IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Appeal number: A227/2012

In the Appeal between:

CHEMANE PIET RADEBE 1st Appellant

PITSO JEREMIAH MATHABATHE 2nd Appellant

THABO PHILLIP MOKOENA 3rd Appellant

JOSEPH SEUN SELEPE 4th Appellant

and

THE STATE Respondent

CORAM: LEKALE, ADJP *et* REINDERS, J *et* ZIETSMAN, AJ

HEARD ON: 21 MAY 2018

JUDGMENT BY: LEKALE, ADJP

DELIVERED ON: 24 MAY 2018

SUMMARY: Criminal law and Procedure – Unfair and impermissible to convict an accused person of a charge never put to him and not competent, as a verdict, on a charge preferred against him - Common purpose to commit assault not established where the accused did not make common cause with perpetrators by actively associating with them – Effective sentences too harsh where the accused were motivated by genuine belief that they were acting in the interests of the society – Convictions on assault GBH set aside and effective sentences reduced.

[1] The four appellants, who were all legally represented, were arraigned before a single judge in this division together with some two other accused and were, on 13 June 2012 convicted of housebreaking with intent to murder and murder as count 1 and public violence as count 5. Appellants 1, 2 and 4 were, further, convicted of kidnapping as count 2, two counts of assault with intent to cause grievous bodily harm (assault GBH) as counts 3 and 4 after the two other accused were discharged at the close of the State's case. On 14 June 2012 the first, second and fourth appellants were sentenced to 25 years imprisonment on counts 1 and 2 taken together, five years imprisonment on counts 3 and 4 also taken together for sentence purposes and 10 years imprisonment on the public violence count. Some of the sentences were directed to run concurrently with the effect that they were each sentenced to effective 30 years imprisonment. The third appellant, on his part, was sentenced to an effective 20 years imprisonment after he was sentenced to 20 years on the murder count and 10 years on the public violence count which were directed to run concurrently.

[2] The appellants feel aggrieved by the convictions on count 4 and the sentences on all counts. They now approach us on appeal against the same with leave of the trial court.

[3] On returning the guilty verdicts relating to assault GBH on count 4 as opposed to common assault as the preferred charge the trial court found that **"maar ten aansien van daardie aanklag en aanklag 4 is hierdie hof van mening dat gevaarlike wapens gebruik was, 'n panga en 'n bottel bier. En die hof in belang van reg en geregtigheid is van mening dat die gebruik van daardie tipe voorwerpe die opset aandui om ernstig te beseer."**

[4] On finding cause to deviate from life imprisonment as the prescribed minimum sentence for murder in the circumstances of the instant matter the trial court took into consideration the very close relationship the appellants had with one Mbangiso who was killed by the victim of murder *in casu*, incitement from and moral decline on the part of the community leading the appellants to feel like heroes in their dastardly deeds as well as the fact that some of the appellants consumed some alcoholic beverages before participating in the unlawful activities.

[5] In argument on papers and before us, Mr Nel, *inter alia*, submits to the effect that the totality of evidence before the trial court did not implicate the appellants on count 4 and, further, that in any event the court *a quo* erred in convicting the appellants of assault GBH when they were indicted for common assault on the relevant count. The sentences on count 1 should be 18 years and 15 years respectively while the sentences imposed for counts 2 to

and including 5 should run concurrently with the sentences on count 1.

[6] On its part the State, through Ms Moroka initially stood by the heads filed by her colleague Advocate Bester and, *inter alia*, conceded that the appellants were guilty of common assault on count 4 and not assault GBH insofar as the latter is not a competent verdict on the former charge. In argument before us she correctly conceded that there was no evidence whatsoever before the trial court to show that any of the appellants made common cause with the attackers on count 4. Some may have been present but there was no evidence to prove that they associated themselves actively with the actual perpetrators. On the sentences Ms Moroka correctly and laudably conceded that the sentences imposed are too harsh regard being had to the factors found by the trial court as justifying a departure from the ultimate sentence prescribed for murder in the instant matter.

[7] It is correct that in line with the our criminal justice system only verdicts that are competent on the charge preferred against the accused can be returned if the evidence before the court establishes the same as opposed to the preferred charge. (See **Section 267 of Criminal Procedure Act 51 of 1977** and **S v F** 1975 (3) SA 167 (T)).

[8] It is, further, correct that the powers of a court of appeal are limited when it comes to sentences insofar as it can only interfere with the same if the sentencing court did not exercise its

discretion properly or at all by failing to strike a healthy balance between the *Zinn*-triad. (See **S v Pieters** 1987 (3) SA 717 (A)).

[9] The parties are correctly in agreement that the trial court erred in returning guilty verdicts on assault GBH on count 4 as opposed to common assault which was the preferred charge to which they pleaded. They never faced the risk of being convicted of assault GBH on the relevant count and were, as such, not on their guard in that regard. It was simply not fair to convict them of the charge they never faced.

[10] The parties are, correctly *ad idem* before us that the recorded evidence before the trial do not establish the guilt of appellants 1, 2 and 4 on count 4. The State relied on common purpose in its case against the appellants. It, as such, had to show beyond reasonable doubt not only the presence of the appellants when the crime was committed but also that they acted through the actual perpetrators in that they made common cause with them by associating themselves actively with their acts and omissions. (See **S v Mgedezi** 1989 (1) SA 687 (A)).

[11] There was no evidence whatsoever before the trial court to show that all the relevant appellants were present when the victim was assaulted or aware of and associated themselves with the assault on her by showing solidarity with the perpetrators when the assault took place.

[12] Direct evidence in support of count 4 was to the effect that on the fateful morning after sunrise the complainant was sitting around the fire outside with, *inter alia*, the deceased on count 1 when a group of male persons showed up. The deceased ran away and the group chased after him. She could identify accused 1 before the trial court as well as the second appellant among the group. The group later returned that night and she saw the second appellant again. The deceased entered the house shortly before the group could arrive. There was a knock at the door but they declined to open the door. A window was broken whereafter they opened the door. One Thabo, who was not before the trial court, entered together with others and proceeded to slab her in the face where she was sitting next to the heater. The group thereafter took one Ndade from the bedroom and left the house with him. She was also dragged out of the house. She broke loose, ran into the bedroom and hid behind the wardrobe. The first appellant kicked the door open and proceeded to lift the mattress from the bed, whereafter, he called out to others to come as he had found the deceased. They took the deceased out of the bedroom leaving Thabo and accused 1 behind but they also eventually left shouting and accusing her of hiding furtively in the room. She was also hit with a beer bottle by someone who she believes the first appellant should have seen as she was standing next to him when she was assaulted. The deceased was eventually placed on a burning tyre and killed against the songs and ululations of members of the community who appreciated what the culprits were doing.

[13] It is not permissible to convict an accused of a charge more serious than the one preferred against him by the State regard being had to the need to advise the accused adequately of the allegations against him in order to enable him to prepare fully and properly for the trial. To do so is to prejudice them and to fly in the face of the rule of law. The position is different where it was not possible to prefer more serious charges before such as where the assault victim dies after the fact of a conviction and the State decides to bring murder charges against the accused on the same factual matrix after the conclusion of the assault trial. (See **Lelaka v The State** [2015] ZASCA 169).

[15] Relative youthfulness of the accused plays a significant role in the determination of appropriate sentence and the sentencing court is generally obliged to ensure that it has all the relevant information to assist in that regard. (See **Calvin v The State** [2014] ZASCA 145 and **S v Mabuza & Others** 2009 (2) SACR 435 (SCA)) where the court held that youthfulness entitles an accused person to human dignity of being considered capable of redemption.

[16] No pre-sentencing reports served before the trial court although some of the accused were relatively young with the second appellant being 19 years of age at the time he was sentenced. The trial court found no reason to differentiate between first, second and third appellants for sentence purposes. In this regard the trial judge specifically found that the second appellant was already a major at 18 years of age.

[17] I am persuaded by the material properly before the trail court that the appellants are not inherently wicked and that, as correctly found by the court *a quo*, were largely influenced by the community and thought that they were actually serving the interests of the community when they committed the relevant crimes. Indeed they acted unlawfully and the trial court was correct in expressing its disapproval of their conduct by imposing long term custodial sentences. I am, however, of the view that the sentences so imposed are out of proportion with the personal circumstances of the appellants, the interests of society and the crimes themselves and do not, as such, strike a healthy balance between the *Zinn*- triad. It was common cause before the trial court that the community had lost confidence and trust in the police and the appellants regarded themselves as heroes in the sense that they were protecting the community. The appellants' immediate community supported their actions and actually urged them on in their deeds.

[18] Mr Nel is, therefore, correct in his submissions that 18 years in respect of the first, second and fourth appellants would be appropriate while 15 years would be appropriate in respect of the third appellant as effective custodial sentences.

ORDER

[19] In the result the appeals against the convictions on count 4 as well as against sentences succeed.

[20] The convictions on count 4 are therefore set aside and so are the sentences imposed on the first, second and fourth appellants in relation thereto.

[21] The sentences imposed on the first, second and fourth appellants in respect of counts 1 and 2 are set aside and in their place and stead are substituted 18 years imprisonment.

[22] The sentences imposed on the first, second and fourth appellants in respect of count 3 are set aside and in their place and stead are substituted 3 years imprisonment.

[23] The sentences imposed on the first, second, third and fourth appellants in respect of count 5 are set aside and in their place and stead are substituted five years imprisonment.

[24] The sentence imposed on the third appellant in respect of count 1 is set aside and in its place and stead is substituted 15 years imprisonment.

[25] The sentences are al directed to run concurrently with the effect that first, second and fourth appellants shall serve an effective 18 years in prison while the third appellant shall serve 15 years imprisonment.

[26] The sentences are antedated to run from the 14 June 2012.

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LJ LEKALE, ADJP

I agree _____

C REINDERS, J

I concur _____

P ZIETSMAN, AJ

On behalf of appellant:	Adv. PW Nel
Instructed by:	Legal Aid SA Bloemfontein Office Bloemfontein
On behalf of respondent:	Ms MMM Moroka
Instructed by:	Director of Public Prosecutions Bloemfontein