REPORTABLE

IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 80/08

In the matter between:-

MDUDUZI AGRIPPA DLADLA **APPELLANT**

and

THE STATE **RESPONDENT**

J U D G M E N T

MSIMANG JP

[1] One of the allegations the State must prove as a basis for criminal liability is that the accused participated in the criminal activity giving rise to that criminal liability.

[2] This is the crisp issue in this appeal and, as there is no direct evidence of such participation by the appellant, the respondent has urged this Court to consider the circumstantial evidence tendered in the Court *a quo* and to infer therefrom that there was such participation.

[3] With this prelude, I proceed to deal with the material facts.

[4] It was alleged that sometime prior to 5 January 2005 the appellant and two other persons conspired to commit robbery at the Umziwabantu Municipality (municipality) situate in the KwaZulu Natal south coastal town of Harding. Indeed, on 5 January 2005 the three assailants, which included the appellant, proceeded to the premises of the Municipality and, when they aroused suspicion, the Municipality employees called upon the deceased to

attend to the matter. At the time the deceased was employed by the municipality as the Chief Protection Officer. The deceased then pursued and reached the assailants and started to search them, one by one. One of them removed the deceased's firearm from his person and shot the deceased twice on his shoulder. The deceased then fell on the ground and the assailants entered his motor vehicle and drove away. It is common cause that the deceased died as a result of a gunshot wound of the chest he sustained during the incident.

[5] It was on the basis of these allegations that the appellant appeared before **McLaren J** in the Southern Circuit Local Division charged with the crimes of murder and robbery with aggravating circumstances, the State alleging that the assailants acted in concert and in furtherance of the execution of a common purpose to commit the said crimes.

[6] The appellant admitted that on 4 and 5 January 2005 he was in the Harding area but denied that he participated in the incident giving rise to the crimes contained in the indictment. Regarding his fingerprint which was uplifted from the deceased's motor vehicle, he explained it as follows. He had travelled to Harding visiting his girlfriend on 4 January 2005. He had spent a night with his girlfriend, got up at 08h00 the next morning, proceeded to a place called Ikhwezi (that is where the deceased's motor vehicle had subsequently been found abandoned) where he was destined to board a taxi to take him to Harding. Before doing so, he made enquiries from a person who was sitting in a white pick-up parked next to the rank. He testified that the pick-up concerned resembled a pick-up depicted in one of the exhibits which, it is common cause, was the deceased's motor vehicle. He thereafter boarded a taxi which took him to Harding where he arrived at approximately 10h45. The State witnesses had, however, already testified to the effect that the deceased had been murdered at approximately 14h00.

[7] The Court *a quo* found that the appellant had given false evidence when he denied having been present during and participated in the robbery of the deceased, that he was present during and participated in the said robbery

and accordingly convicted the appellant of the crimes of murder and robbery with aggravating circumstances.

[8] The evidence sustaining proof that the appellant was present during and participated in the robbery of the deceased was overwhelming. I, accordingly, cannot find any fault in the judgment of the Court *a quo* on that issue.

[9] The basis upon which the appellant was convicted of the crime of murder is, however, difficult to fathom. It is therefore hardly surprising that the Court *a quo* granted appellant leave to appeal against the conviction of murder, holding that:-

> "…there is a reasonable possibility that another Court may reach a different conclusion to the one which I arrived at with regard to the count of murder."

[10] In giving reasons for convicting the appellant, the Court *a quo* pronounced itself as follows:-

> "The accused was an evasive witness and was patently untruthful. There is no doubt whatsoever that he falsely claimed that Buys had made a telephone call to Superintendent Nyuswa during the course of the interview which Superintendent Nyuswa had with the accused. This was not put to either Buys nor to Nyuswa. It was not put to Buys that he had assaulted the accused in any manner whatsoever.
> The false evidence which the accused gave in connection with the interview with Superintendent Nyuswa and the statement which is recorded in Exhibit H, can be explained on one footing only. The accused gave this false evidence because he could not explain why on his evidence in court he had lied to Superintendent Nyuswa about his not being present at Harding on 5 January 2005. That false testimony commenced when the accused was asked to explain why he had allegedly lied to Nyuswa. …
> He was in their company after suspicious behaviour at the municipal offices, he fled, together with the other two persons and he did not claim that he was simply an innocent bystander who got caught up in the events which happened. He had that opportunity to tell the truth, he had the opportunity to say that he was not part of the plan or conspiracy or a common purpose to murder and rob the deceased, instead of doing that he told the Court a pack of lies. It is not for me to now speculate on whether there is an innocent explanation for his

actions on that day."

[11] It would therefore appear that, in convicting the appellant, the Court *a quo* relied heavily on the fact that the appellant had given false evidence.

[12] In *S v Burger*[1] Navsa JA sounded the following warning:-

> "There might be suitable cases in which it is safe to conclude that lies, together with other acceptable evidence, prove the guilt of an accused. However, courts should be careful to decide against an accused merely as punishment for untruthful evidence."[2]

[13] He went on to rely on the following passage quoted from the decision in *S v Mtsweni*[3]:-

> "Voordat 'n skuldigbevinding aan moord kan geskied moet daar bewese feite wees wat by wyse van afleiding die appellant aan die dood van die oorledene koppel. By ontstentenis daarvan bestaan daar nie 'n *prima facie* saak teen die appellant nie, en kan sy leuenagtige getuienis, net soos in die geval waar hy nie getuig nie, nie die leemtes in die Staat se saak aanvul en 'n gevolgtrekking van skuld regverdig nie …"[4]

[14] It would therefore appear that the Court *a quo* failed to take heed of this warning and seemed to have convicted the appellant as punishment for giving untruthful evidence. In so doing, that Court misdirected itself. The Appeal Court is accordingly at large to reconsider the issue of this conviction afresh.

[15] It is evident from the proven facts that there is no evidence identifying anyone amongst the three assailants as having de-holstered the deceased's firearm and having fired a shot or shots that killed him. It therefore accordingly follows that the appellant can only be convicted of the crime of murder if it is shown that he acted with a common purpose with the other two

---

1 2010 (2) SACR 1 (SCA);
2 Ibid at 8 par (3);
3 1985 (1) SA 590 (A);
4 Ibid at 594 E-F;

assailants to murder the deceased.

[16] The crucial requirement for the finding that an accused person acted with a common purpose with one or more other offenders is that he must have intended to commit such a crime. In *S v Safatsa and Others* [5] Botha JA put the position as follows:-

> "These accused shared a common purpose with the crowd to kill the deceased and each of them had the requisite *dolus* in respect of his death. Consequently the acts of the mob which caused the deceased's death must be imputed to each of these accused."[6]

[17] Returning to the facts of the present case, no evidence was adduced in the Court *a quo* to show that the two other assailants foresaw a possibility that their co-assailant would suddenly deholster the deceased's firearm and fire a shot or shots that would lead to the death of the deceased. The Court *a quo* accordingly erred when it found that the appellant had formed common purpose with his co-assailants to commit the crime of murder.

[18] *Mr Nel*, who argued the appeal for the respondent, however, urged us to find, on the evidence, that the appellant did form such common purpose and, for that submission, he relied on a statement which was made to the police by the appellant and which was entered as evidence in the Court *a quo* and marked Exhibit "H".

[19] In that statement the appellant had denied that he had been present during the robbery and murder of the deceased but had added that, during the month of January 2005, he had been visited by his old friend, one **Mthunzi**, who informed him that he had been at Harding with one **Nathi** and one **Star,** and that they were walking on foot, when they were approached and stopped by a traffic policeman who requested to search them. After he had searched them he found firearms in **Mthunzi's** and **Nathi's** possession. **Nathi's** firearm could, however, not be removed from him and, when the traffic

---

5 1988 (1) sa 868 (a);
6 *Ibid.* at 901 H-I;

policeman was trying to remove the same, **Mthunzi** took out his firearm and shot the policeman and **Nathi** followed suit, pulled out his firearm and shot the policeman. **Star** went for the policeman's firearm, deholstered the same and all three mounted the policeman's motor vehicle and drove away.

[20] As I understood **Mr Nel's** argument, it proceeded as follows. As the Court *a quo* correctly found, the appellant had not been telling the truth when he testified that he had not been present during the robbery and murder of the deceased. However, instead of coming clean and disclosing to the Court that he had been present during the occurrence of and that he had participated in the incident, the appellant invented a tale of a visit by **Mthunzi** who is supposed to have related to him the events that had unfolded during the occurrence of the incident whereas, in truth, he himself was present during and participated in the said occurrence and what he had related to the police in Exhibit "H" is not what he had heard but it was what he had witnessed and lived out on 5 January 2005. The details given in Exhibit "H" were, on all fours, similar to the version given by the eyewitness who gave evidence for the State, save that the statement gave details as to the act performed by each of the assailants. **Mr Nel** accordingly urged the Court to find that, in his tale, all the appellant had done was to substitute his name for one of those mentioned in Exhibit "H". As the Court has found that the appellant had been present, this Court should infer from the evidence that he had performed one of the said acts and, as there is no direct evidence as to which act he had performed, the least serious one, namely, the one involving the deholstering of the policeman's firearm, should be attributed to him as the only reasonable inference to be drawn from the proven facts.

[21] Having found, by inferential reasoning, that the appellant removed the deceased's firearm shortly after his co-assailants had fired a shot or shots that had murdered the deceased and having witnessed the incident, the Court should, **Mr Nel** further argued, infer therefrom, also as the only reasonable inference, that the appellant associated himself with the commission of the crime of murder and that, by so doing, he formed common purpose with his co-assailants to commit that crime.

[22] The point of departure in addressing **Mr Nel's** argument is, perhaps, to caution, that, as a general rule, it is unjust to impute one person's criminal conduct to another. Each person's criminal liability should be based:-

> "Not upon what somebody else has done, but upon what he himself has done."[7]

[23] A person can only forfeit his identity in the field of criminal responsibility if it can be shown that he acted with a common purpose with his co-offenders, in which event the conduct of anyone of them can be imputed upon him.

[24] That being the position, absent such a common purpose, the least serious role which **Mr Nel** has urged us to attribute to the appellant can be attributed to him only if it can be shown that it was the conduct which he himself performed. As there is no direct evidence of such performance, **Mr Nel** has argued that such an act should be attributed to him by inference.

[25] When dealing with the subject of inferential reasoning, it is always useful to be reminded of the following two *dicta*, one from the speech of **Lord Wright** in the English decision in *Caswell v Powell Duffryn Associated Collieries Ltd*[8] and the other from the leading South African decision on the subject, namely, *R v Blom*[9].

[26] In his speech **Lord Wright** counselled as follows:-

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or

---

7 *Criminal Law – CR Snyman* – 4th Edition at 262;
8 (1939) 3 All ER 722;
9 1939 AD 188;

conjecture."[10]

[27] And in a leading South African decision on the subject, **Watermeyer JA** proclaimed the following two cardinal rules of logic:-

> "(1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
> 2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct."[11]

[28] The *dictum* quoted from *Caswell (supra)* referred to above has often been quoted, with approval, in a number of our Courts' decisions.[12]

[29] The proven facts upon which **Mr Nel** urges us to infer that, during the occurrence of the incident, the appellant had deholstered the traffic policeman's firearm are the following. The appellant made a statement to the police in which he falsely denied having been present when the incident occurred, invented a tale of one **Mthunzi** having visited him and having informed him that he, together with one **Nathi** and one **Star**, had been present during and participated in the occurrence of the incident, that they had been searched by the said traffic policeman who found firearms in **Mthunzi's** and **Nathi's** possession, that **Mthunzi** had taken out his firearm and shot the policeman, that **Nathi** had followed suit, also pulled out his firearm and shot the policeman, that **Star** had gone for the policeman's firearm, deholstered the same and that all three of them had thereafter mounted the policeman's motor vehicle and drove away.

[30] It is important to digress and point out that the details contained in Exhibit "H" differ from the version given by the eyewitness in another material respect, namely, that, while, according to the eyewitness, the firearm which

10 *Caswell (supra)* at 733;
11 *Blom (supra)*at 202-203;
12 See, for instance, *S v Essack* 1974 (1) SA 1 (A) at 16D-E; *S v Naik* 1969 (2) (N) at 234D; *Mazu v Du Toit en 'n ander* 1983 (4) SA 629 (A) at 650E-F; Dissenting judgment of Botha JA in *Motor Vehicle Assurance Fund v Dubuzane* 1984 (1) SA 700 (A) at 706B-C; *S v Mdweni* 1985 (1) SA 590 (A) at 592F-G; *Labour v Gorfinkel* 1988 (4) SA 123 (C) at 135A-B;

had been utilised to fire two shots at the deceased had been his own firearm which had been removed from him by one of the assailants, according to Exhibit "H", it had been two of the assailants who had each used his firearm and fired a shot at the deceased.

[31] Analysing **Mr Nel's** argument, it is evident that he is urging us to travel through two inferences to reach the desired destination, the ultimate inference which he wishes us to draw from the proven facts being that the appellant had formed a common purpose with his co-assailants to commit the crime of murder. Now, on the authority of *Caswell (supra),* an inference can be made only if there are and on the basis of "objective ……. positive proved facts" or, as **Seligson AJ** put it in *Lazarus (supra)*:-

> "Even if it be assumed that plaintiff had made an error in question, in my judgment it is extremely difficult on the totality of the evidence to draw a clear inference that Kahn had told defendant that plaintiff and not Mobren was the creditor. In the circumstances I would be in danger of resting my decision on the shifting sands of conjecture and assumption rather than drawing an inference from a bedrock of fact."[13]

[32] Could it be said that the facts upon which the first-desired inference is based are "objective …… positive proved facts" or, in the words of **Seligson AJ**, do they constitute "a bedrock of fact"? Perhaps of more relevance, is this "piling inference upon inference" permissible?

[33] The view which would hold sway, especially in the American Courts, was that an inference upon an inference was not permissible. Over the years that view has, however, been discredited. One American author has expressed himself as follows about the view (to which he refers as a rule):-\

> "There is no such orthodox rule; nor can there be. If there were, hardly a single trial could be adequately prosecuted. ….. In innumerable daily instances we build up inference upon inference, and yet no Court (until in very modern times) ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials

13 *Lazarus (supra)* at H-I;

> proceed upon such data. The judicial utterances that sanction the fallacious and impractical limitation, originally put forward without authority, must be taken as valid only for the particular evidence and facts therein ruled upon". [14]

[34] That is also the position in our Courts. In their every day deliberations, they often engage in the method of inferential reasoning, building up inferences upon inferences. When I was writing this judgment I could not come across any South African decision in which the subject was specifically discussed, save that this method of proof appeared to have received support, albeit somewhat elliptically, in the dissenting judgment of Botha JA in *Motor Vehicle Assurance Fund v Dubuzane* [15] when he made the following remarks regarding the facts of that case:-

> "The facts that the deceased was found lying near the pedestrian crossing justifies the inference that he was hit by the motor vehicle when he was on or near the crossing. **That inference, by itself, does not, however, in my view give rise to a further inference that the driver of the motor vehicle was negligent. Such further inference fails, as a matter of logic, in the absence of any data as to the manner in which the deceased came to be at the particular spot where he was not ….."[16] (my emphasis).**

[35] The view proclaiming a rule against inferences upon inferences has accordingly been rightfully discredited. One American Judge was therefore correct when he referred to it as follows:-

> The so-called rule against pyramiding inferences, if there really is such a "rule" and if it is anything more than an empty pejorative, is simply legalese fustian to cover a clumsy exclusion of evidence having little or not probative value." [17]

[36] There is therefore nothing wrong with this method of proof, provided that each inference is "reasonably well supported by the evidence" and provided that each inference is judged "taking into consideration that its

---

14 *Wigmore on Evidence* Vol 1A – by **John Henry Wigmore** (1983 Ed) at 1111;
15 1984 (1) SA 706 (A)
16 *Ibid* at 707D-E;
17 Mr Judge Wisdom in *NLRB v Camco Inc,* 340F.sd.803, 811 (5th Cor. 1965);

probability may be attenuated by each underlying inference".

[37] Conjecture or speculation, to which **Lord Wright** referred in *Caswell (supra),* is referred to as such by reason of the fact that it is not supported by the evidence and therefore can have little, if any, probative value.

[38] In my judgment, that is exactly where **Mr Nel's** submission fails. That the appellants removed the deceased's firearm, is not supported by any positive proved facts. **Mr Nel** seeks to persuade us to speculate that, by reason of appellant's mendacity and his invention of a tale which specifies the role played by each of the three alleged assailants, the appellant must have played one of the three roles, namely, the least serious one. Clearly, the proven facts, which are supposed to form the basis for such an inference, do not go far enough and cannot reasonably sustain such an inference.

[39] The proven facts herein accordingly cannot pass the first of the two cardinal rules of logic in that the inference sought to be drawn is not consistent with these facts. That inference can therefore not be drawn.

[40] Even if I were wrong in my evaluation of the proved facts *vis-à-vis* the first of the two cardinal rules of logic herein and even if it can be shown that the said inference could legitimately be drawn from those facts, in my view, those facts would fail on the second of the cardinal rules as they would not be such as to exclude every reasonable inference from them save the one sought to be drawn. The inference that the appellant would have intended to steal the policeman's firearm, would equally be a reasonable one.

In the premises I order that the appeal against the conviction of murder be upheld and that the order of the Court *a quo* convicting the appellant for that crime be and is hereby set aside and substituted with an order acquitting the appellant on the crime of murder.

_____

MSIMANG JP

_____ **I agree**

GYANDA J

_____ **I agree**

MOKGOHLOA J

Appeal heard on :	**15 July 2010**
Counsel for the appellant :	**P Marimuthu**
Instructed by :	**Justice Centre**
Counsel for the State :	**G Nel**
	Director of Public Prosecutions
Judgment handed down on :	