weighed in assessing reliability, but it is not decisive.²⁷

²⁶ *Dhlumayo* at 705-706.

²⁷ *Ngcobo v S* [2025] ZASCA 12 para 12.

[74] The first appellant further contended that the magistrate attached undue significance to his position as an induna and impermissibly reasoned that he ought to have prevented the crowd from carrying out the assaults. It was submitted that the evidence rather demonstrated that the crowd was uncontrollable, that large numbers of persons participated in the assaults and that even police officers who arrived at the scene were unable to restore order.

[75] There is force in the submission that criminal liability cannot be founded merely upon the first appellant's status as an induna or upon a perceived failure to intervene. The doctrine of common purpose requires proof of active association and the requisite *mens rea*. A person's standing within a community cannot, without more, substitute for those requirements.

[76] The magistrate's finding, however, was not based solely upon the first appellant's status as an induna. The evidence accepted by the magistrate was that the first appellant played a central role in the unfolding events. He personally fetched Mr Mbatha's father and brought him to the Sibiya homestead, where the complainant and Mr Ntanzi had already been tied together and assaulted. After Mr Mbatha's father assaulted the complainant and departed, the first appellant remained present as the crowd became increasingly hostile and the violence escalated. The magistrate further found that he failed to take meaningful steps to prevent the assaults and thereby associated himself with the treatment meted out to the complainant and the deceased. In addition, the magistrate accepted Mr Mbatha's evidence that, when asked what should be done with the victims, the first appellant stated that they should be killed.

[77] Particular criticism was directed at the evidence concerning the blowing of a trumpet. It was submitted that Mr Mbatha failed to mention in his police statement that the first appellant blew a trumpet to summon members of the community and that aspects of the evidence suggested that a younger person may have been in possession of the instrument. It was accordingly argued that the trumpet evidence bore the same hallmarks of embellishment that led the magistrate to reject other portions of Mr Mbatha's testimony. The criticism is not without force. However, the significance of the issue lies less in whether the first appellant personally blew the

trumpet than in whether the evidence, viewed holistically, established that he played a role in mobilising members of the community and thereafter associated himself with the conduct of those who assaulted the complainant and the deceased. The magistrate's finding in that regard did not rest solely on the trumpet evidence.

[78] At this stage it is sufficient to note that the criticisms advanced on behalf of the first appellant are not directed solely at identification but also at the inferences drawn from his conduct and presence at the scene. The ultimate determination of those issues must await consideration of the doctrine of common purpose in the light of the evidence as a whole.

[79] The question is therefore not whether the first appellant personally assaulted any of the victims. The question is whether the evidence established beyond a reasonable doubt that, through his words and conduct, he actively associated himself with the actions of those carrying out the assaults and shared the requisite intention. That enquiry is inextricably linked to the broader issue of common purpose and will be revisited later in this judgment.

The second appellant (accused 2)

[80] The State's case against the second appellant rested principally upon the evidence of Mr Mbatha that he actively participated in the assaults. Unlike the position of the first appellant, Mr Mbatha attributed direct acts of violence to the second appellant.

[81] Mr Mbatha testified that the second appellant repeatedly assaulted him with the steel handle of a rake and later struck him with a rubber hammer. According to Mr Mbatha, the second appellant ceased the assault only after he noticed that Mr Mbatha had sustained a bleeding injury to his knee. The second appellant denied these allegations and contended that the magistrate ought not to have accepted Mr Mbatha's evidence in this regard.

[82] In argument, considerable emphasis was placed upon perceived inconsistencies in Mr Mbatha's evidence concerning the implements allegedly used during the assault. It was submitted that the evidence relating to the rake was unsatisfactory and that the reference to a rubber hammer emerged only during the

oral evidence and did not feature in Mr Mbatha's police statement. It was further argued that the medical evidence did not conclusively support the allegation that the injuries were inflicted in the manner described by Mr Mbatha.

[83] These criticisms were fully canvassed during the trial and carefully considered by the magistrate. Whilst the omission of the rubber hammer from Mr Mbatha's statement was a relevant factor bearing upon reliability, it was not, in itself, decisive. Statements made to the police are often incomplete and are not intended to constitute exhaustive records of every detail later recounted in evidence. The significance of such an omission depends upon the surrounding circumstances and must be assessed together with the evidence as a whole.²⁸

[84] It is also necessary to bear in mind that the second appellant was not implicated solely by reference to a single isolated act. Mr Mbatha's evidence was that the second appellant actively participated in the assault upon him over a period of time. The magistrate had the benefit of observing both witnesses testify and ultimately accepted Mr Mbatha's account in preference to the denial advanced by the second appellant.

[85] The appellants further criticised the magistrate's reliance on the medical evidence, contending that she accepted corroboration in relation to the second appellant whilst rejecting comparable evidence relating to accused 3. It was submitted that this demonstrated an inconsistent approach to the assessment of the evidence.

[86] In my view, that submission elevates individual discrepancies beyond their proper significance. The magistrate's reasoning must be read as a whole. Her acquittal of accused 3 was not based solely on the absence of medical corroboration, but upon her broader assessment of the reliability of the evidence implicating him. The fact that she reached a different conclusion in relation to the second appellant does not of itself demonstrate a misdirection.

²⁸ *PHK* para 19.

[87] More fundamentally, the evidence against the second appellant differed materially from that against the first appellant and the third appellant. Mr Mbatha placed the second appellant amongst those who physically assaulted him. The credibility finding in relation to the second appellant therefore rested upon direct evidence of participation rather than upon inference alone.

[88] Whether that participation is sufficient to sustain the convictions for murder and attempted murder is a separate question. The second appellant accepted no involvement in the fatal assaults and contended that, even if portions of Mr Mbatha's evidence were accepted, the requirements of common purpose and the necessary *mens rea* were not established. Those issues are more conveniently considered when dealing with the doctrine of common purpose and the evidence relating to all of the appellants collectively.

[89] At this stage, however, I am not persuaded that the magistrate's acceptance of Mr Mbatha's evidence implicating the second appellant in the assault upon the complainant constituted a material misdirection or a finding that is plainly wrong. The challenge raised by the second appellant is directed less at identification than at the legal consequences flowing from the conduct attributed to him. Those matters will be considered later in this judgment.

The third appellant (accused 4)

[90] The case against the third appellant differs materially from that against both the second and fourth appellants. Mr Mbatha did not attribute any direct assault upon either himself or the deceased to the third appellant. Indeed, under cross-examination, Mr Mbatha conceded that the third appellant did not assault him either at the Sibiya homestead or later on the road.

[91] The State's case against the third appellant rested substantially upon his alleged involvement in the events preceding the assaults and his continued presence during the ensuing violence. Mr Mbatha testified that the third appellant, together with accused 5 and Mzwe, was present when he and Mr Ntanzi were woken and instructed to accompany them. According to Mr Mbatha, the third appellant was

present when Mzwe assaulted him and Mr Ntanzi after they were reluctant to go with them.

[92] The evidence further established that the third appellant drove the vehicle in which Mr Mbatha and Mr Ntanzi were transported to the Sibiya homestead. It was common cause that the third appellant transported Mr Mbatha and Mr Ntanzi from Green Gate to the Sibiya homestead, although he disputed that either had been compelled to accompany him and maintained that they entered the vehicle voluntarily.

[93] The third appellant contended that he acted at the request of his father and merely assisted in locating certain individuals whom members of the community suspected of criminal conduct. It was submitted that there was no evidence that he assaulted anyone, that he coerced anybody into entering the vehicle, or that he actively associated himself with the later assaults carried out by the crowd.

[94] Particular reliance was placed upon the magistrate's decision to acquit accused 3 and accused 5. It was argued that the evidence implicating the third appellant in the kidnapping conviction was not materially different from the evidence relied upon against accused 5 and that the magistrate's differing treatment of the two accused disclosed an inconsistency in the evaluation of the evidence.

[95] The submission cannot be dismissed out of hand. Unlike the second appellant and the fourth appellant, the case against the third appellant is not founded upon direct participation in the assaults. His criminal liability depends primarily upon what role he played in bringing the complainant and the deceased into the situation that ultimately developed into the mob attack, and whether he thereafter associated himself with the conduct of those who carried out the assaults.

[96] The evidence nevertheless places the third appellant at the centre of the events preceding the assaults. On Mr Mbatha's version, he was present when Mr Mbatha and Mr Ntanzi were confronted, present when they were compelled to accompany the group, and directly involved in transporting them to the Sibiya

homestead. The magistrate accepted that evidence and rejected the third appellant's explanation.

[97] The question is not whether the third appellant personally inflicted any injuries. The issue is whether the evidence establishes beyond a reasonable doubt that he knowingly associated himself with the conduct of those who deprived the complainant of his liberty and thereafter associated himself with the conduct giving rise to the assaults and deaths. That enquiry overlaps substantially with both the kidnapping and common purpose analyses and cannot properly be divorced from them.

[98] In evaluating the magistrate's findings, it must be remembered that the role attributed to the third appellant was qualitatively different from that attributed to accused 3 and accused 5. Whether those differences were sufficient to justify the convictions ultimately entered against him is a matter that must be assessed when considering the requirements of common purpose and the kidnapping conviction in light of the evidence as a whole.

[99] The acquittal of accused 5 does not, without more, render the conviction of the third appellant inconsistent. The magistrate's concern regarding accused 5 was not that he was absent from the events at Green Gate, but rather that aspects of the evidence implicating him were regarded as unreliable and, in certain respects, appeared for the first time during cross-examination. By contrast, the magistrate was satisfied beyond reasonable doubt that the third appellant was involved in the transportation of Mr Mbatha and Mr Ntanzi to the Sibiya homestead and rejected his explanation as not reasonably possibly true. The differing outcomes therefore flowed from the magistrate's assessment of the reliability of the evidence against the respective accused and do not in themselves demonstrate a misdirection.

[100] At this stage, I am not persuaded that the magistrate's acceptance of the evidence placing the third appellant at the scene and in the transportation of Mr Mbatha and Mr Ntanzi constitutes a material misdirection. What remains to be determined is the legal significance of that conduct and whether it was sufficient to

establish the offences for which he was convicted. Those issues are best addressed in the ensuing discussion of common purpose and kidnapping.

The fourth appellant (accused 6)

[101] The case against the fourth appellant stands on a markedly different footing to that of the other appellants. Whereas the convictions of the first and third appellants rest substantially upon principles of common purpose and active association, the State alleged that the fourth appellant personally participated in the assaults which resulted in the deaths of the deceased and the attempted murder of Mr Mbatha.

[102] Mr Mbatha's evidence was that the fourth appellant was not present when the assaults commenced. According to him, the fourth appellant arrived at a later stage after he (the complainant) and the deceased had already been subjected to assaults by members of the community. The significance of this evidence is that it excludes any suggestion that the fourth appellant was involved in the initial detention of the complainant and the deceased or in the early stages of the assaults.

[103] Mr Mbatha testified that upon arriving at the scene, the fourth appellant instructed his son to fetch a bush knife, described as the implement ordinarily used to deal with 'paras', and thereafter joined in the assault. Mr Mbatha further testified that the fourth appellant used the bush knife to strike both him and the deceased. In relation to Mr Mtshali, Mr Mbatha was emphatic that the fourth appellant struck him on the head with the bush knife.

[104] The fourth appellant denied these allegations and contended that the regional magistrate ought not to have accepted Mr Mbatha's evidence. It was submitted on appeal that the conviction rested exclusively upon the evidence of a single witness whose testimony was unreliable and who had contradicted himself on numerous aspects of the case.

[105] It was further argued that the circumstances prevailing at the scene rendered reliable identification difficult. Reliance was placed upon the fact that a large crowd was present, that numerous assaults were occurring simultaneously, and that Mr Mbatha himself was under attack and sustained injuries during the course of the

incident. It was contended that these circumstances materially diminished the reliability of Mr Mbatha's observations.

[106] These factors undoubtedly required careful consideration. They must however be evaluated against the fact that Mr Mbatha knew the fourth appellant before the incident and that his evidence constituted recognition rather than the identification of an unknown person. Moreover, Mr Mbatha's evidence concerning the fourth appellant was not vague or general in nature. He attributed specific conduct to him, namely the fetching and use of a bush knife and the infliction of particular blows upon himself (the complainant) and the deceased.

[107] Significantly, the regional magistrate found that Mr Mbatha was a credible witness in relation to the fourth appellant and accepted his evidence regarding the latter's participation in the assaults. The magistrate's finding was informed not only by her assessment of Mr Mbatha's evidence but also by her rejection of the fourth appellant's version as not reasonably possibly true. As previously stated, this court may interfere with those credibility findings only where a material misdirection has been demonstrated or where the findings are plainly wrong.²⁹

[108] Unlike the position of the first and third appellants, the challenge mounted by the fourth appellant is directed less at the application of the doctrine of common purpose and more at the reliability of the evidence placing him at the heart of the fatal assaults. The enquiry therefore turns principally upon whether the magistrate was justified in accepting Mr Mbatha's evidence as reliable notwithstanding the criticism levelled against it.

[109] Having regard to the evidence as a whole, I am not persuaded that the regional magistrate misdirected herself in accepting Mr Mbatha's evidence concerning the fourth appellant's participation in the assaults. The criticisms advanced on appeal do not demonstrate that her findings were unsupported by the evidence or that they were clearly wrong.

²⁹ *Dhlumayo* at 705-706.

[110] The legal consequences of the conduct attributed to the fourth appellant, including whether it established the requisite *mens rea* for the murder and attempted murder convictions, will be considered together with the broader discussion of common purpose and criminal liability which follows. In relation to the factual findings themselves, however, no basis has been established for appellate interference.

Common purpose

[111] The murder and attempted murder convictions of the first, second and third appellants rested substantially upon the doctrine of common purpose. Different considerations arise in relation to the fourth appellant, whose liability was based principally upon allegations of direct participation in the assaults.

[112] As already indicated, the regional magistrate found that the State had not proved the existence of a prior agreement amongst the participants. The convictions must therefore be considered through the prism of active association as contemplated in *Mgedezi*.

[113] The evidence establishes beyond dispute that the complainant and the deceased were subjected to sustained and vicious assaults by numerous members of the community. Equally clear is the fact that the crowd was large, volatile and, at times, seemingly uncontrollable. Captain Ndwandwe testified that members of the community openly expressed the desire that the complainant and the deceased should die. The police officers who attended the scene were unable to disperse the crowd and were chased away. The regional magistrate herself described the incident as a 'free for all'.

[114] These features of the evidence are important because the existence of a large and violent crowd does not, without more, establish common purpose on the part of every person present. The doctrine does not impose liability by association alone. The State remained obliged to prove, in respect of each appellant, conduct demonstrating active association together with the necessary *mens rea*.

[115] The third appellant further contended that the fatal consequences which ultimately ensued were too remote from his initial conduct to justify liability for murder. It was submitted that he could not reasonably have foreseen that the

situation would escalate into sustained mob violence, that additional participants would join the crowd, or that the fourth appellant would later arrive and participate in the assaults using a bush knife. The submission, however, overlooks that the case against the third appellant was not founded solely upon his role in transporting the complainant and Mr Ntanzi to the Sibiya homestead. The magistrate found that, by bringing them to the homestead and delivering them into an already volatile situation, he played a material role in creating the circumstances in which the ensuing violence occurred.

[116] The significance of the third appellant's continued presence lies not merely in the fact that he remained at the scene. Presence alone would not suffice. The evidence accepted by the magistrate was that he participated in bringing the complainant and Mr Ntanzi to the Sibiya homestead, remained present while the assaults escalated, and did nothing to distance himself from or oppose the conduct of those carrying out the attacks. It was that combination of prior involvement and continued association with the unfolding violence that underpinned the finding of common purpose.

[117] There is however merit in the proposition that mere presence is insufficient. Had the evidence against the first and third appellants gone no further than placing them at the scene, the convictions could not stand. The evidence accepted by the regional magistrate, however, went beyond mere presence. In the case of the first appellant, the magistrate accepted that he summoned members of the community, remained present throughout the incident and expressly associated himself with the violence by declaring that the victims should be killed. In the case of the third appellant, the magistrate accepted that he participated in events that brought the complainant and the deceased into the custody of those who ultimately assaulted them and thereafter remained associated with the enterprise as the assaults unfolded.

[118] Counsel further submitted, with reference to *S v Maxaba en Andere*,³⁰ that common purpose is not a device by which criminal liability may be imposed upon

³⁰ *S v Maxaba en Andere* 1981 (1) SA 1148 (A) at 1155E-G.

persons whose participation in events was peripheral or whose conduct falls short of the requirements of the offence charged. That proposition is undoubtedly correct. The doctrine does not relieve the State of the obligation to establish conduct demonstrating active association and the requisite *mens rea* on the part of each accused.³¹ The difficulty with the submission in the present matter is that the magistrate's findings went beyond mere presence at the scene. In relation to the first appellant, the evidence accepted by the magistrate established participation in mobilising members of the community and encouragement of the violence. In relation to the third appellant, the evidence established that he fetched and transported Mr Mbatha and Mr Ntanzi to the Sibiya homestead and thereby played a material role in placing them in the circumstances that ultimately culminated in the assaults. The convictions therefore rested not upon mere presence, but upon conduct from which active association was inferred.

[119] The position of the second appellant is materially different. On the evidence accepted by the magistrate, he personally participated in the assaults upon Mr Mbatha. His involvement was therefore not inferential but direct. The question in his case is not whether there was active association but whether the nature of his participation, viewed in the context of the overall attack, justifies liability for the ultimate consequences that followed.

[120] The fourth appellant likewise occupied a different position. According to Mr Mbatha, he arrived after the assaults had commenced, armed himself with a bush knife and personally assaulted both the complainant and the deceased. His liability does not depend exclusively on conduct attributable to others but on his own alleged participation in the violence.

[121] The appellants further argued that the evidence failed to establish the necessary intention for murder and that, at best for the State, the evidence may have supported convictions for culpable homicide. Reliance was placed upon the absence of any prior plan to kill, the spontaneous nature of the crowd violence and the chaotic circumstances in which the assaults occurred.

³¹ *Thebus* para 49.

[122] The absence of a prior agreement does not preclude a finding of *dolus eventualis*. The enquiry remains whether the accused subjectively foresaw the possibility that death might result from their conduct and nevertheless reconciled themselves to that outcome. Such foresight may be inferred from the surrounding circumstances, provided that the inference is the only reasonable one to be drawn from the proven facts.³²

[123] The evidence accepted by the magistrate established that the complainant and the deceased were subjected to prolonged assaults by a large crowd using an assortment of weapons and implements. The violence was sustained, public and severe. On the State's accepted version, the appellants who remained involved throughout the incident could not have been unaware of the very real possibility that death or grievous bodily harm would result.

[124] It was further submitted that the regional magistrate failed expressly to analyse the issue of *mens rea* at the stage of determining guilt and only later referred to *dolus eventualis* during sentencing proceedings. That criticism has some substance. Although the conviction judgment contains a detailed discussion of common purpose and active association, it does not undertake a separate analysis of whether the State had established the requisite intention for murder in respect of each appellant. The enquiry on appeal, however, remains whether the evidence ultimately accepted by the magistrate was sufficient to establish the requisite *mens rea*. The absence of an express analysis of intention does not, in itself, constitute a material misdirection if the proven facts justify the conclusion reached. It therefore remains necessary to consider whether the conduct attributed to the appellants, viewed against the backdrop of the sustained and escalating violence, was sufficient to establish subjective foresight of death or grievous bodily harm and reconciliation with that possibility.

[125] The difficulty for the appellants is that the magistrate's findings were not founded solely upon their presence at the scene. She found that each appellant, in

³² *Sigwahla* at 570B-E.

differing ways, actively associated himself with the events that culminated in the assaults. In the case of the first appellant, this included his role in mobilising members of the community and his continued involvement as the violence unfolded. In the case of the third appellant, it included his role in bringing Mr Mbatha and Mr Ntanzi to the Sibiya homestead and placing them in circumstances that exposed them to the violence that followed. The second and fourth appellants were found to have participated directly in the assaults. Having considered the evidence holistically, I am unable to conclude that those findings were unsupported by the evidence or that they constitute a material misdirection.

[126] I am satisfied that no basis has been established for interference with the regional magistrate's findings on the murder and attempted murder counts. Although the conviction judgment did not contain a separate and explicit analysis of *dolus eventualis*, the evidence accepted by the magistrate established active association on the part of the appellants and, in my view, justified the inference that each subjectively foresaw the possibility that death might result from the sustained assaults and nevertheless reconciled himself to that possibility. The evidence therefore supports a finding that the appellants possessed, at the very least, the requisite form of *dolus eventualis* in relation to the fatal consequences of the assaults. I return later to the effect, if any, of the kidnapping conviction on the overall outcome of the appeal.

The kidnapping conviction

[127] The conviction on count 5 requires separate consideration. Unlike the murder and attempted murder counts, the enquiry is not directed at participation in the assaults themselves but at whether the State proved beyond a reasonable doubt that Mr Mbatha was unlawfully and intentionally deprived of his freedom of movement and whether each of the appellants was criminally liable for that deprivation.

[128] The evidence establishes that the events giving rise to the kidnapping count commenced at Green Gate. Mr Mbatha testified that he and Mr Ntanzi were asleep in an abandoned structure when accused 4, accused 5 and Mzwe Nzuza arrived. According to Mr Mbatha, Mzwe assaulted him and Mr Ntanzi when they were

reluctant to accompany them to the Sibiya homestead. Mr Mbatha stated that he ultimately agreed to go because he feared further assault if he refused.

[129] Mr Mbatha further testified that he and Mr Ntanzu entered a vehicle and were transported to the Sibiya homestead. He stated that Mzwe travelled with them and that the canopy of the vehicle was closed and locked. On his version, he and Mr Ntanzu did not voluntarily accompany the group but did so because they feared continued violence should they refuse.

[130] If Mr Mbatha's evidence is accepted, the unlawful deprivation of his liberty commenced before his arrival at the Sibiya homestead. The kidnapping was therefore complete before the later assaults at the homestead and on the road commenced. The critical question is whether the State proved the participation of each appellant in that deprivation of liberty.

The third appellant

[131] The evidence against the third appellant differs materially from that against the remaining appellants. It was common cause that he transported Mr Mbatha and Mr Ntanzu from Green Gate to the Sibiya homestead, although he disputed that either was compelled to accompany him and maintained that they entered the vehicle voluntarily.

[132] The magistrate accepted Mr Mbatha's evidence that Mzwe assaulted the complainant and Mr Ntanzu when they refused to accompany the group and that the third appellant was present during those events. She further accepted that the third appellant transported them to the Sibiya homestead despite their reluctance and despite the coercive circumstances in which they had been placed.

[133] On those findings, the magistrate was entitled to conclude that the third appellant knowingly participated in the unlawful deprivation of Mr Mbatha's liberty. His liability did not depend solely on common purpose arising later at the scene of the assaults but on his direct involvement in conveying Mr Mbatha from Green Gate to the Sibiya homestead.

The first and second appellants

[134] The position of the first and second appellants is considerably different. Neither was present when Mr Mbatha and Mr Ntanzi were confronted at Green Gate. Neither was alleged to have participated in the decision to remove them from that location. Nor did the evidence place either appellant in the vehicle which transported them to the Sibiya homestead.

[135] The magistrate nevertheless concluded that liability for kidnapping extended beyond those directly involved in the initial deprivation of liberty. Relying on the proposition that kidnapping may constitute a continuing offence, she reasoned that the complainant remained captive at the Sibiya homestead and, later, on the road, and that those who continued to associate themselves with that unlawful detention became criminally liable for it.

[136] There can be little doubt that Mr Mbatha remained deprived of his freedom after his arrival at the Sibiya homestead. According to the evidence accepted by the magistrate, he and Mr Ntanzi were tied together, remained under the control of others and were subsequently subjected to assaults while being moved from the homestead onto the road.

[137] The difficulty, however, lies in determining whether the evidence established beyond reasonable doubt that the first and second appellants actively associated themselves with that continuing deprivation of liberty as required by the doctrine of common purpose.

[138] In this regard the acquittal of accused 5 assumes significance. The evidence placed accused 5 at Green Gate and associated him with events at the commencement of the deprivation of liberty. Yet the magistrate concluded that the evidence implicating him was insufficiently reliable and acquitted him on all counts.

[139] By contrast, the first appellant was first implicated at a later stage when he arrived with Mr Mbatha's father at the Sibiya homestead, whilst the second appellant was first implicated only after Mr Mbatha had already arrived there. Neither was shown to have participated directly in the initial removal of Mr Mbatha from Green Gate.

[140] The question is therefore whether their later conduct, viewed in the context of the continuing detention, was sufficient to establish participation in the kidnapping itself, as distinct from participation in the later assaults.

Was there a misdirection?

[141] In my view, the magistrate's reasoning presents a difficulty. Much of the conduct relied upon to implicate the first and second appellants relates to the assaults which occurred after Mr Mbatha had already been brought to the Sibiya homestead. The fact that an accused subsequently associated himself with violence perpetrated against a victim does not, without more, establish participation in the earlier deprivation of liberty.

[142] Although kidnapping may be a continuing offence, liability still requires proof that the accused intentionally associated himself with the ongoing deprivation of liberty. Mere presence at the scene, knowledge that the complainant was not free to leave, or failure to intervene is insufficient. The requirements of active association remain applicable.

[143] This conclusion is not inconsistent with the findings made in relation to the murder and attempted murder counts. The evidence establishing active association with the assaults was not necessarily co-extensive with the evidence required to establish participation in the deprivation of liberty. An accused may align himself with the conduct of those perpetrating the assaults after the complainant has already been unlawfully detained, without it following that he thereby became a participant in the kidnapping itself. The two enquiries remain distinct, and each must be determined with reference to the elements of the particular offence under consideration.

[144] The reasoning employed by the magistrate appears, at least in part, to conflate participation in the later mob violence with participation in the continuing detention. In doing so, insufficient distinction was drawn between the conduct establishing common purpose in relation to the assaults and the conduct necessary to establish common purpose in relation to the kidnapping count.

[145] In the result, whilst the evidence was sufficient to sustain the conviction of the third appellant on count 5, I am not persuaded that the State established beyond reasonable doubt that the first and second appellants actively associated themselves with the unlawful deprivation of Mbatha's liberty in a manner sufficient to attract criminal liability for kidnapping.

[146] The appeal of the first and second appellants against their convictions on count 5 must therefore succeed.

Conclusion on conviction

[147] For the reasons already set out, I am satisfied that the regional magistrate correctly approached the evidence of Mr Mbatha with the necessary caution and was entitled to accept those portions of his evidence which she found to be reliable. No basis has been established for interference with her factual findings relating to the murder and attempted murder counts.

[148] The evidence further established beyond reasonable doubt that the fourth appellant personally participated in the assaults, and that the first, second and third appellants actively associated themselves with the conduct of those carrying out the attacks. The convictions on counts 1, 2, 3 and 4 therefore fall to stand.

[149] Different considerations apply to count 5. Whilst the evidence established that Mr Mbatha was unlawfully deprived of his liberty, I am not persuaded that the State established beyond reasonable doubt that the first and second appellants actively associated themselves with that deprivation in a manner sufficient to attract criminal liability for kidnapping.

[150] Consequently, the appeals against the convictions of the first and second appellants on count 5 fall to succeed. Those convictions, together with the sentences imposed in respect of them, must accordingly be set aside. The appellants have established no basis for appellate interference with their remaining convictions or sentences. The appeals in those respects must therefore fail.

[151] The conviction of the third appellant on count 5 is, however, supported by the evidence. The magistrate accepted that he participated in the events at Green Gate and transported Mr Mbatha and Mr Ntanzu to the Sibiya homestead in circumstances in which their freedom of movement had already been unlawfully curtailed.

[152] It follows that the appeals against conviction succeed only to the limited extent reflected above.

Sentence

Applicable principles

[153] Sentencing is pre-eminently a matter for the discretion of the trial court. An appellate court may interfere only where that discretion was not exercised judicially and properly, where the trial court committed a material misdirection on the facts or the law, or where the sentence imposed is shockingly inappropriate or vitiated by a gross disparity between the sentence passed and that which the appellate court would have imposed.³³

[154] In exercising its sentencing discretion, the trial court is required to balance the triad formulated in *S v Zinn*,³⁴ consisting of:

- (a) the gravity and nature of the crime;
- (b) the personal circumstances of the offender; and
- (c) the legitimate interests of society.

[155] The ultimate enquiry is whether the sentence imposed satisfies the constitutional requirement of proportionality, namely, that the severity of the punishment must not be disproportionate to the blameworthiness of the offender and the harm caused.³⁵

[156] Where a trial court has properly considered all relevant factors and exercised its discretion judicially, an appellate court may not interfere merely because it would have imposed a different sentence had it sat as the court of first instance.³⁶ A mere

³³ See *S v Rabie* 1975 (4) SA 855 (A) at 857D–F; *S v Bogaards* [2012] ZACC 23, 2013 (1) SACR 1 (CC) para 41.

³⁴ *S v Zinn*, 1969 (2) SA 537 (A) at 540G–H.

³⁵ *S v Dodo* [2001] ZACC 16, 2001 (3) SA 382 (CC) (*Dodo*) para 38.

³⁶ *S v Malgas* 2001 (2) SA 1222 (SCA) (*Malgas*) para 12; *S v Pillay* 1977 (4) SA 531 (A) at 535A–B.

difference of opinion between the trial court and the appellate court does not justify intervention.

[157] A misdirection by the trial court only justifies appellate interference if it is material. As held in *S v Pillay*,³⁷ a misdirection is material if it is of such a nature, degree, or seriousness that it shows that the trial court did not exercise its discretion at all, exercised it improperly, or based its conclusion on a mistaken view of the facts or legal principles. In the absence of a material misdirection, appellate intervention is permissible only if the disparity between the sentence imposed and that which the court of appeal would have imposed is striking, startling, or disturbingly inappropriate.³⁸

[158] Where the sentencing discretion is circumscribed by the minimum sentencing regime under s 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA), the prescribed minimum sentence is the statutory starting point and standard sentence to be imposed ordinarily.³⁹ A sentencing court may deviate from the prescribed minimum sentence under s 51(3)(a) of the CLAA only when satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence.

[159] In evaluating whether substantial and compelling circumstances exist under CLAA; the court must consider all traditional mitigating and aggravating factors cumulatively. The ultimate test is whether the prescribed statutory sentence would result in a clear, gross injustice because it is shockingly disproportionate to the crime, the criminal, and the needs of society.⁴⁰ An appellate court reviewing a sentence governed by the CLAA must determine whether the sentencing court properly applied this test before interfering with either the refusal or granting of a deviation from the prescribed sentence.

Evaluation

[160] The appellants submitted that the regional magistrate over-emphasised the seriousness of the offences and insufficiently considered their personal

³⁷ *S v Pillay* 1977 (4) SA 531 (A) at 535E–F.

³⁸ See *S v Sadler* 2000 (1) SACR 331 (SCA) para 7.

³⁹ See *Malgas* paras 25–26.

⁴⁰ See *Malgas* para 25; *Dodo* paras 38–40.

circumstances, their relative youthfulness, the absence of previous convictions and the fact that the offences arose within the context of mob violence rather than a pre-planned attack.

[161] The record does not support that contention. The magistrate considered the personal circumstances of each appellant in considerable detail. She took into account their ages, family responsibilities, employment histories, health conditions, dependent children and prospects of rehabilitation.

[162] The magistrate further accepted that there had been no prior planning of the attack and expressly recognised that the liability of appellants 1, 2 and 3 rested on the doctrine of common purpose rather than upon the direct infliction of the fatal injuries. The issue of *dolus eventualis* was not expressly analysed in the conviction judgment.

[163] Of particular significance is the fact that the murder convictions attracted the provisions of s 51(1) of the CLAA. The prescribed sentence was life imprisonment unless substantial and compelling circumstances justified a lesser sentence.

[164] Counsel further submitted that the regional magistrate failed adequately to recognise that the offences arose from a single course of conduct and were inextricably linked in time, place and circumstance. Reliance was placed upon authority dealing with the cumulative effect of sentences imposed in respect of offences forming part of a single criminal enterprise. There is merit in the proposition that a sentencing court must guard against an unduly severe cumulative sentence where multiple convictions arise from substantially the same incident. The regional magistrate was alive to that consideration. This is apparent from the concurrency order she imposed in respect of counts 3, 4 and 5. The result was that the sentences on those counts did not operate cumulatively in the full measure otherwise available. Whilst a different court may perhaps have fashioned the concurrency order differently, that does not establish a material misdirection warranting appellate interference.

[165] The magistrate found that substantial and compelling circumstances were present in respect of appellants 1, 2 and 3. She accordingly declined to impose life imprisonment and instead sentenced each of them to twenty years' imprisonment on each murder count.

[166] In doing so, the magistrate expressly relied upon their personal circumstances, family responsibilities, prospects of rehabilitation and the fact that their connection to the offences arose through the doctrine of common purpose in circumstances where the mob violence had become uncontrollable.

[167] It was further argued that insufficient distinction was drawn between the respective roles of appellants 1, 2 and 3. Whilst their participation differed in important respects, the regional magistrate was alive to those differences. The sentences imposed upon them reflected the fact that each was convicted on the basis of common purpose rather than direct infliction of the fatal injuries. The magistrate expressly regarded that consideration, together with their personal circumstances and prospects of rehabilitation, as constituting substantial and compelling circumstances justifying a deviation from the prescribed sentence of life imprisonment. The mere fact that the appellants fulfilled different roles within the events does not establish that the imposition of similar sentences constituted a misdirection.

[168] That leaves the effect of setting aside the kidnapping convictions of the first and second appellants. The first and second appellants each received eight years' imprisonment on count 5. The magistrate ordered that the sentences imposed on counts 3, 4 and 5 run concurrently with the sentence imposed on count 2. Accordingly, the kidnapping sentence did not increase the effective sentence of forty years' imprisonment imposed upon either appellant.

[169] Notwithstanding the absence of a material misdirection in many aspects of the sentencing process, the cumulative effect of the sentences imposed requires closer scrutiny. The offences arose from a single episode of vigilante violence occurring

over a limited period of time and forming part of one continuous course of conduct.⁴¹ Although the regional magistrate recognised this consideration and ordered partial concurrency, no reasons were furnished for structuring the concurrency order in a manner that effectively required the first, second and third appellants to serve two separate sentences of twenty years' imprisonment. Having regard to the substantial and compelling circumstances found to exist, the basis upon which their liability was established, and the totality principle applicable to sentencing, the resulting effective sentence of forty years' imprisonment is disproportionate and justifies appellate interference.

[170] In my view, the interests of justice would be adequately served by directing that the sentences imposed on counts 2, 3 and 4 run concurrently with the sentence imposed on count 1 in the case of the first and second appellants, and that the sentences imposed on counts 2, 3, 4 and 5 run concurrently with the sentence imposed on count 1 in the case of the third appellant. Such an order properly reflects the seriousness of the offences, the loss of three lives, and the need for deterrence, whilst avoiding a disproportionate cumulative effect. The effective sentence in respect of the first, second and third appellants would accordingly be twenty years' imprisonment.

[171] Different considerations apply to the fourth appellant. Counsel submitted that the sentence of life imprisonment should likewise be interfered with and replaced by a determinate term of imprisonment, contending that a sentence of 25 years' imprisonment would be appropriate. I am unable to agree.

[172] Unlike the first, second and third appellants, whose liability arose through the doctrine of common purpose and who were found by the regional magistrate to have established substantial and compelling circumstances, the fourth appellant was found to have participated directly and personally in the assaults. The evidence accepted by the magistrate established that he arrived armed with a bush knife, associated himself with the ongoing violence and personally assaulted both the complainant and the deceased. The magistrate concluded that no substantial and

⁴¹ *Dlamini v S* [2023] ZAGPPHC 468 para 26.

compelling circumstances existed which justified a departure from the prescribed sentence of life imprisonment. Having regard to the nature and extent of his participation, the gravity of the offences, and the absence of any material misdirection, I am unable to conclude that the sentence of life imprisonment is disproportionate or that a sentence of 25 years' imprisonment would adequately reflect his moral blameworthiness.

[173] Furthermore, whilst the previous convictions recorded against the fourth appellant are of considerable age and cannot be accorded significant weight for sentencing purposes, they form part of the broader personal circumstances distinguishing his position from that of the first, second and third appellants, all of whom were treated as first offenders. The principal distinction, however, lies in the nature and extent of the fourth appellant's participation in the offences and the absence of substantial and compelling circumstances warranting a departure from the prescribed sentence.

[174] A further difficulty arises in relation to the fourth appellant. The conviction proceedings, properly construed, reflect that he was acquitted on count 5. Notwithstanding that acquittal, the sentencing court purported to impose a sentence of eight years' imprisonment on that count. In the absence of a conviction, no sentence could competently be imposed. The sentence imposed on count 5 in respect of the fourth appellant therefore falls to be set aside. As that sentence was ordered to run concurrently with the sentence of life imprisonment imposed on count 1, its setting aside does not affect the effective sentence imposed upon the fourth appellant.

Conclusion

[175] The offences themselves are exceptionally serious. Three people lost their lives, and the complainant sustained very serious injuries. The victims were publicly assaulted by a crowd that had elected to take the law into its own hands. The conduct constituted a particularly egregious form of vigilante violence.

[176] The interests of society and the need for deterrence were therefore important considerations. The magistrate cannot be faulted for treating vigilante violence as a serious aggravating feature deserving of substantial punishment.

[177] Cases of this nature continue to present themselves before our courts with alarming frequency. Communities frustrated by crime sometimes resort to what is euphemistically described as 'community justice'. That description is misleading. There is nothing just about a process in which suspicion replaces investigation, accusation replaces proof, and a crowd assumes for itself the functions of police officer, prosecutor, judge and executioner. Such conduct strikes at the heart of the rule of law.

[178] South Africa is founded upon constitutional values which require that every person, irrespective of the allegations levelled against him or her, is entitled to the protection of the law, the presumption of innocence, and a fair trial before an independent court. When communities take the law into their own hands, they do not strengthen the administration of justice; they undermine it. Vigilantism inevitably carries the risk that innocent persons will be subjected to violence, humiliation, permanent injury, or death without any lawful determination of guilt.

[179] The courts are therefore obliged to send a clear and unequivocal message that so-called community justice has no place in a constitutional democracy governed by the rule of law. Grievances concerning criminal conduct must be reported to the police and dealt with through lawful processes. Resort to mob violence cannot and will not be tolerated, regardless of the purported motives of those who participate in it.

[180] In the circumstances, I would propose the following order:

1. The appeals of the first and second appellants against their convictions on count 5 are upheld.
2. The convictions and sentences imposed on the first and second appellants on count 5 are set aside.

3. In respect of the first and second appellants, it is ordered that the sentences imposed on counts 2, 3 and 4 shall run concurrently with the sentence imposed on count 1.
4. In respect of the third appellant, it is ordered that the sentences imposed on counts 2, 3, 4 and 5 shall run concurrently with the sentence imposed on count 1.
5. The sentence purportedly imposed on the fourth appellant on count 5 is set aside.
6. Save as aforesaid, the appeals against conviction and sentence are dismissed.

Andrews AJ

I agree, and it is so ordered.

Nirghin J