IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE SIGNATURE

16/05/2024 N V KHUMALO J

APPEAL CASE NO: A89/2022

Regional Court Case No: SH14/2015

In the matter between:

THABO BRIAN MBETHE **1st APPELLANT**

HOSIA KABIZULU KHUMALO **2nd APPELLANT**

MICHAEL MLUNGISI MTHIMUNYE **3rd APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

Khumalo N V (with Mogotsi AJ concurring)

Introduction

[1] This is an appeal pursuant to a leave to appeal granted on 5 March 2021 in the above Honourable Court on petition in terms of section 309C of Act 51 of 1977 ('the Act"). The Appellants, Thabo Brian Mbethe, Hosia Kabizulu Khumalo and Michael Mlungisi Mthimunye (1st, 2nd and 3rd Appellants respectively) were convicted in the Regional Court, Ekangala on the 4th March 2020 of an offence of murder, read with s 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("the Amendment Act") as well as s 258 of the Act and each sentenced to an effective term of 15 - years imprisonment. They are appealing against both conviction and sentence.

[2] On 25 November 2022, the Appellants filed comprehensive heads of argument with an intention to proceed with the appeal. It turned out that they had appointed Mr I Pather, from T I Pather Attorneys, a private company, to continue with the prosecution of their appeal. Mr Pather had then proceeded to attend to the procurement of a reconstructed record. On the other hand, on 18 January 2023, a few days before the date of the appeal, Adv Van As from Legal Aid South Africa (who seemingly was unaware of the 3rd Appellant's instructions also to the new attorneys), filed on behalf of the 3rd Appellant an Application for a postponement of the appeal, submitting that the record was inadequate for purposes of an appeal. As a result, the Appellant sought an order for the matter to be returned to the *court a quo* for purposes of a proper reconstruction of the record. On being appraised of the fact that all three Appellants are represented by T I Pather attorneys, Legal Aid South Africa formally withdrew from the matter.

[3] The Appellant's attorneys had in the meantime delivered a reconstructed record of proceedings together with their heads of argument. The issues pertaining to the incomplete record seemingly having been resolved but for the issue of certification, the parties were ready to proceed when the matter came before court. The record was
reconstructed on 21 April 2021 in the absence of the Appellants at the insistence of Mr Pather, who was instructed to proceed with the Appeal. The Appellants' legal representatives in the trial court, state prosecutor and interpreter who were requisitioned to attend participated in the reconstruction of the record. The

reconstruction of a record being part of a fair trial entrenched in *section 35(3) of the Constitution,*[1] it is acknowledged in, *S v Chabedi*[2] *that;*

> *"[T]he requirement is that the record must be adequate for proper consideration of the appeal; not that it must be a perfect record of everything that was said at the trial."*

[4] It is also to be noted that the period it took to prosecute the matter was 7 years, due to the trial only commencing on 29 November 2017[3], even though the Appellants were arrested on 13 November 2013. Any further delays in the appeal would have severely prejudiced the parties and not served the interest of justice.

[5] All three Appellants were duly represented in the trial court. The 1st Appellant represented by Mr Nkadimeng and the 2nd and 3rd Appellants by Mr Mphephu. They all tendered a plea of not guilty to the charge of having acted in common purpose to commit an offence of murder of a 33 years old Christopher Majola (the deceased) on the 13th November 2013 at about 3h00 am in that they unlawfully and intentionally killed the deceased by assaulting (Beating) and kicking him numerous times till he died. No explanation of Plea was tendered. All three chose to remain silent. The Appellants further admitted formally, in terms of s 220 of the Criminal Procedure Act 0("the Act"), Exhibit A which is the certificate on declaration of the deceased's death, Exhibit B, the identification of the deceased body, Exhibit C the post mortem report and Exhibit D the photo album consisting of 80 photos taken at the scene.

[6] The salient facts are that in the early hours of the morning on 13 November 2013 Ms Monyele Johanna Mahlangu ("Mahlangu"), a resident in the premises of a church reported to the 2nd Appellant, a priest residing opposite the Church, that she heard a sound in the church premises and suspected a possible burglary. She later that morning was asked by the three Appellants to let them into the church yard. They came in carrying an injured deceased with blood on his head and face who was later confirmed to have sustained severe multiple injuries to his body including

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[1] *section 35(3) of the Constitution of the Republic of South Africa, 1996 (as amended).*

[2] *S v Chabedi [2005] ZASCA 5; 2005(1) SACR415 (SCA)*

[3] see charge sheet on page 11 of the record.

his head and face and subsequently succumbed to his injuries. It also turned out that there was no burglary at the church. The trial court convicted all three Appellants based on the testimony of a key eyewitness namely, Siphiwe Given Masemola (Masemola), and Mahlangu. Masemola was in the company of the deceased when the deceased was accosted and grabbed by the 1st Appellant. He identified the three Appellants as the people he saw assaulting and dragging the deceased into the church premises. A hockey stick with blood was found next to the deceased's body in the church premises. The court was also reliant on the post mortem report dated 14 November 2015 that the parties at the beginning of the trial accepted and formally admitted into evidence in terms of s 220 of the Act. The report confirmed the cause of death to be the head injuries. The court found that the Appellants were involved in the killing of the deceased and the state to have proven the Appellants' guilt beyond reasonable doubt, whilst their denial and versions were found to be not reasonably possibly true. It was however further noted during sentencing that exhibit C, also refers to a "gunshot to the left parietal bone," seemingly suggestive of the deceased having also sustained a gunshot injury to the head.[4]

Grounds of appeal

On conviction

[7] The Appellants are accordingly appealing their conviction on the basis that the learned magistrate in the court a quo erred:

> [7.1] In finding that the Appellants were involved in causing the death of the deceased under circumstance were the cause of death is recorded as a gunshot wound by the medical practitioner that had conducted and completed the medical post mortem report. Arguing that another court may come to a different conclusion in relation to the interpretation of the medical evidence and the opinion expressed therein.

[4] see page 273 of the record.

[7.1.A] (However the cause of death is not recorded as a gunshot wound – but as “head injuries”)

[7.1.1] When the court dealt with the post mortem and the findings therein during sentencing, which is irregular**,** the address by the prosecutor on this point without any evidence is not admissible. Had the issue been canvassed with the legal representatives prior to their closing arguments and before conviction and the issue ventilated giving the Appellants an opportunity to express their views it would have expended the argument for reasonable doubt.

[7.1.2] This court did not conclude the issue of the cause of death with certainty and clarity. Another court may come to a different conclusion.

[7.1.3] Another court may find that the medical evidence supports the version of the Appellants that they did not assault the deceased and does not support the objective medical evidence that is common cause to both parties.

[7.2] In accepting part of the evidence of Masemola, that he heard a gunshot, but seemingly incriminate the Appellants in the assault leading to the death of the deceased, whereupon the transcript does not have the evidence in chief of Masemola and the Appellants’ rights reserved in relation to supplementation of any further grounds for appeal based on the evidence of Masemola).

(The record on Masemola’s evidence was, in agreement with the Appellant’s present and former legal representatives, reconstructed in proceedings convened by the magistrate and attended by Appellants’ current and former legal practitioners, the state prosecutor and the interpreter. The evidence was summarised by the magistrate from her notes and confirmed by all the other parties in attendance. Nevertheless, the Appellants

hereafter acknowledge that the court correctly noted Masemola's evidence that he heard a gunshot. This point has therefore become moot and would not be addressed further.)

[7.2.1] In summing up the evidence in the judgement, the court correctly noted that the witness heard a shot and to ignore this in the light of the medical report is irregular, unfair and unjust and a travesty of justice.

[7.3] In finding that it was the 1st Appellant that assaulted the deceased with a hockey stick as per his confession rather than Masemola's testimony that it was Accused 2 that assaulted the deceased with an iron rod. The finding is inconsistent with the evidence as a whole. There has been no trial within a trial to determine the admissibility of the 1st Appellant's confession.

[7.4] In accepting the evidence of Masemola regarding the identity of the Appellants, incriminating the Appellants as the persons who assaulted the deceased under circumstances which makes it difficult or at least have sufficient room for doubt as to the veracity of the witness' observation, and testimony of the Appellant. It is evident that the witness has a motive and absent the alleged confession, he is a single witness that does not pass the test for the reliability of a single witness.

[7.5] In finding that the blood on the hockey stick was that of the deceased and fingerprints of the Appellants or not being those of the Appellants were found or not found. The evidence should have vindicated the Appellants.

[7.5.A] No such findings were made by the court a quo).

[7.6] All the material facts did not identify the hockey stick. Masemola identified an iron rod and placed it in the hands of the 2nd Appellant, whilst Sibanyoni referred to a golf stick which he placed in the hands of the 1st Appellant, according to the confession.

[7.7] The magistrate descended into the arena, aiding and abetting the state's case on the issue of a golf or hockey stick, in that: Sergeant Sibanyoni said it's a golf stick rather than a hockey stick that was depicted in the photos as suggested by the prosecutor. The court supported and abaited the state's case that it is a hockey stick.[5] This failure to act impartially rendered the proceedings a sham and the magistrate must be held to have acted impartially, lacking open mindedness and fairness.

[7.8] The Appellants also dispute that the state proved that there was an intention on any part of one accused to commit murder or that they had agreed on such intent, alternatively that the accused had agreed on such intent or alternatively that the accused had actively associated in a purported criminal act with a requisite blameworthy state of mind. (Dispute proof of common purpose).

[7.9] Further, being Appellants' key contestation against the court *a quo* that during sentencing the court *a quo* raised the issue of a post mortem with the prosecutor only, who allegedly conceded that the death was as a result of the gunshot wound caused to the head. Further that when the magistrate summarised the evidence, he agreed that there was evidence of a shot that went off, but none of this was canvassed during the trial and the issue completely overlooked and ignored when giving judgment. Consequently, there is no evidence before the court that concludes beyond reasonable doubt that it was the Appellants that caused the death of the deceased. They argue that the death was caused by a gunshot wound. The court is also said to have ignored that Masemola's evidence during the trial differed to his affidavit that he made in 2013 that makes no mention of a gunshot or of the 1st Appellant approaching them. They argue that the conviction was wrong in law and was influenced by these wrong irregularities.

[8] Finally, the Appellant also criticised the legal representation of the Appellants on the basis inter alia, that they admitted to the medico legal post mortem report, completely disregarding the contents thereof and failed to cross examine the witness

[5] see pages 4 and 6 line 20 and 10 of the record for 28 March 2018

on the issue that emanate from this fact, rendering all the Appellant's representation nugatory.

On sentence

[9] The Appellants' ground of appeal against sentence is that the sentence imposed does not take into consideration the personal circumstances of the appellants. It also does not relate to the circumstances of this case. It induces a sense of shock.

Evidence led

The State

[10] The evidence on behalf of the state as set forth does not follow any sequence. Ms Mahlangu who lived in the church premises, testified that she interpreted the sound she heard on the morning in question to have been of something breaking and thought that there was a burglary in the church premises. She phoned the 2nd Appellant for assistance and remained locked in her room out of fear. The 2nd Appellant stays in the vicinity of the church. Later on, she unlocked the church gate to let the three Appellants into the church premises. They came in carrying the deceased whom they held on both sides. The deceased's head and face was covered with blood. She did not witness the deceased being assaulted by the Appellants. The Appellants then just left the deceased lying down near the church office. The 2nd Appellant poured water over the deceased. The Appellants wanted to ascertain the identity of the deceased. She confirmed that the church belongs to the 1st Appellant's father who have let her stay in the premises as she did not have a place to stay. She stayed in the premises with her daughter.

[11] Mr Nkadimeng, the 1st Appellant's representative, put to Mahlangu that the Appellants testimony is going to be that they did not actually assault the deceased, he was assaulted by the members of the public outside the church. Mahlangu had indicated the stop sign where these people were supposed to be, to be 50 meters

away from the church and denied hearing voices of people making noise outside the gate.

[12] On cross examination by Mr Mphephu, the 2nd and 3rd Appellant's representative, she could not remember if the deceased's face was covered with blood but she could see blood on his head. It was put to her that 2nd Appellant is going to testify that indeed she called him regarding the noise and he called 1st and 3rd Appellant. They arrived together at the church and found two unknown people behind the church building who started to run away. The 2nd and 3rd Appellants chased one of the unknown persons. They could not apprehend him. They then walked back to the church. At the gate of the church they found a person lying on the ground, his face full of blood, that is when 1st Appellant called her to open the gate. They entered the premises with the person to see who this person was as they could not see his face. They wanted to take him to a place where there is visibility. The 2nd Appellant took water in a bucket and poured it on the deceased' face. He then called the police. The Appellants are going to say they never assaulted the deceased.

[13] The evidence of Mr Masemola, the state's key witness and that of Constable John Mankwane ("Mankwane), who both testified on the 29 November 2017 was missing and reconstructed as previously mentioned. Masemola's evidence was also inferred from the trial court's judgment. Masemola testified as the second witness following Mankwane who was the first witness to testify for the State.

[14] According to Masemola on the day in question, he was with the deceased at around 3h00am. They were braking a steel bath with an intention to sell the pieces during the day. They had just placed the pieces in the field when they were approached by the 1st Appellant who tried to accost the two of them but Masemola managed to run away. The 1st Appellant tried to grab the deceased. The deceased moved backwards and ran towards a nearby mountain. He saw the 1st Appellant grabbing the deceased, pulling him with his jersey. Masemola continued to run away in an opposite direction. He then heard the deceased calling out his name several times and heard a shot. In an endeavour to track the deceased he walked backwards, taking the direction of the church and passed the graveyard. He then saw three male persons who were busy attacking the deceased. There was light that

was situated at a shack which lit the place and a full moon, plus the Apollo light. The three Appellants were assaulting the deceased, hitting him with stones. They tried to drag him to the church premises. He could see the 2nd Appellant clearly whom he could identify, with his height and the way he walked. He then saw the 2nd Appellant hitting the deceased with an iron rod and stabbing him on his right hand and cheek. 1st Appellant also started to assault the deceased. He could not see exactly what the 3rd Appellant was doing. In the church premises there is an alternative source of light besides the moon. Also an Apollo light nearby. There are 2 gates, the main and the back gate. There was also a pregnant woman inside the church building. He identified the 2nd Appellant by his height and the way he walked with a limp. He was afraid to go closer to the scene and was running away to look for help. The three Appellants were dragging the deceased towards the back gate. At the deceased's parents the gate was locked. He came back to the scene and saw the 2nd Appellant with a bucket of water that he poured over the deceased. Later the police arrived. He also mentioned to have identified 2nd Appellant by his dark complexion.

[15] Under cross examination he confirmed that the church is near a four way stop. They went to place the steel bath tub next to the church. They tried to break it into pieces by throwing it on the tar road and it did make a noise. They were near a manhole that is about 25 to 30 meters from the church. The 1st Appellant approached them at the time they were about to go home. In the church yard the 3rd Appellant was holding the deceased's shoes whilst 1st and 2nd deceased were holding the deceased. He also indicated that the 2nd Appellant walks with bended legs and a limp and is dark in complexion.

[16] Mankwane's brief testimony was that on that day he was on duty. At quarter past four that morning he received a complaint of housebreaking at the church. He arrived at the scene with Sergeant Sibanyoni. They found a lot of people in the church yard and a person who was severely injured lying face down next to a shack. There was a bucket next to the person and his clothes were wet. Mankwane saw wounds also on the person's mouth, open wounds on the face and both eyes. He was not sure if at that time the person was still alive. He then called the emergency services. He also saw a hockey stick with blood on it. The people he found in the church yard were about eight to nine, amongst them, besides the three Appellants

there was the 1st Appellant's father, a Captain of Ekangala Police, and the 2nd Appellant's father who told him that the 2nd Appellant called the police on several times regarding the housebreaking. He didn't' interview any person. He didn't know who assaulted the deceased. There was one light in the premises. The emergency services arrived and the deceased was declared dead. He handed the scene to Warrant Officer Torson.

[17] According to Sergeant Sibanyoni soon after their arrival at the scene at the church, she enquired from the people who were there as to what happened. The deceased was lying on the ground facing up. He was full of blood, a golf stick and a bucket were next to his body. The 1st Appellant approached her and told her that he found the deceased in the church premises and assaulted him with a golf stick. She confirmed that the 1st Appellant only spoke about himself being involved in assaulting the deceased, no other people. She confirmed the stick found near the body of the deceased depicted on the photo album. The court indicated to Sibanyoni that what is in the picture is a hockey stick. She confirmed it to be indeed the stick she found at the premises and which was also photographed. She indicated that the deceased had serious head injuries and was subsequently declared dead by the paramedics who later arrived at the scene. She then at that time arrested the 1st Appellant for murder of the deceased, after reading him his rights. Subsequent the arrest, she did not take a statement nor did the 1st Appellant make a statement to her. She did not arrest the 2nd and 3rd Appellants.

[18] Under cross examination, Mr Nkadimeng asked Sibanyoni to repeat what the 1st Appellant said in his own words when he made the admission. She said the 1st Appellant said that "One of the people staying in the church phoned him and informed him that there is an African male in the yard, they chased him and the person ran to the field. They grabbed him from the field and brought him to the church. He then hit him with the golf stick." She was told that the 1st Appellant is going to deny telling her that. She also confirmed to have made his own statement after the arrest of the 1st Appellant the same morning.

The Defence

[19] The 1st Appellant confirmed that the church belongs to his father. His evidence was that on the day in question, at ± 3h00am-4h00am he headed a call about an intruder at the church when he found the deceased in the street, 40 meters away from the church. The deceased was amongst a group of people assaulting him. It was dark but he could see by the noise they were making that a person was being assaulted, although he could not say who was assaulting that person. He also indicated that he did not manage to talk to these people. He met up with the 2nd and the 3rd Appellant at the gate of the church. They took the deceased inside the church premises, trying to assist him. The deceased was full of blood and they wanted to ascertain his identity, so they poured him with a bucket of water. He denied that any of the Appellants assaulted the deceased. In response to the fact that Masemola saw him assaulting the deceased whilst in the company of the other Appellants, he argued that it was dark and he does not know how Masemola could say what he or the other Appellants were doing. When asked on his admission made to Sibanyoni he said he did not remember talking to the police. He also denied knowing Sibanyoni.

[20] The 2nd and the 3rd Appellant's version was put to the 1st Appellant that 2nd Appellant is going to testify that the 2nd and the 3rd Appellant went to inform him about the break in and the three of them went to the church together. Approaching the church, they could see three people in the church yard who started running away. The 2nd Appellant and the 3rd Appellant who had jumped the fence started chasing two of those people whilst the 1st Appellant chased the other one. The 2nd and 3rd Appellant could not apprehend the people they were chasing and when they came back they heard the 1st Appellant screaming that they must come. They found 1st Appellant alone next to the deceased who was lying on the ground his face was full of blood." In response the 1st Appellant denied that he arrived with them at the church or chased anybody. He agreed that he called the 2nd and 3rd Appellants to come and assist him to take the person that was lying on the ground inside the church yard. The person's face was full of blood. He said it was because the person was assaulted. They poured water on the deceased to see his face. He questioned how 2nd and 3rd Appellant could have seen that he was also chasing someone when they were at the same time chasing other persons as well. It was further put to the 1st Appellant which he denied, that the 2nd and 3rd Appellant's version was also that he

assaulted the deceased and he was also alone there, with no group of people. In relation to Sibanyoni he said he could not deny talking to her as he couldn't remember.

[21] Under cross examination by the prosecutor the 1st Appellant testified that he found the person already at the gate, losing energy and power. Then again said when he was going to the gate there was a group of people. Although it was dark, when he came nearer to the group he could see the people's hands going up and down assaulting the deceased and shouting that he was a thief. He asked to take the deceased from there as the church had the same problem. The deceased was becoming weak. He walked with the deceased until at the gate. He also said the people were either waiting for something or passing by but they were not people who were chasing the deceased. It was also put to him that Masemola testified that when he was running away, he heard something like a gunshot, something very loud. He only confirmed the allegation by Masemola that there was also a pregnant woman in the church yard, whom he confirmed to be his wife, but had come later. He also confirmed that there is a spotlight in the church yard and an Apollo light near the stadium. He also couldn't respond to Masemola's allegation that the deceased was also stoned by the Appellants and dragged into the yard. He denied having any knowledge about how the hockey stick got into the premises. He was shown photos which show the deceased with deep indentations (hollows) and lacerations on the face and head. He agreed that the deceased was carried into the yard by the three of them.

[22] 2nd Appellant's testimony was that he received Mahlangu's call informing him about the noise she heard around the church and her suspicion that there were people attempting to steal something. He went to the fence at the corner of the churchyard to see if he can see what was happening. There is light in the church yard but the rest of the surroundings are dark. He found 3rd Appellant already there who confirmed to have also been woken up by a sound. They went to 1st Appellant's room to inform him about the noise. They all agreed to go and see what was happening and which road they were going to use. He left with the 3rd Appellant leaving the 1st Appellant behind, contrary to what he put to the 1st Appellant that the three of them walked together to the church. He and the 3rd Appellant used the road

walking straight ahead as discussed so that the culprits if found should only be able to run towards the church where there is light. They walked past the corner of the four way stop, passing people who were standing there, and also a mountain when they heard a noise, like somebody shouting that “stop him” and they continued to walk until they saw two people running. They tried running after the two people but couldn’t catch them. They then heard 1st Appellant calling them. They walked back towards the church and found the 1st Appellant with the deceased lying on the ground with injuries on his body. The 1st Appellant told them that the deceased was assaulted by the people. He (the 2nd Appellant) called Mahlangu to open the church gate for them. They picked the deceased up and took him into the church yard where there was light so that they can see who he was. They poured water on him as he was full of blood.

[23] He disputed that there was a hockey stick in the yard. He remembers two female officers but did not see, hear or take notice if one of the officers spoke to the 1st Appellant or vice versa. He disputed Masemola’s allegation that he saw him with two other people, (being the Appellants) chasing or assaulting the deceased. Notwthstanding the version he put to Mahlangu and 1st Appellant, he denied that the 1st Appellant was there and alleged that Masemola was lying when he purported to have seen two people one dark in complexion whom he recognised due to his height and limp assaulting the deceased. He was not limping at the time, his limp was because of an accident he had in 2018, the previous year (Masemola testified in 2017 and his evidence was neither disputed nor was his version on his limping put to Masemola). He denied hitting the deceased with an iron rod on the cheek. He said there were people who were shouting “stop him” and chasing the two people. He denied being asked by the police about who assaulted the deceased except for asking him how the deceased ended up being in the church yard. Notably, he also denied saying anything about what his attorney had put to the 1st Appellant to be his version, namely, that the 1st Appellant informed them that he assaulted the deceased.

[24] Under cross examination by 1st Appellant’s attorney, he said that there is no bus stop or such a structure near the church but sometimes people stand there nearby and wait for a bus. When the police arrived there were a few people in the

yard. He denied assaulting the deceased or seeing the 3rd Appellant assaulting the deceased. He alleged that the people they chased were running away from the church. They only heard and did not see the people who were saying “stop these people.” The words were not directed at them. So they did not ask these people who were they stopping and why, even though they were on their way to church because of a report that there were people trying to break in. He also was not afraid that they might have guns because he did not hear a sound of or see a gun. He confirmed to have heard the police officer testify that 1st Appellant said he assaulted the deceased, but 1st Appellant told them that he didn’t. He instead collected the deceased whilst being assaulted by the people. He also denied that and was adamant that he did not give his attorney an instruction that was put to the 1st Appellant that he told them that he assaulted the deceased. It was put to him that it was put to the police officer that the 1st Appellant said he found the deceased at the gate. He also confirmed the version that whilst behind the church they saw two unknown males who ran away and they chased them. He disputed that they saw the two when they heard people screaming to stop them but that they heard people screaming only when they were using a different road and not when they saw and chased the two people. He also confirmed that he did not tell the police anything except that he did not assault the deceased. He was arrested on the same day by the police because he moved the deceased from where he was into the yard. He disputed that Masemola could have seen anything at the church saying it was dark. It was put to him that it was not conveyed to Masemola that he was going to dispute that he had a limp at the time. It was also put to him that the deceased had multiple head and face injuries of a repetitive nature, lacerations on the face and hand, and bruising on the lower ribs, over the entire back of the shoulders, buttocks, abrasions on the arms. Deep grass burn marks, fracture on the base of the skull, nine ribs fractured. He had no comment.

[25] The 3rd Appellant stays near the church in the same yard with the 1st and 2nd Appellants. According to him on the day of the incident he heard sounds coming from the side of the church, like somebody breaking something. He peeped through the window of his room and when he peered through the door, he saw the 2nd Appellant walking towards his door. The 2nd Appellant told him about the call from Mahlangu. They went to knock at 1st Appellant’s room who told them that he will

follow them. So he with the 2nd Appellant proceeded to run towards were the sound was coming from. They passed the bus stop and before they could get to the church, heard people saying “stop, stop”. They saw two people running and they ran after them. The two people outran them. They turned back walking towards the church. That is when they heard the 1st Appellant calling his name. They ran to the 1st Appellant to find out what was happening. They found 1st Appellant at the gate of the church with somebody who was lying on the ground. He could not look at the person because it was dark. He told the other two Appellants to lift the person up and take him into the yard of the church where there is light so that they can see who this person was. They still could not see the person’s therefore 2nd Appellant poured water over the person. He did not know the reason why the 2nd Appellant poured the deceased with water. He still could not see this person’s face because he stood backwards and that is when people came. 1st Appellant was around there.

[26] He was asked about the hockey stick as the police official indicated that other than the body of the deceased and a bucket of water, there was also a hockey stick. He confirmed to have seen the hockey stick from the photos but did not remember seeing it at the scene. He said he did not see if the 1st Appellant was holding anything

when they found him at the gate as it was dark. There were a lot of people in the yard, he just stood there on the side (when the gate was supposedly locked). He saw the hockey stick only when the police were there and pointed it out, but as to who was holding it before then he didn’t know. He only realised that the person has died when the police wanted the people who were present when that incident took place. The deceased was still alive when they picked him at the gate but not sure if he was conscious. In respect of Masemola’s evidence that the 3rd Appellant as one of the Appellants also took part in assaulting the deceased, his response was that he did not see Masemola because it was dark. Even when they were inside the church premises he did not see Masemola. He denied that anybody assaulted the deceased after they picked him up, or seeing anybody at the gate or nearby. He said when they came, they did not go straight to the church but used a road that did not have light so that they can push the culprits towards the light. He was not sure whether he saw one or two people running away. They heard people shouting just before they reached the stop sign which is 50 meters from the church gate and then saw one or

two people running. He, notwithstanding the deceased's ghastly injuries depicted on the photos, was adamant not to have seen any injuries on the deceased.

[27] Under cross examination by the prosecutor he indicated that at that time he was working as a security guard but had not received any training as one, and has never been involved in an incident like that. He was only taught in class the rules of being a security guard which is to stop the crime and then call the police. He did not make a statement nor was he asked any questions by the police. The police only asked for the people who were there when the incident took place and they were taken to the police station. The evidence of Sibanyoni was put to him that she said when she asked what happened, the 1st Appellant told her that they found one male person in the church, chased and caught him in the field. The1st Appellant hit the deceased with a stick. His response was that he did not see that. He confirmed that he said there were people at the bus stop at about 3:00-4;00 and did not know where they were going. Even if these people shouted stop, they were not chasing the person the Appellants were chasing. He did not see people coming into the yard to look at the deceased. There were also no people at the bus stop. It was put to him that Mahlangu who opened the gate for them, also did not see any persons at the stop sign. Masemola as well did not see any people. He then again said the police came first but the people were already outside the gate. He insisted not to have looked at the deceased, saying maybe he was scared because they found him lying down. He did not hear the 1st Appellant say anything to the police. He disputed Masemola's evidence that the spot light helped him see everything in the yard even when they were assaulting the deceased with a stick and that he participated but to a lesser extent. He said it was dark. He also said they did not look to see where the break in was, or if there was any break in.

[28] The court in its summary of the evidence mentioned, inter alia, that Masemola who was with the deceased had testified that the 1st Appellant dragged the deceased after they ran their different ways. He heard a shot and also the deceased calling his name several times. He went looking for the deceased nearer to the church, that is when he saw the three Appellants attacking the deceased with stones. They thereafter tried to drag him into the church yard. He saw the deceased being hit by the 2nd Appellant with what he referred to as an iron rod and also stabbed on his right

hand and cheek. The 1st Appellant also attacked the deceased. Whilst walking away from the scene, he saw the 2nd Appellant with a bucket of water whilst the 1st and 2nd Appellant were holding the deceased and the 3rd Defendant holding the deceased's shoes.

[29] The question that arises is whether the contentions raised by the Appellants are valid and justify a conclusion that the Appellants' conviction was wrong in law and influenced by the alleged (wrong) irregularities. Can it be concluded that there was as a result a failure of justice, factually or procedurally which resulted in the Appellants being prejudiced and in the state's failure to prove Appellants' guilt beyond reasonable doubt.

Legal framework

[30] On deciding appeals against the trial court's errors on finding of facts, the Constitutional Court in *Lehloka v S*[6] pronounced as follows;

> *'It is trite law that a court of appeal should be slow to interfere with the findings of fact of the trial court in the absence of material misdirection see, S v Dhlumayo and Another 1948 (2) SA 677 (A) at 705-706. An appeal court's powers to interfere on appeal with the findings of fact are limited S v Francis 1991(1) SACR 198 (A) at 204 E. In the absence of a demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong. When an appeal is lodged against the trial court's findings of fact, the appeal court should take into account the fact that the trial court was in a more favourable position than itself to form a judgment because it was inter alia, able to observe the witnesses during their questioning and was absorbed in the atmosphere of the trial: S v Monyane and Others* 2008 (1) SACR 543(SCA)'

[6] *Lehloka v S (A213) [2022] ZAWCC 34 (16 March 2022) at para.12*

[31] The Court further, in reaffirming the trite principles outlined in *Dhlumayo,* quoted in *Makate v Vodacom (Pty) Ltd,*[7] the following dictum of Lord Wright in *Powell & Wife v Streatham Nursing Home*:

> *"Not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judges, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case."* (Accentuation added)

[32] In *Leve v S*[8] it was concluded that :

> *"The fundamental rule to be applied by a court of appeal is that while the appellant is entitled to a re-hearing because otherwise the right of appeal becomes illusory, a court of appeal is not at liberty to depart from the trial court's findings of fact and credibility, unless they are vitiated by irregularity or unless the examination of the record of evidence reveal that those findings are patently wrong, The trial court's findings of fact and credibility are presumed to be correct because that court, has had the advantage of seeing and hearing the witnesses and is in the best position to determine where the truth lies.*[9]

[33] As a result, for a finding of fact to be overturned on appeal, it must be one that no reasonable judge could have reached, therefore blatantly wrong. The court must have demonstrably misunderstood or overlooked some of the evidence in order to arrive at the disputed finding or there was no evidence at all to support the finding that was made. This is to be considered by the appeal court with the matter of *S v M* 2006 (1) SACR 135 (SCA) paragraph [40] at 152a – c, in mind, where the following was outlined by the Supreme Court of Appeal that:

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[7] *Makate v Vodacom (Pty)Ltd* (CCT 52/15) [2016] ZACC 13
[8] (CA&R 163/12) [2013] ZAECGHC 5 (31 January 2013)
[9] *R v Dhlumayo and Another* 1948 (2) SA 677 (A) at 705 *et seq; S v Hadebe and Others* 1997 (2) SACR 641 (SCA) at 645; and *S v Francis* 1991 (1) SACR 198 (A) at 204*c – f.*

> *"an awareness that no judgment is perfect and the fact that certain issues were not referred to does not necessarily mean that these were overlooked. It is accepted that factual errors do appear from time to time, that reasons provided by a trial court are unsatisfactory or that certain facts or improbabilities are overlooked. The appeal court should be hesitant to search for reasons that are in conflict with or adverse to the trial court's conclusions. However, in order to prevent a convicted person's right of appeal to be illusionary, the appeal court has a duty to investigate the trial court's factual findings in order to ascertain their correctness and if a mistake has been made to the extent that the conviction cannot be upheld, it must interfere." (my emphasis)*

[34] The Supreme Court of Appeal also discouraged a compartmentalised and fragmented approach as opined in *S v Trainor*[10] that:

> *"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. Evidence must of course be evaluated against the onus on any particular issue or in respect of the case in its entirety*."

[10] (468/01) [2002] ZASCA 125; [2003] 1 All SA 435 (SCA) (26 September 2002)

Analysis

[35] Accordingly, as a court of appeal, this court must determine as regards the conviction, what the evidence of the State witnesses was, as understood within the totality of the evidence led, including evidence led on the part of the accused or defence, and compare it to the factual findings made by the trial court in relation to that evidence, and then determine whether the trial court applied the law or applicable legal principles correctly to the said facts in coming to its decision. The appeal court must be satisfied that the appellant's guilt was proven beyond reasonable doubt.

[36] In order to succeed, then the appellants must convince this court on adequate grounds that the trial court was wrong in accepting the evidence of the State and rejecting their version as not being reasonable possibly true.[11]

[37] In casu, the trial court looking at the conspectus of all the evidence led, made a finding of fact that the deceased was severely beaten and all three Appellants were involved, in line with the evidence of Masemola, an eye witness to the assault, whose evidence the court found to be corroborated by the evidence of Mahlangu and the circumstantial evidence. Masemola had seen the Appellants' number inflicting injuries to the deceased hitting him with stones. He saw the 2nd Appellant hitting the deceased with an iron rod and stabbing him on the right cheek and hand. The deceased was also dragged by the Appellants to the church premises. Whilst Mahlangu testified that she unlocked the church gate to let the three Appellants into the church yard. They were carrying the injured deceased whose head and face was full of blood. Whilst the identity of the three Appellants was found not to be in issue, as being the three that turned up at the church gate with the deceased, also was their involvement up to a point when they carried the deceased into the church yard and poured water over him from a bucket, as confirmed by Mahlangu and depicted in the photos of the scene. The photos also showed a rod or hockey stick, albeit wooden and the ghastly injuries. The trial court found all three Appellants'

[11] *Sphanda v S* (A607/2017) [2021] ZAGPPHC 186 (29 March 2021)

involvement in the infliction of the deceased's injuries to have been proven beyond reasonable doubt.

[38] Following the finding that all three Appellants were proven to have been involved in the deceased's assault, the further deduction the court could come up with was that all three Appellants had the intention to kill the deceased, drawing an inference, from the fact that the assault was brutal with ghastly wounds inflicted repetitively. The Appellants' intention therefore discernible from the severity and the extent of the injuries inflicted on the deceased. The deceased had multiple blunt tissue injuries on the head and face. He also suffered inter alia, multiple fractured ribs, 8 to 9 according to the post mortem. Alternatively, that a reasonable person would have foreseen that such brutality will result in the demise of the deceased. In the final analysis the trial court had to determine whether the state has met the requisite threshold – that is proof beyond reasonable doubt that the Appellants were guilty of or responsible for the murder of the deceased, (that the deceased's death was as a result of injuries the Appellants were found to have inflicted on him). The trial court correctly concluded in the positive, based also on the post mortem report that confirmed the cause of death to be the injuries inflicted on the deceased's head.

[39] The Appellants challenge their conviction against the findings of the trial court on the facts, the credibility of Masemola as a key witness, admissibility of the statement made by the 1st Plaintiff to Sibanyoni and findings made in relation thereto. The Appellants also allege procedural irregularities in the admission and interpretation of the medical evidence. They argue that the fair administration of justice was compromised and the Appellants prejudiced and as a result they are entitled to an acquittal. This court had to determine if those are valid challenges and if indeed the fair administration of justice was compromised, justifying the setting aside of their conviction.

Credibility of key witness

[40] The Appellants' argue that Masemola was not a credible witness because not only was he a single witness, but evident that he had a motive and absent the

alleged confession, he is a single witness that does not pass the test for the reliability of a single witness's evidence. They point out that his evidence differed from the statement he made on 15 November 2013, prior to the trial, omitting certain information, which is his failure to mention in his statement that he had a sound like that of a gunshot and that the 1st Appellant approached him and the deceased and chased the deceased.

[41] In *S v Govender and Another* 2006 (1) SACR 332 (E) the court cited the dictum of the Supreme Court Appeal in *S v Mafaladiso and Another*[12] as follows:

> *"The juridical approach to contradictions between two witnesses and contradictions between the versions of the same witness (such as, inter alia, between her or his viva voce evidence and a previous statement) is, in principle (even if not in degree), identical. Indeed, in neither case is the aim to prove which of the versions is correct, but to satisfy oneself that the witness could err, either because of a defective recollection or because of dishonesty. The mere fact that it is evident that there are self-contradictions must be approached with caution by a court. Firstly, it must be carefully determined what the witnesses actually meant to say on each occasion, in order to determine whether there is an actual contradiction and what is the precise nature thereof. (my emphasis).*
>
> ...
>
> *Secondly, it must be kept in mind that not every error by a witness and not every contradiction or deviation affects the credibility of a witness. Thirdly, the contradictory versions must be considered and evaluated on a holistic basis. (my emphasis)*

[12] 2003 (1) SACR 583 (SCA). See also *R V Mokoena* 1932 OPD 79 at 80. "...the uncorroborated evidence of a single competent and credible witness is no doubt declared to be sufficient for a conviction by s 284 of Act 31 of 1917, but in my opinion that section should only be relied on where the evidence of the single witness is clear and satisfactory in every material respect. See also *R V Abdoorham* 1954 (3) SA 163 (N). S V T 1958 (2) SA 676 (A). *S V Souls and Others* 1981 (3) SA 172 (A) partly differing with *Mokoena* . See also *Stellenbosch Farmers' Winery Group and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA). To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.

[42] This is applicable generally to all witnesses. It also important to consider the rest of the dictum in *Mafaladiso t*hat reads:

> *"The circumstances under which the versions were made, the proven reasons for the contradictions, the actual effect of the contradictions with regard to the reliability and credibility of the witness, the question whether the witness was given a sufficient opportunity to explain the contradictions - and the quality of the explanations - and the connection between the contradictions and the rest of the witness' evidence, amongst other factors, to be taken into consideration and weighed up. Lastly, there is the final task of the trial Judge, namely to weigh up the previous statement against the viva voce evidence, to consider all the evidence and to decide whether it is reliable or not and to decide whether the truth has been told, despite any shortcomings."*[13] *(my emphasis).*

[43] The Appellants vigorously criticise Masemola, questioning his motive for omitting from his police statement taken a day after the incident, the evidence about hearing a gunshot, the 1st Appellant approaching him and the deceased and chasing the deceased. Also that he could identify the 2nd Appellant by his limp, seemingly incriminating the Appellants in the assault that led to the death of the deceased. The criticism is misguided as what is said in the police statement and during his viva voce evidence depends on the questions imposed to him at the time. Masemola could not have anticipated or known the impact of such a fact. The omission cannot therefore be found to have been deliberate and Masemola to have had any particular motive in omitting that evidence unless proven to have been intentional. It should consequently not affect his credibility as a witness, considering his whole evidence and the fact that it is not in contradiction of any other evidence led. What is significant and determinative of the reliability of his evidence, is the fact that it is also corroborated in the conspectus of all the evidence, the truth being told.

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[13] *S v Mafaladiso (at 593e - 594h.)*

[44] In addition, the Appellants were made aware of and also confronted with such evidence in Masemola's evidence in chief. They had an opportunity to challenge the evidence if they had any intention to do so or cross examine to counter its impact on the weighing of the total evidence to negate any adverse finding against them. They barely dealt with that evidence except for pointing out its omission in the police statement which does not take away its relevancy to the whole evidence nor justify casting a suspicion on Masemolas' motive and credibility. The 1st Appellant just denied hearing any sound or knowing anything about a gunshot, even when it was put to him in cross examination that according to Masemola, he heard the sound after the deceased was seen being grabbed by him. There was no argument raised in relation thereto during the trial. It is opportunistic of the Appellants to now seek on appeal an adverse finding on Masemola's credibility, questioning his motive without advancing any substantive grounds for that, so as to discredit his evidence and exonerate themselves from their proven involvement in the assault and murder of the deceased. Masemola's evidence on the gunshot sound was in fact accepted in evidence as per summation in the judgment of the trial court and formed part of the mosaic. Any lapse on the Appellants to deal with that evidence cannot be blamed on Masemola's omission to mention that in his statement and does not prove his evidence unreliable.

Application of the cautionary rule to Masemola as a Single Witness

[45] Furthermore, Masemola is alleged not only to have a motive, but also to be a single witness, as a result subject to the cautionary rule. In terms of s 208 of the Act even an uncorroborated evidence of a single competent and credible witness will be sufficient, if it is clear and satisfactory. The correct approach to the application of the so-called 'cautionary rule' was elaborated not to be so stringent as in *Mokoena* by Diemont JA in *S v Sauls and Others*[14] set forth as follows :

> *'There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness (see the remarks of Rumpff JA in S v Webber) The trial judge will weigh his evidence,*

[14] 1981 (3) SA 172 (A) at 180E-G

> *will consider its merits and demerits and, having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony, he is satisfied that the truth has been told. The cautionary rule referred to by De Villiers JP in 1932 [in R v Mokoena 1932 OPD 79 at 80] may be a guide to a right decision but it does not mean "that the appeal must succeed if any criticism, however slender, of the witnesses' evidence were well-founded" (per Schreiner JA in R v Nhlapo (AD 10 November 1952) quoted in R v Bellingham 1955 (2) SA 566 (A) at 569.) It has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense.'*

[46] Diemont AJ therefore cautioned, addressing the question of interest, prejudice and contradictions that the presence of such interest or bias will not necessarily cause the evidence of a single witness to be insufficient. The trial court is required to nevertheless determine the severity of the prejudice and assess its importance in the light of all the evidence[15]

[47] Considering that Masemola's evidence is corroborated not only by Mahlangu but also real and circumstantial evidence from which the only inference to be drawn supports the conclusion that the Appellants caused the injuries inflicted on the deceased that led to his death, makes Masemola a credible witness and his evidence not only sufficient but satisfactory. Any shortcomings in his evidence were not material.

[48] Furthermore, Masemola's evidence that at that time there was no crowd or people outside the church premises accords with Mahlangu's evidence that even though there is a stop sign near the church where people allegedly wait for a bus, when she opened the gate for the three Appellants there was no crowd of people. The trio came in dragging the deceased who was bleeding from the head. The 1st Appellant in his cross examination of Masemola and Mahlangu put to them or mentioned that the deceased was found by the 1st Appellant being assaulted by a group of people alleging an involvement or presence of a group near the gate. However, Mahlangu reiterated that there were no people or noise coming from the

[15] *Sauls* 179G -180G

stop sign. All this weighs strongly on the reliability of Masemola's evidence denying the involvement of any other persons but the Appellants in the infliction of the deceased's injuries. There cannot be any doubt that there was adherence to all the safeguards required by the cautionary rule principle when reliance is on the evidence of a single witness, corroboration also being key even though not strictly a requirement. Constabel Mankwane's testimony, although not necessarily referred to by the trial court, was that they found 8 to 9 people in the church premises. He counted besides the three Appellants, the Ekangala Police Captain, the 2 fathers to the 1st and 2nd Appellant, who arrived after the incident. It is common cause that the 1st Appellant's pregnant wife, Mahlangu and her daughter were also in the premises. No crowd on sight. Just as well our courts have repeatedly warned that the exercise of caution should not be exaggerated and allowed to replace the exercise of common sense.[16]

[49] It is, as a result evident that when due regard is placed on the whole evidence led during the trial, the trial court cannot be faulted for having found Masemola to be a credible witness and his evidence reliable. Any shortcomings in his evidence were immaterial in the conspectus of the whole evidence that pointed to all the Appellants having participated and or actively associated themselves with each other's criminal conduct which was perpetrated with an intention to kill the deceased or total disregard if it results in the deceased's death.

On the allegation of a wrong finding by the court that the deceased was assaulted by 1st Appellant with a hockey stick rather than by the 2nd Appellant with an iron rod in accordance with Masemola's testimony.

[50] The Appellants submitted that the court erred in finding that it was the 1st Appellant that assaulted the deceased with a hockey stick as per his confession rather than finding in accordance with Masemola's testimony that it was the 2nd Appellant that assaulted the deceased with an iron rod. They argue that the finding is inconsistent with the evidence as a whole. In addition that there has been no trial within a trial to determine the admissibility of the 1st Appellant's confession. It is common cause that evidence of the deceased being assaulted with an iron rod by

[16] (*S v Artman and Another* 1968 (3) SA 339 (A) at 341C.)

the 2nd Appellant and of a hockey stick found in the church premises next to the deceased's body was inter alia, indeed before court.

[51] In its judgment the court a quo did mention that Masemola saw the 2nd Appellant hitting the deceased with the iron rod which it accepted. Masemola also saw the 1st Appellant assaulting the deceased that is when he went away looking for help. It being clear from the photo album and Sibanyoni's evidence that the deceased was indeed severely beaten and the hocky stick which is a rod, albeit wooden was found next to the deceased's body. The court also mentioned that the 1st Appellant admitted to Sibanyoni to have solely assaulted the deceased with the hockey stick which was inconsistent with his viva voce evidence of a crowd that assaulted the deceased. The 1st Appellant's statement or pseudo admission to have solely inflicted the injuries on the deceased admissible not for its truthfulness but only as proof of his inconsistency. As a result of the inconsistency the trial court found 1st Appellant not to be a credible witness and his total evidence to be false. The other Appellants' versions were also found to be false. Obviously what remained and upon which the Appellants were convicted was the evidence by the state, specifically of Masemola.

[52] Consequently, the contention that the trial court made a wrong finding that was in accordance with the 1st Appellant's alleged confession has no merit. The admittance of 1st Appellant admission was relevant as far as reliability of his evidence was to be established. The admission was contradictory to the version the 1st Appellant put to a witness and evidence in chief which he also altered under cross examination, like the other Appellants. It did not negate the court's finding that the 2nd Appellant had hit the deceased with a rod who was also stoned and stabbed, except show 1st Appellant's inconsistency. On an overall analysis of the record, looking at the whole evidence, the court's rejection of the evidence of the 1st Appellant' together with that of the other Appellants which it had found to be false, is unassailable. The Appellants' evidence was poor and interspersed with contradictions, could not have been reasonably possibly true.

[53] The 1st Appellant was therefore found to have been involved or convicted not on the basis of his statement or admission to Sibanyoni but on the overall evidence

as presented by the state that showed that all of them were actively involved in inflicting the deceased's injuries and or to have acted in association with each other's actions in doing so. The 1st Appellant's statement or admission to Sibanyoni proved his inconsistency. He was as a result found not to be a credible witness and his evidence unreliable.

On whether the admissibility of 1st Applicant's statement to Sibanyoni was to be determinable in a trial within a trial.

[54] A further criticism raised by the Appellants is of the court's handling of the testimony of Sergeant Sibanyoni on the admission made voluntarily by the 1st Appellant that he solely assaulted the deceased with the hockey stick that was found next to the deceased body in the church yard. They argued that a trial within a trial should have been held to determine its admissibility alleging it to be a confession or admission of guilt to the charge of murder. The state seemed to had initially intended to concede to that contention but then renounced it on the basis that under cross examination by the 1st Appellant's legal representative Sibanyoni repeated to the court the exact words said by the 1st Appellant in response to her. Incidentally, the 2nd and 3rd Appellant's counsel had also put the same version to the 1st Appellant that he admitted to the 2nd and 3rd Appellant to have assaulted the deceased, which he denied). The criticism is misdirected. Although it is the accused's prerogative to question the admissibility of any evidence and to demand its disregard for the purposes of determining his guilt or credibility, a court cannot be bound by the view of the litigants as to whether the contents of a statement amount to a confession, an admission or something else. The court would have to consider the statement and the circumstances under which it was made to determine if it meets the requirement of a confession or admission of guilt. It is to be noted that a challenge raised on appeal based on hindsight is discouraged. 1st Appellant did not admit to making the statement, and did not even remember talking to Sibanyoni whereas he later indicated a possibility that he might have made it. The challenge lacks honesty.

[55] The evidence in relation to the statement was that the police were called by the Appellants, and on arrival Sibanyoni enquired as to the purpose of the call and

about the scene they found in the church premises. The 1st Appellant came forward and made an admission to have assaulted the deceased. It is key that, at the time neither the 1st Appellant nor any of the Appellants were suspects, an accused or detainee. The 1st Appellant was not forced, coerced, threatened or unduly influenced to respond. He out of his own volition came forward to Sibanyoni and informed her that he assaulted the deceased with the bloodied hockey stick that was next to the deceased body. The admission to the assault was as a result freely and voluntarily made.[17] Sibanyoni confirmed that following the 1st Appellant's spontaneous reply or verbal admission to assaulting the deceased, no arrest, detention or accusation took place. The 1st Appellant was arrested only after the paramedics came to the scene and the deceased was declared dead. Sibanyoni arrested the 1st Appellant as a suspect to murder. His rights were explained to him. He did not confess or make any formal statement or admission in relation to the murder charge. The pre-arrest or pre-suspect verbal statement made was therefore neither a confession or admission of guilt to the murder and falls under s 219A.[18] Sibanyoni's conduct under the circumstances was reasonable and justifiable. Such admission or statement admissible in criminal proceedings against the 1st Appellant. A trial within a trial was therefore not necessary.

[56] Furthermore, Sibanyoni was cross examined extensively in that regard and asked to repeat the words that were said by the 1st Appellant. She then said the 1st Appellant told him that "they chased and caught the deceased who had broken into the church premises before and stolen the music instruments." He then hit the deceased with the hockey stick. On basic principles, that cured the aspect of the evidence being hearsay evidence since he was testifying about what was allegedly said to him. In *Barlin* at 463 Innes CJ had said as much as a general proposition in our law after finding that any statement made by an accused to a person in authority was only admissible if made freely and voluntarily:

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[17] See R v Barlin 1926 AD 459 at 462

[18] S219A reads:

(1) Evidence of any admission made extra judicially by any person in relation to the commission of an offence shall, if such admission does not constitute a confession of that offence and is proved to have been voluntarily made by that person, be admissible on evidence against him at criminal
(2) proceedings relating to that offence:

> "*Statements which, though not confessions of the commission of an offence, are prejudicial to the accused fall to be dealt with under the common law, and not under the statute. The matter before us affords an excellent example of such a statement.*"

[57] As the admission was voluntarily made, and being neither a confession nor an admission of guilt to the offence charged, it was admissible on evidence against the 1st Appellant at criminal proceedings relating to that offence following the provisions of s 219A. In common law the inconsistent statement of a witness may only be used in assessing the credibility of a witness and may not be used as evidence of the truth of the matter stated therein.[19] In that instance the court can consider the admission and the circumstances under which it was made for the purposes of a credibility finding.

[58] The trial court in assessment of the 1st Appellant's credibility and thereby establishing the reliability of his whole evidence mentioned that the 1st Appellant made the admission to Sibanyoni that he solely assaulted the deceased which is contrary to his viva voce evidence. Due to the inconsistency, the court found the 1st Appellant not to be a credible witness and his evidence unreliable. He was found together with his co- Appellants to be lying and their viva voce evidence therefore out rightly rejected as false. The admission was used to discredit the 1st Appellant as a reliable witness, but not as evidence of the facts stated therein. The court took into account the totality of the evidence led, including the evidence of 1st Plaintiff's verbal statement to Sibanyoni, and concluded that the 1st Appellant made the statement unsolicited informing Sibanyoni to be the one who assaulted the deceased. The statement was contrary to his viva voce evidence and proved the unreliability of his evidence. It found him untruthful and that they were all together actively involved in the assault of the deceased, as proven by the State.

On whether the 1st Appellant was convicted on the basis of his admission to Sibanyoni

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[19] See *Hoskisson v Rex* **1906 TS 502** *at 504*; *R v Deale and others* **1929 TPD 259**

[59] In addition to the argument raised that the 1st Appellant's response to Sibanyoni's enquiry was a confession or admission of guilt to the charge of murder, the Appellants alleged that the 1st Appellant was convicted on the basis thereof. The issue of whether the admission was a confession or admission of guilt and the limitation of its impact on the conviction has already been dealt with in the previous immediate paragraphs. As already indicated it was actually inconsequential in the realm of proving the 1st Appellant's guilt, especially having regard to what was said by the court a quo that Masemola testified that he witnessed all three of them being involved with the deceased, and at some stage it was the 1st and 2nd Appellant that were assaulting the deceased and such involvement corroborated by Mahlangu's evidence. They were all three found guilty on the conspectus of that evidence.

[60] It is therefore incorrect to allege that the 1st Appellant's conviction was on the basis of his admission. The admission was admissible only in the assessment of his credibility not of his guilt. The status quo is that he, in his admission took a fall for solely inflicting the injuries on the deceased with a hockey stick. It is not the finding of the trial court that he was solely involved in the assault of the deceased. The trial court only found the 1st Appellant, on the basis of that admission, not to be a credible witness and in the conspectus of all the evidence his whole evidence questionable, unreliable and therefore false. The admission was therefore admissible as far as it denounced the 1st Appellant's credibility and veracity of his *viva voce* evidence. What is apparent from the judgment is that the court in its reasoning by inference, laid emphasis on the evidence of Masemola, as the eye witness who had seen the three Appellants assaulting the deceased and Mahlangu who confirmed that the three came into the premises grabbing the deceased whose head and face was bleeding, finding them to have acted in cohorts each actively in association with the actions of their number; see *S v Mthembu* [2008] ZASCA 51; [2008] 3 All SA 159 (SCA); [2008] 4 All SA 517 (SCA); 2008 (2) SACR 407 (SCA) para 27.

[61] Contrariwise, if the conviction of the 1st Appellant was based on his impugned alleged confession to Sibanyoni (which it was not) then the 2nd and 3rd Appellant were supposed to be acquitted on the murder charge as he in his statement admitted to have been solely liable for the assault. The admissibility of the admission was

hence secondary, only for the purpose of establishing the 1st Appellant's credibility as a witness, consequently the reliability of his evidence.

[62] Furthermore, although it was put to Sibanyoni that the 1st Appellant will dispute making the admission and tell the court that he never uttered those words, he, in his evidence in chief did not outright deny making the admission. He instead said he did not remember talking to Sibanyoni and under cross examination by his co-accused said he also could not deny saying that. Whilst in his evidence in chief he alleged that a crowd was responsible for the injuries inflicted on the deceased about whom Sibanyoni was never informed. Nevertheless, the evidence, viewed in its totality proves that his version could not be reasonably possibly true as a result correctly rejected by the trial court. His conviction certainly not based on the alleged confession.

Appellants version

[63] On the other hand the version by the Appellants in countering the evidence of the state made no sense. It is therefore not surprising that the court a quo rejected their versions which were found to be false. Not only did the Appellants put one version to a witness and then lead contradictory evidence in chief, they also had too many varying versions. Some part of the state' witnesses' evidence went uncontested, only for the Appellants to put a different version when testifying. They were just pitiable as witnesses denying even obvious facts.

[64] In the case of the 1st Appellant, although he was out to apprehend whoever was the culprit reported by Mahlangu, he denied chasing anybody. He alleged instead to have rescued the deceased from a crowd that was assaulting him without asking the crowd the reason for the assault. Under cross examination by the prosecutor he alleged to have found the deceased at the gate, losing energy. He then again alleged to have spoken to the crowd negotiating the deceased's release. In the instance of the 2nd and the 3rd Appellant, besides the 1st Appellant not admitting making the admission to Sibanyoni, their attorney put their version to the 1st Appellant to be that the latter admitted to them that he assaulted the deceased. They

however thereafter testified contrary to that version and denied making such an allegation. It was also put to the 1st Appellant that the 2nd and 3rd Appellant were going to say the three of them walked together to go to church. The 2nd Appellant also put to Mahlangu that whilst he and the 3rd Appellant were chasing the two intruders the 1st Appellant chased the other one. The 1st Appellant denied chasing anybody and questioned how they could have seen him whilst they were chasing the other two culprits found at the church. When the 2nd and 3rd Appellant testified their version was that the 1st Appellant was actually left behind whilst they went ahead. Also that there were only two intruders not three. The 1st Appellant was adamant the three of them only met at the gate of the church where he was found with the deceased. The 2nd and 3rd Appellant's story also of having passed a crowd at the bus stop at 3:00 in the morning, and then passing another crowd that was allegedly shouting, "stop" and then alleging to have only heard and not seen the crowd that was shouting, were also as absurd and convoluted as that of the 1st Appellant who also encountered his own crowd assaulting the deceased. When Mahlangu unlocked the gate for the three Appellants she did not see a crowd or hear a noise coming from the stop sign that she confirmed was 40 meters away from the church yard. Their testimonies was just a collection of concocted stories, that could not be considered as reasonably possible true, wherefore rightly rejected as false.

[65] They also notwithstanding the hockey stick found in the church yard next to the deceased, did not tender any explanation how the stick got there even though they brought the deceased into the church yard already bleeding from the head and face. The 1st and 2nd Appellant denied having seen it or having any knowledge about the hockey stick. The 3rd Appellant with unparalleled insincerity first denied seeing the stick and the injuries or the blood on the head or face of the deceased, even though he carried the deceased into the church premises, holding his feet and confirmed that the premises are illuminated by a spotlight making the whole church yard bright. So visibility was clear. He then admitted to have seen the stick in the yard but still persisted to deny being able to see the injuries or blood on deceased's face and head even after water was poured over the deceased's face. It is very strange that Mahlangu had testified that she opened the gate for the three Appellants who were holding the deceased and she could see the deceased's head and face full of blood because of the bright light that illuminated the church yard.

Notwithstanding having testified that the reason for bringing the deceased inside the church was to have a proper look at him, and to have been holding the deceased's feet when they entered the church premises, the 3rd Appellant still persisted to have not been aware of the deceased's bloody head or face. Clearly being very illusive. He worked as a Security Guard, supposedly well aware of the protocols applicable in issues of arrest, he, like his co-Appellants failed to tell the police when they were there about the crowd or people that were shouting and had according to the 1st Appellant brutally assaulted the deceased.

[66] The test in a criminal case has been restated in *S v V*[20]. If there is a reasonable possibility that the accused is not guilty, he should be acquitted. The accused should be convicted if the court finds not only that his version is improbable, but also that it is false beyond reasonable doubt. It is not necessary for the court to believe an accused person in order to acquit him.

[67] There was no doubt that the Appellants were extremely dishonest, beyond reasonable doubt. The court a quo accordingly found that all three were lying and rejected their testimonies as false, their versions being definitely not reasonably possibly true. Also that the state had proven their guilt beyond reasonable doubt.

Allegations of the court abetting the state or its witnesses

[68] The Appellants also took issue with the trial court's handling of the proceedings during Sibanyoni's testimony about the golf stick, alleging that the trial court abetted the state or its witnesses, with specific reference to the court correcting Sibanyoni on what was depicted in the photos in Exhibit F that it was in fact a hockey stick not a golf stick. The objection, has got no merit. The court indicated that factually what was depicted in the photos, is a hockey stick, which is what it is, notwithstanding what Sibanyoni called it. Sibanyoni confirmed that what is depicted in the picture is indeed what they found next to the deceased's body, albeit her reference to it as a golf stick.

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[20] 2000 (1) SACR 453 (SCA) para [3] at 455b - c

[69] There was therefore neither a discrepancy on what the object was nor any aiding or abetting by the court. Sibanyoni's referral to it as a golf stick does not change the reality of the fact that it was a broken hockey stick. The 3rd Appellant even though reluctantly so, confirmed that the hockey stick depicted in the photo was there when the police arrived. Also it does not invalidate Masemola's evidence that the deceased was seen being severely attacked with a rod. This does not carry any much weight to can persuade the court to find that there was a material discrepancy in the evidence. Masemola was not in the yard, but he did see 2nd Appellant using a rod and so him mistaking the rod to be that of an iron instead of wood is a reasonable but not a material error.[21]

Alleged discrepancy in the post mortem report on the cause of death and in the interpretation of its findings

[70] The Appellants' other main contention is on the cause of death of the deceased, whether the matter of the post mortem report in relation to the cause of death was properly handled by the court and or by the Appellants' legal representative. If not, if the fair administration of justice was compromised thereby: Further that the court erred in finding that the Appellants were involved in causing the death of the deceased under circumstance were the cause of death is recorded as a gunshot wound by the medical practitioner that had conducted and completed the medical post mortem report. Arguing that another court may come to a different conclusion in relation to the interpretation of the medical evidence and the opinion expressed therein.

[71] It is prudent first to indicate that the cause of death recorded in the post mortem report is "the head injuries (there is nowhere were it is recorded as a gunshot wound).[22]

[72] The post mortem report was formally admitted in terms of s 220 of the Act. The section reads:

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[21] A rod in accordance with the Cambridge Dictionary is a long thin pole which can be made of wood or metal.
[22] Record page 275

> *"An accused or his or her legal adviser or the prosecutor may in criminal proceedings admit any fact placed in issue at such proceeding and any such admission shall be sufficient proof of such fact."*

[73] The emphasis being on "sufficient proof of such fact. It is indicated that what is contemplated by the legislature in the use of the word "sufficient proof is "conclusive proof" due to the fact that such admission can no longer be rebutted. The result thereof is that the parties accepted the evidence in the report as proven. The point on which there is an admission can no longer be adjudicated.[23]

[74] In *Seleke*, B Rumpff CJ distinguishing what is contemplated by "sufficient evidence" as against "sufficient proof" further opined that:

> *"Sufficient evidence is naturally not conclusive evidence (afdoende bewys) and can later be rebutted by the accused, eg, on the grounds of duress or mistake or by other legally acceptable facts. It speaks for itself that the section must be limited to that which is intended by the section, namely only a pure fact which has been placed in issue and which is admitted by or on behalf of the accused. If explanations or statements appear with the admitted fact, the court can take notice of them, subject to further evidence which might be adduced before the trial court, but only the pure fact which was put in issue and is admitted is regarded as sufficient proof."*

[75] It has therefore been found that when an admission is made in terms of s 220, it means that the accused cannot later allege that, that which was admitted has still to be proved by the State. The words "sufficient proof" therefore absolve the State from the burden of proving in any other manner the particular fact which has been admitted, unless the State, for special reasons, wishes to adduce before the trial court further evidence concerning the fact.

[76] The Chief Post - Mortem record the injuries found on the deceased to be "*Multiple blunt soft tissue injuries to the head and face of repetitive nature. All*

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[23] *S v Seleke en ander* 1980 (3) 745 (A) at 745A-

lacerations to the head and face have surrounding bruises into the soft tissue and between wounds in the soft tissue. Most injuries are on the left side of the head and face." Further findings recorded in the chief post mortem report in relation to the head injuries are: "*Fracture of the base of the skull left is present. Diffuse Subarachnoid bleeding of the Cerebral hemispheres more prominent over the right posterior Parietal- and Temporal lobes and the left Cerebellum. Brainstem bleeding is present."* As it is pointed out by the Respondent's Counsel the injuries stated thereat corresponds with the notes on the sketches attached to the report.

[77] It was admitted by the defence and state that the deceased had sustained injuries to parts of his body, including the head and face as reflected in the chief post mortem report and that the death of the deceased was caused by the "head injuries" as mentioned therein. The report therefore served as sufficient proof that the head injuries (that is the multiple blunt soft tissue injuries of repetitive nature and lacerations, fractured skull, bleeding of the cerebral hemispheres and more as mentioned therein) that were inflicted on the deceased as stated in the report caused the death of the deceased. The findings were accepted and not challenged during the trial in conformity with s 220, as a result the report was not regarded as a source of controversy. It was instead found to be consistent with the evidence led by Masemola that the deceased was repeatedly hit by the Appellants including being assaulted with a rod, stabbed, kicked as well as stoned. The contents of the post mortem were regarded as sufficient proof of the cause of death, and the Appellants were found to have inflicted the injuries on the deceased including the head injuries that were found to have caused the death of the deceased.

[78] A further reporting in the post mortem report was made in a new page, under a heading General: Subheading, Head and Neck, in paragraph 5, reporting on the scalp and skull it reads: "Gunshot left Parietal bone with inner table fragments taken in and exit wound. Occipital bone in midline with outer table fragments taken out. Fractured left frontal- temporal and parietal bones fractured." The added report is to be regarded as formally admitted as one with the chief post mortem. Under this further report that has a narration that refers to a "gunshot", there was no mention or reference to the cause of death in relation thereto. A gunshot is also neither indicated on the sketches nor mentioned in the notes. The issue of the cause of

death and the injuries as reported in the Chief post mortem report since it was accepted by the parties, was accordingly settled.

[79] Notably however, is the fact that no reference is made to the significance of a further description on the injuries in the report. Neither the parties nor the court questioned or requested any clarification or an explanation on the significance of the added narration. The court's failure to do so is understandable since there was no further issue raised and the report accepted by both parties as conclusive proof of the injuries sustained and the cause of death, therefore no call for interrogation of the report and adjudication.

[80] The reference however to a gunshot in the further narration on the injuries is what is alleged by the Appellants to be or to have caused an irregularity. When Masemola testified, the post mortem report was already admitted into evidence and therefore before court. Meaning all in the report in relation to injuries sustained and the cause of death which is "head injuries" was admitted by the defence. The question that was to be decided by the trial court was whether the injuries sustained by the deceased including the head injuries that led to his death were inflicted by the Appellants. Determining whether there is proof that they were inflicted by the Appellants. Masemola's testimony inadvertently corroborated the mentioned post mortem report on the injuries sustained by the deceased that include the head injuries. He mentioned to have heard a gunshot sound, after the deceased had disappeared being dragged by the 1st Appellant. He later traced the deceased being with all three Appellants who were assaulting him. The inference drawn from that evidence together with the whole evidence, is that the Appellants were responsible for all the injuries inflicted on the deceased which would include where there is a probability of the deceased having sustained a gunshot head injury.

[81] Consequently, circumstantially the deceased's wounds could only have been inflicted by the Appellants. Bar that conclusion, it remains the finding of the post mortem report that the head injuries sustained by the deceased (the multiple blunt soft tissue injuries of a repetitive nature and lacerations to the head (which the trial court found to have been inflicted by the Appellants) caused the demise of the deceased. There is a link between the death of the deceased and the injuries

inflicted by the Appellants. There is no further reading or interpretation possible, or defensible that would alter the outcome; see *S v Blom*.[24] The argument therefore of a possible different interpretation or outcome or of another person being involved cannot be substantiated and has no merit.

[82] The duly represented Appellants did not deem it necessary to challenge or interrogate either the report and or Masemola's testimony for what they allege to have been a discrepancy. They could have done so by a withdrawal of the admission at any time during the trial which was possible in certain instances, prior judgment.[25] The withdrawal is unattainable post the trial and conviction. The court could not *mero motu* interrogate the report in any way otherwise, other than the fact that it has been accepted by the parties as proof of the disputed fact of causation. There being no issue raised in relation thereto during the trial, the allegations of any irregularity are meritless.

[83] Furthermore, the Appellants have not alleged that their admission of the report was an error. Their appeal is based on an issue that did not engage the court a quo until after conviction. Noteworthy however, is the Appellants failure to refute the prima facie direct and circumstantial evidence that points to the Appellants having caused all the injuries sustained by the deceased, including the head injuries that have caused the death' of the deceased. Any injuries sustained by the deceased at the time could only have been inflicted by the Appellants in whose custody he was, after being accosted by the 1st Appellant; see *S v Blom*, their conviction remains unassailable. The alleged irregularity resultant from the alleged failure to deal with the further report on the injuries, is not fatal to the proceedings as it has not impacted on the involvement of the Appellants and their infliction of the fatal injuries, therefore no prejudice has been suffered.

[84] The legal test in determining whether there was a failure of a fair administration of justice, is in the often quoted maxim of Holmes JA in *S v Moodie*[26]

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[25] *S v Seleke* (1980 (3) SA 172 (D) at 179 F

[26] 1961 (4) SA 752 (A) at 758F-G

where he held that the following rules apply in determining whether there was a failure of justice:

> (1) The general rule on irregularities is that the court will be satisfied that there has in fact been failure of justice if it cannot hold that a reasonable trial court would inevitably have convicted if there had been no irregularity.
>
> (2) In an exceptional case, where the irregularity consists of such gross departure from established rules of procedure that the accused has not been properly tried, this is per se a failure of justice, and it is unnecessary to apply the test of enquiring whether a reasonable trial court would inevitable have convicted if there had been no irregularity.
>
> (3) Whether a case falls within (1) or (2) depends upon the nature and degree of the irregularity.

[85] It is accordingly well established that there are two kinds of irregularities: the kind that *per se* vitiates the proceedings,[27] and the kind which requires consideration of the question whether, on the evidence and credibility findings unaffected by the irregularity, there was proof of guilt beyond a reasonable doubt, in accordance with the test laid down in *S v Yusuf* .[28] It is necessary to emphasize that the word 'irregularity' has a technical meaning. Not every deviation from a norm constitutes an irregularity in law. Where the deviation is fundamental, it is properly categorized as an irregularity *per se*. If the deviation is not fundamental, it is not an irregularity at all unless it results in prejudice.

[86] The facts the Appellants are reliant upon to have caused an irregularity were in the knowledge of both parties. As a result, a valid consideration of the full merits was not precluded. For instance, as already pointed out, not only did Masemola mention in his testimony in chief to have heard a sound like a gunshot after the deceased was chased and dragged by the 1st Appellant, reference was already

[27] see *S v Moodie* supra 1961 (4) SA 752 (A)
[28] 1968 (2) SA 52 (A) at 57C-D

made to a gunshot in the post-mortem report formally admitted into evidence at the beginning of the trial proceedings. The intimation that there is a possibility that another person or persons outside the Appellants, who may have inflicted a further head injury by gunshot which could thus exculpate the Appellants from being accountable for the death of the deceased, is not supported by nor can it be inferred from the evidence led. It was also not one of the issues brought to the fore during the trial as part of the Appellants' contention notwithstanding Masemola alluding to a gunshot in his testimony. The only inference that could be drawn in the light of the total evidence led during the trial is that the Appellants were responsible for all the head injuries sustained by the deceased including those that have been indicated to have caused his death. Had the trial court considered, together with the whole evidence led, the mentioned shotgun evidence in the post mortem report as part of causation and the contention that is now raised on appeal, it is inescapable that the court would have reached the same conclusion. The suggestion that it wouldn't, is based on speculation. The Appellants did not suffer any prejudice nor was there a failure of justice resultant from the alleged irregularity.

[87] Section 322 of the Act provides as follows on irregularity:

> '. . . [N]o conviction or sentence shall be reversed or altered by reason of any irregularity . . . in the record or proceedings, unless it appears. . . that a failure of justice has in fact resulted from such irregularity . . .."

[88] It has been noted that: “Several other provisions of the Criminal Procedure Act (for example section 317, section 322 and section 324) deal with irregularities. From the wording of section 322 (1) (on the powers of a court of appeal) it is clear though that not every irregularity has to result in a conviction or sentence being set aside. A conviction or sentence may only be set aside by reason of an irregularity, if it appears to the court that a “failure of justice” has in fact resulted from the irregularity. The concept of a failure of justice must be understood within the context of the constitutional guarantee of a fair trial and therefore poses the question whether the irregularity has resulted in an unfair trial.”[29]

[89] In *R v Matsego and Others*[30], the court held as follows on irregularity that vitiates the proceedings that:

> *“[5] This Court, in deciding a matter on further appeal in terms of s 21 of the Supreme Court Act, 59 of 1959, cannot, because of the provisions of s 22 of that Act read with the proviso in s 309(3) of the Criminal Procedure Act, 51 of 1977 ('the Act'), reverse a conviction by reason of an irregularity in the proceedings unless it appears to this Court that 'a failure of justice has in fact resulted from such irregularity'. The meaning of the proviso is that 'the Court, before setting aside the conviction, must be satisfied that there had been actual and substantial prejudice to the accused' —*

[90] In consideration of all the evidence that was before the trial court, of which the defence was aware of prior to presenting its argument on conviction, the irregularity that is alleged by the Appellants wouldn’t alter the outcome as the assault of the deceased by the three Appellants in the presence of each other whereupon the injuries on the head were sustained was proven beyond reasonable doubt. The Appellants did not suffer any prejudice in relation to the presentation of their case or arguments as a result of the said irregularity. A conclusion cannot be made that a valid consideration of the merits was precluded.

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[29] *S v Phiri* (2033/05) [2005] ZAGPHC 38; 2005 (2) SACR 476 (T) (4 April 2005)
[30] *R v Matsego and Others* 1956 (3) SA 411 (A) at 415A-D;

[91] The argument that there was an irregularity and the Appellants suffered prejudice also when the magistrate pointed out to the state prosecutor during the address on sentence that a gunshot is also referred to in the post mortem report has no substance. Reading from the record, the magistrate's indication of what should have been again obvious to both parties and be addressed on sentence, was for the purpose of an order in terms of the Fire Arms Control Act. It couldn't have been for any other purpose since a reconsideration of the facts or the merits by the trial court was no longer possible as the court had already handed down its judgment on conviction. The court was *functus officio* on the merits. In no way that could have been an irregularity justifying a reconsideration of the merits at that time. What the Appellants argument entails is that the trial court would have been required to reverse the conviction so that further evidence can be adduced. It is trite that a presiding officer that has already concluded that the appellant is guilty of an offence and furnished his reasons for doing so, cannot hear any further evidence in the matter for reconsideration.[31]

Common purpose

[92] The Appellants also dispute that the state proved that there was an intention on any part of one Appellant to commit murder or that they had agreed on such intent, or alternatively that the accused had actively associated in a purported criminal act with a requisite blameworthy state of mind. In essence the Appellants are denying that the doctrine of common purpose is applicable or has been satisfied.

[93] The often quoted definition of common purpose is found in Jonathan Burchell's *Principles of Criminal Law* at 574, which reads:

> *"Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design."*

[31] *Mokoena v The State* (200/2018) [2019] ZASCA 74 (30 May 2019)

[94] Consequently, there are two forms of common purpose as indicated and confirmed in the decision in *S v Thebus.*[32] The first arises where there is a prior agreement express or implied to commit an offence. The second is when no such agreement exist or is proved, however liability arises from active association and participation in a common criminal design with a requisite blameworthy state of mind.[33] What is applicable in *casu* is the second form, that involves the prerequisites of which are laid down in *Mgedezi*[34]*.*

[95] In *Jacobs and Others v S*,[35] the court made the following observation in relation to active association, that:

> *"For conduct to constitute active association, the requirements set out in Mgedezi need to be met. These are well-established.*[36] *I set them out in the context of the crime of murder. Firstly, the accused must have been present at the scene where, for example, the assault was being committed. Secondly, the accused must have been aware of the assault on the deceased, in Mgedezi this contemplated that the accused had knowledge of a previous assault. Thirdly, the accused must have intended to make common cause with those who were perpetrating the assault. Fourthly, the accused must have manifested a sharing of a common purpose with the perpetrators of the assault by performing some act of association with the conduct of the others. Fifthly, the accused must have had the requisite mens rea (intent). In the context of this case, the applicants must have intended that the deceased be killed, or they must have foreseen the possibility of him being killed and performed an act of association with recklessness as to whether or not death was to ensue. Of particular relevance in this matter is the requirement that the applicants must have been present at the time when the fatal blow was inflicted for them to be guilty of murder."*

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[32] 2003 ZACC 12. 2003 (2) 319 (CC)

[33] *S v Mgedezi* [1988] ZASCA 135; 1989 (1) SA 687 (A) (*Mgedezi*) at 705-6 and *S v Ngobozi* 1972 (3) SA 476 (A).

[34] Supra at footnote 25

[35] [2019] ZACC 4; 2019 (5) BCLR 562 (CC); 2019 (1) SACR 623 (CC)

[36] *S v Mgedezi* [1988] ZASCA 135; 1989 (1) SA 687 (A) (*Mgedezi*)

[96] The court further indicated in *Jacobs*[37] that at a practical level the causal links between the specific conduct of an accused and the outcome may be murky and that is where the doctrine of common purpose assists with the conduct of each perpetrator being imputed to all the others. The doctrine is invoked in the context of consequence crimes to overcome the "prosecutorial problems" of roving the normal causal connection between the conduct of each and every participant and the unlawful consequence. Moseneke J explained in *S v Thebus*[38] that:

> "*The principal object of the doctrine of common purpose is to criminalise collective criminal conduct and thus to satisfy the social 'need to control crime committed in the course of joint enterprises.' The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder, robbery, malicious damage to property and arson, it is often difficult to prove that the act of each person or of a particular person in the group contributed causally to the criminal result. Such a causal prerequisite for liability would render nugatory and ineffectual the object of the criminal norm of common purpose and make prosecution of collaborative criminal enterprises intractable and effectual."*

[97] The trial court had considered and found that the three Appellants were actively involved in the assault of the deceased. They all went out to pursue the perpetrators of the suspected crime during which the deceased was accosted. He was thereafter heard screaming and calling the name of Masemola followed by a sound of a gunshot. Masemola traced the whereabouts of the deceased when he saw the deceased outside the church where he identified all three Appellants present. He witnessed the attack by the three, the deceased being stoned as well. The 1st and 2nd Appellant in the presence of 3rd Appellant continued to assault the deceased with an iron rod on the face, hand and also stabbing him on the cheek. They later dragged and carried the deceased into the church premises severely assaulted and bleeding heavily from the injuries inflicted to his head and face. They

[37] Supra at para 71
[38] Supra at [34]

were found to have acted in collaboration with each other. The extent and brutality of the injuries indicative of the intention to kill the deceased or of being reckless in that regard. As with that kind of brutality they should have known that the deceased who was, evident from the photos taken, a small person, might succumb to such brutality.

[98] The prerequisites laid down in *Mgedezi* in the second form were met for the conviction of all three Appellants for deceased's murder on the basis of common purpose. They actively participated in the infliction of injuries on the deceased making common cause and associated with each other's unlawful conduct in the perpetration of the assault with an intention or whereby they foresaw or must have foreseen the possibility of the deceased being killed however performed an act of association with reckless disregard as to whether or not death ensued. Their guilt, each, proven beyond reasonable doubt.

On fair legal representation

[99] Finally, the legal representation afforded the Appellants is criticised on the basis inter alia, that they admitted to the medico legal post mortem report, completely disregarding the contents thereof and failed to cross examine the witness on the issue that emanate from this fact, rendering all the Appellant's representation nugatory.

[100] The right to fair trial is enshrined in section 35 (3) of the Constitution, 1996 encompassing various fundamental rights. However, the significant rights that are relevant to the dispute raised by the Appellants are found in Sections 35 (3) (e); to be present when being tried, 35 (3) (f) to choose and be represented by a legal practitioner and to be informed of this right promptly. 35 (3) (h); to be presumed innocent, remain silent and not testify during the proceedings and 35 (3) (i) to adduce and challenge evidence effectively.

[101] For the quoted rights to be safe guarded and realised, the right to choose and be represented by a legal practitioner is paramount. The legal representation extends to effective legal representation uncompromisingly, which denotes that the

legal representative must act in the best interest of his or her client, while still ensuring that his or her inherent duty towards the realisation of fair administration justice is maintained.[39] It has also been stated that the constitutional right to counsel must be real and not illusory therefore encompass in principle, the right to a proper, effective or competent defence. The principle is clear that ineffective and improper defence by a legal representative vitiates a trial as being unfair. The right to legal representation therefore means a right to competent and effective representation of a quality and nature that ensures that the trial is indeed fair**.**[40] Incompetent lawyering can wreck a trial, thus violating the accused's fair trial right.

[102] Furthermore as much as effective and competent representation is of utmost importance, to be realized, the effective participation of the accused in the proceedings is necessary and of vital importance. Hence it is a fundamental right that the accused must attend his trial and be present in court when tried, to adduce and challenge evidence effectively (through counsel of his legal representative). His absence or absence in participation will certainly vitiate the proceedings.

[103] The Supreme Court of Appeal in *S v Dalindyebo* applied the abovementioned case of *Tandwa*[41] as well as made reference to the fact that:

> *"It is equally well established that a legal representative never assumes total control of a case, to the complete exclusion of the accused. An accused person always retains a measure of control over his or her case and, to that end, furnishes the legal representatives with instructions."*

[104] In particular, one of the ways in which an accused's right to a fair trial may be realized through his presence is by observation of State witnesses while testifying, for the purpose of giving instructions to the legal representative. It can be instructions on contradictory facts and or demeanour, that being relevant to the assessment of credibility of witnesses, an integral part of the trial. He should be consulted on any documentary evidence as well, that includes, inter alia, witness statements and

[39] *S v Mofokeng* 2004 (1) SACR 349 (WLD) on 355
[40] *S v Halgryn* 2000 (2) SACR 211 (SCA) para [14]
[41] (090/2015) [2015] ZASCA 144; [2015] All SA 689 (SCA) PAR 22-23

exhibits for his necessary input. The case is conducted within the bounds or limits of his instructions. In essence he retains the measure of control over his case.

[105] The preeminence of the accused's instructions or mandate was confirmed by Van Blerk JA in *R v Matonsi* 1958 (2) SA 450 (A) at 458 A-B as follows:

> *"while a legal representative assumes control over the conduct of the case, that control is always confined to the parameters of the client's instructions. The other side of the coin is that, in the event of an irresolvable conflict between the execution of a client's mandate and the legal representative's control of the case, the legal representative must withdraw or the client must terminate his or her mandate where such an impasse arises. An accused person cannot simply remain supine until conviction."*

[106] The Appellants defence was a plea of not guilty denying any involvement in the assault of the deceased, therefore denying that they have anything to do with the infliction of injuries on the deceased and the resultant death (what led to his death). The 1st Appellant also denounced his admission to the assault. The post mortem report is on the overall injuries that were caused by the assault of the deceased and the establishment if any of those were fatal, thereby establishing a causal connection between those injuries and the deceased's death (constituting factual findings). The report was formally admitted by the Appellants, accepting the findings therein in relation to the injuries sustained and those that were fatal. In the light of their plea, the Appellants not making issue with the State in the admission of the report is no irregularity.

[107] The onus or duty is on the Appellants to prove that he was not properly represented as per their allegation (he who alleges) or indicate what he was not satisfied with in the representation as compared to his instructions and input.

[108] On determining the issue of incompetence of Counsel Harms JA in *Halgryn* supra, stated as follows:

> *"Whether a defence was so incompetent that it made the trial unfair is once again a factual question that does not depend upon the degree of ex post facto dissatisfaction of the litigant. Convicted persons are seldom satisfied with the performance of their defence counsel. The assessment must be objective, usually, if not invariably, without the benefit of hindsight. Cf S v Louw* ***[1990] ZASCA 43****;* ***1990 (3) SA 116*** *(A) 125D-E. The court must place itself in the shoes of defence counsel, bearing in mind that the prime responsibility in conducting the case is that of counsel who has to make decisions, often with little time to reflect (cf R v Matonsi* ***1958 (2) SA 450*** *(A) 456C as explained by S v Louw supra).*[1] *The failure to take certain basic steps, such as failing to consult, stands on a different footing from the failure to cross-examine effectively or the decision to call or not to call a particular witness. It is relatively easy to determine whether the right to counsel was rendered nugatory in the former type of case but in the latter instance, where counsel's discretion is involved, the scope for complaint is limited. As the US Supreme Court noted in Strickland v Washington* ***[1984] USSC 146****;* ***466 US 668*** *at 689:"*

[109] The Appellants have only stated that the legal representatives admitted to the medico legal post mortem report, completely disregarding the contents thereof and failed to cross examine the witness on the issue that emanate from this fact.

[110] The Appellants have not indicated why Counsel was not supposed to accept the medico legal report and how the cross examination of the witnesses on any issue relating to the injuries and or cause of death would have advanced the Appellants' defence, especially in relation to their denial of any involvement in the infliction of the injuries on the deceased. The Appellants have as well not indicated which witness did counsel fail to cross examine in relation thereto and the issue that emanate from which fact that Counsel was supposed to cross examine the witness on. The most important indication would be on how that would have advanced their defence or influenced the outcome.

[111] Also as it is a specialised field the adequacy of the cross examination will have to be supported by evidential material which rebuts the contents of the report.

None was available. It is to be, that the fact that the defence makes a statement that the contents of the report or certificate are not accepted does not affect the prima facie evidential value of that report. Evidential material in rebuttal of the contents of the certificate will have to be offered, otherwise the certificate becomes conclusive proof of its findings.

[112] As a result the acceptance of the evidence in the report and failure to examine thereon, which is in any case a decision that falls within Counsels' discretion, did not render the representation incompetent and ineffective so as to conclude that there was no fair administration of justice and the violation of the Appellants fundamental rights to a fair trial. It is a fact that obviously the Appellants Counsel can therefore not be criticized, using the benefit of hindsight, for failing to challenge the report and or to call on the appearance of the witness for purpose of cross examination. The acceptance of the report had no influence on the merits considered for determining whether or not the Appellants were involved in the infliction of the injuries found on the deceased. It has no bearing on the court's finding that they were involved in the assault as it is of no probative value in determining the Appellants guilt on the charge of murder.

[113] Having read the record I am of the view that the criticism has no substance and the issue of discontentment did not constitute an irregularity sufficient to render the trial unfair. The Appellants did have a fair trial. The Appellants legal representative constantly took instructions, especially prior to cross examination, posed questions and put their versions to witnesses as instructed accordingly, and notwithstanding struggling at some instances to get the intended cohesion and co-operation between the versions put to witnesses and evidence led by the Appellants in chief. The criticism is misguided.

[114] The conviction of the Appellants is unassailable.

Sentence

[115] The approach to sentencing remains as expressed by E M Grosskopf JA in *S v Blank*[42] as follows:

> *'It has repeatedly been emphasised by this Court that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial Judge and that a Court of appeal can interfere only where such discretion was not properly exercised. One of the ways in which it may be shown that a trial court's discretion was not properly exercised is by pointing to a misdirection in the court's reasons for sentence"*

[116] It is therefore trite that the imposition of sentence is pre-eminently a matter falling within the discretion of the trial court, the court of appeal can only interfere with the sentence if the court a quo did not exercise its discretion judicially or if there was an irregularity. The principle in this regard is expressed as follows by Trollip JA in *S v Pillay*[43]

> *"Now the word 'misdirection' in the present context simply means an error committed by the Court in determining or applying the facts for assessing the appropriate sentence. As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the Court in imposing it exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence, it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the Court did not exercise its discretion at all or exercised it improperly or unreasonably. Such a misdirection is usually and conveniently termed one that vitiates the Court's decision on sentence".'*

[117] The Appellants in their heads of argument have left out any arguments on the grounds of appeal relating to sentence. It also turns out that in their petition there were no grounds of appeal relating to sentence. The grounds of appeal set out in the notice of appeal were that the sentence imposed does not take into consideration the

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[42] 1995 (1) SACR 62 (A)
[43] 1977 (4) SA 531 (A) at 553E-F:

personal circumstances of the appellants. It also does not relate to the circumstances of this case as a result induces a sense of shock. In essence the Appellants allege that the court did not exercise its discretion judicially there being also some form of irregularity.

[118] It is clear from reading the record that the sentencing of the Appellants was actually centred on two issues, that is, their personal circumstances and whether there were substantial and compelling circumstances to justify a deviation from the prescribed minimum sentences as specified in the Criminal Law Amendment Act 105 of 1997 (as amended) (the Act). The court a quo went in extra length addressing the issue of substantial and compelling circumstances where after it dealt with the personal circumstances of the parties. The allegation that personal circumstances of the Appellants were not taken into consideration is not correct.

[119] It was of major concern to the court, justifiably so, that the offence committed was of a very serious nature, the gravity and brutality regarded as shockingly severe. The trial court considered the trauma that the deceased went through having to die in such a brutal way and also that of the family. Indeed, it is the worst ordeal that any victim or family can go through. The wounds as shown in the photos were, intensely severe and ghastly, to name a few, the multiple blunt tissue injuries to the head and face of a repetitive nature, lacerations to the head and face have surrounding bruising into the soft tissue and between wounds, abrasions and bruising present on the lower ribs anterior and over the entire back from shoulders to buttocks. Both arms with abrasions over the dorsal surface. Deep grass burn marks present over both knees anterior. Fracture of the base of the skull, Brain stem bleeding, Ribs 7-9 fractured. The Respondent's Counsel is correct that there was no intention to restrain but to murder the deceased as the multiple injuries to the head and face not only severe but of a repetitive nature.

[120] Furthermore, this court is concerned about the manner in which the Appellants further conducted themselves after the murder. They were still set on sending the police on a wild goose chase. The three of them are expected to be a model of humanity and decency in their communities and not endorse the taking of the law by the community in their own hands and mete out punishment in such a

barbaric way. It is no justification that they had previously experienced incidents of theft at the church. It is significant that on the day there was no break in. Due to concerns raised in such matters Moseneke DCJ in *Thebe* warned as follows:

> Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals. Effective prosecution of crime is a legitimate, "pressing social need".[44] The need for "a strong deterrent to violent crime" is well acknowledged because "widespread violent crime is deeply destructive of the fabric of our society"[45] . There is a real and pressing social concern about the high levels of crime.[46] In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus there is no objection to this norm of culpability even though it bypasses the requirement of causation.

[121] Under the circumstances the court a quo was correct that their personal circumstances in this instance cannot be regarded as substantial and compelling to justify a deviation from the minimum prescribed sentence.

[122] Following on the authority of *S v Malgas*[47] the trial court could not find any substantial and compelling circumstances, which conclusion we agree with, that there were no truly convincing reasons for departing from the minimum prescribed sentence. It is also not true that the circumstances considered do not relate to the circumstances of this case.

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[44] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (CC); 1995 (1) SACR 568 (CC) at para 41.
[45] See *S v Makwanyane* n 46 at para 117. See also *S v Williams and Others* [1995] ZACC 6; 1995 (3) SA 632 (CC); 1995 (7) BCLR 861 (CC) at para 80. *S v Dlamini; S v Dladla and Others*; *S v Joubert; S v Schietekat* [1999] ZACC 8; 1999 (4) SA 623 (CC); 1999 (7) BCLR 771 (CC) at para 67
[46] *S v Mbatha; S v Prinsloo* [1996] ZACC 1; 1996 (2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 16-
[47] 2001 SACR 469 (SCA)

[123] We cannot find that the magistrate did not exercise the sentencing discretion properly or that there was any irregularity in this case. The sentence of 15 years that was imposed, is in the circumstances in our view, appropriate.

It is accordingly ordered as follows:

1. The appeal against the convictions of the 1st, 2nd and 3rd Appellants is dismissed.
2. The appeal against the sentences of the 1st, 2nd and 3rd Appellants is dismissed.

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KHUMALO N V

JUDGE OF THE HIGH COURT

I agree,

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MOGOTSI D.D.
ACTING JUDGE OF THE HIGH COURT

Appearances

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Director of Public Prosecutions, Pretoria