REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: A478/09

In the matter between:

ANDILE GEDEZI **First Appellant**

SIFISO ZONDI **Second Appellant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ON 5th MARCH 2010

GAMBLE AJ:

Introduction

[1] The Appellants appeared before the Regional Magistrate, Cape Town on a count of murder, it being alleged that on Thursday, 16 June 2005 they killed a certain Mr Zithulele Ntamo at Du Noon, north of Cape Town. During the course of the trial **it** transpired that Mr Ntamo had been shot in his home **in** a informal settlement.

[2] Both Appellants pleaded not guilty. After hearing the evidence of a number of witnesses the Regional Magistrate duly convicted both Appellants as charged. They were each sentenced to 15 years imprisonment with 3 years of the sentence of the Second Appellant being ordered to run concurrently with a 4 year sentence he was serving for an unrelated offence.

[3] With the leave of the Court *a quo* the Appellants now appeal against both conviction and sentence. The Appellants are jointly represented by Ms van der Westhuizen while Mr Vakele represents the State.

[4] In the Court *a quo* Ms van der Westhuizen represented the Second Appellant (then accused number 2) while the First Appellant was unrepresented for reasons which will appear more fully below.

[5] In argument before us Ms van der Westhuizen dealt fully with the merits of the matter and the two sentences imposed. In addition Ms van der Westhuizen argued that an irregularity had occurred in the Court *a quo* relating to the First Appellant's lack of legal representation. She contended that this irregularity was of such a fundamental nature that it violated the proceedings before the Regional Magistrate in respect of the First Appellant. We were asked to set aside the First Appeliant's conviction and sentence-on this ground alone and to remit his matter for retrial.

The right to a fair trial

[6] Before dealing with the events which took place before the Court *a quo* it is apposite to consider the principles applicable to an accused person's right to legal representation in a criminal trial.

[7] The point of departure is the Constitution of the Republic of South Africa, 1996. Section 35(3) thereof provides that:

> *"Every accused has a right to a fair trial, which includes the right -... (b) to have adequate time and facilities to prepare a defence;...*
>
> *(d) to have their trial begin and conclude without unreasonable delay; ...*
>
> *(f) to choose: and be represented by, a legal practitioner, and to be informed of this right;*
>
> *(g) to have a legal practitioner assigned to the accused by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right".*

[8] There are similar fair trial procedures in section 73 of the Criminal Procedure Act, 51 of 1977 {"the Act") which represent the *common law* position. In my view it is not necessary to consider these at this stage since, *prima facie,* a violation of an entrenched constitutional right to a fair trial would ordinarily lead to a quashing of the conviction unless there remains sufficient proof of guilt beyond reasonable doubt, notwithstanding the irregularity complained of[1].

[9] In **Tshona's case,** *supra,* Jones J put it thus at p 879 E:

> *"The cross-examination in this case should in my view be regarded as more than just a procedural irregularity. It is a constitutional irregularity going to basic ideas of fairness and justice which obtain in this country and ail civilised countries. This irregularity, serious as it may be, does not automatically vitiate the conviction. The question still arises whether or not there has been a failure of justice, and that question is, in turn, dependent upon whether or not, when the effect of the unfairness is eliminated, there remains sufficient evidence for proof of guilt beyond reasonable doubt."*

Factors leading to the absence of legal representation for the First Appellant at trial

[10] According to the charge sheet the Appellants were arrested on 27 September 2005, some three months after the fatal shooting. They appeared before the Magistrate, Cape Town on that day and their rights regarding legal representation and legal aid at State expense were explained to them by the presiding officer. Both Appellants indicated that they would conduct their own defences. Furthermore, they declined any assistance that was offered to them there and then by a representative of the Legal Aid Board's Cape Town Justice Centre.

[11] During a subsequent appearance in the Magistrate's Court on 24 November 2005 the prosecutor informed the court that there was a possibility that the matter would be referred to the High Court. Both accused persisted in conducting their own

1 **Shabalalaand Others v Attorney-General and Another 19% (J) SA 725 (CC); S v Shikunga 1997 (9) BCLR 132] (NmS); *Tshona* and Others v Regional Magistrate, Uitenhage and Another 2001 (S) BCLR 860 (E); S v Mazingane 2002 (6) BCLR 634 (W);**

defences at that stage. The First Appellant is recorded as having remarked that 'I *only want a Xhosa-speaking lawyer otherwise I am not interested"* while the Second Appellant said *"I just feel I want to conduct my own defence".*

[12] After a number of further appearances the case was postponed until 6 April 2006 at the request of the State. The Magistrate recorded that this was a *"final remand".*

[13] On 6 April 2006 the Appellants appeared before the Regional Magistrate for the first time. The First Appellant was in person while the Second Appellant had an attorney. At the request of the State the matter was once again postponed, this time until 17 May 2006. The Regional Magistrate cautioned the State in terms of Section 342A of the Act against an unreasonable delay in the trial.

[14] On 17 May 2006 the prosecutor is recorded as having informed the court that the investigation was complete and that the matter could be postponed for the procurement of a trial date in the Regional Court. To this end the matter was adjourned until 29 May 2006.

[15] On 29 May 2006 the mater was then further postponed to 12 July 2006 for the fixing of a trial date. On 12 July 2006 the Regional Magistrate postponed the matter for the trial which was to begin on 14 November 2006. The second day of trial was fixed at that time too: it was to be 20 November 2006.

[16] On 14 November 2006 only the First Appellant was before Court. It appears 1hat in the interim the Second Appellant had been sentenced in an unrelated matter and was imprisoned elsewhere. The matter couid accordingly not proceed and it was postponed to the following week for the trial to commence on 20 November 2006.

[17] At the hearing on the 14,h November, Ms van der Westhuizen appeared on behalf of both accused. She informed the Court that the First Appellant had terminated her mandate on that day and that he had appointed Adv Bobotyane to handle his defence. This seems to accord with his earlier indication that he wished to be represented by a Xhosa-speaking lawyer.

[18] The Regional Magistrate then enquired of the First Appellant when he had appointed the advocate to which he replied that it had been the previous week - he thought on the Sunday. The Regional Magistrate cautioned the First Appellant that the matter would proceed on the 20th November. She pointed out that the matter had been postponed from July 2006 and that one of the witnesses (who was evidently in witness protection) was due to travel to Cape Town from the Eastern Cape for the hearing on the 20,h. It was noted that Mr Bobotyane was absent and had not been excused by the Court.

[19] All of the abovementioned recordais form part of the manuscript notes on the charge sheet. While they are somewhat cryptic they clearly show that all of the postponements of the case prior to 20 November 2006 had been at the request of the State or because of the absence of Second Appellant on 14 November 2006. The First Appellant was also not ready to proceed on that day. All the while the Appellants were remanded in custody.

[20] The proceedings from 20 November 2006 onwards were mechanically recorded and the transcript thereof is part of the record before us. It is necessary to quote at length from passages in the record to consider whether the First Appellant had a fair trial.

[21] Before the charges were put to the Appellants on the 20th November counsel for the First

Appellant addressed the Court and the following exchanges occurred:

> *"MR BOBOTYANE: Your Worship indeed 1 confirm that i appear for Mr Gedozi [sic] in this case Your Worship and I understand that the case today is on the roll for purposes of plea and trial, Your Worship on my side I am not ready to proceed with this trial Your Worship. Your Worship I believe on the last case I informed the Court ~ on Monday last week I was only given instructions to appear for the accused on the Sunday - which the accused appeared on the Monday. And now my instructing Attorney in this matter Your Worship made arrangements to consult with the accused in Goodwood Prison Your Worship. The accused is currently serving sentence in Goodwood Prison and my instructing Attorney had to make now an appointment for the weekend to consult in Goodwood Prison Your Worship but now my instructing Attorney Your Worship experienced some problems Your Worship at home then he had to leave the Western Cape Your Worship and he had to go the Eastern Cape Your Worship. At this point in time Your Worship he is on his way from the Eastern Cape Your Worship to attend one of the family problems Your Worship - serious problems at home. Therefore Your Worship I'm standing before this Court Your Worship without any* instructions Your Worship *pertaining* to the *merits* of *the* case Your *Worship. And also (indistinct) I was informed by the Court that today this case should run. I could not get my colleague to get (indistinct) but without the instructions from my instructing Attorney I'm not.in a position Your Worship to run this case. The appointment was for Sunday but he could not go.*
>
> *COURT: Is State ready?*
>
> *PROSECUTOR: State is ready to proceed Your Worship in this case Your Worship.*
>
> *COURT: This trial is going to run Mr Bobotyane you can then decide what you have to do and what you do not have to do. This ~ it is not acceptable for a case to be postponed from July until November and then instructions been given the day before trial Number 1 you should say no to that type of instructions because the trial date is the next day, number 2 they should not have waited three, four months before*

instructing you. I'm not going to - it's not only him in this case, tnere are many other parties. The State, their witnesses,

Ms van der Westhuizen. the other accused. So this trial is continuing today you can decide what you want.

MR BOBOTYANE: Your Worship in all respect Your Worship - with due respect to Court I understand that the...

COURT: This is not - this is not open to discussion this is my order it will continue so you must decide what you...

MR BOBCTYANE: Your Worship may I then consult my (indistinct) in this matter to see what step should I take then from him because I'm here (indistinct) and if he says that i should proceed then I will but if he says not then I'll have to consult Your Worship.

COURT: I'll give you a few minutes - I'm not going to - consult Mr Bobotyane please don't try to take the back door out of here, its 11 o'clock — 12 o'clock sorry and at! these very same parties that I just mentioned are also not going to sit until 4 o'clock while you consult. The trial will proceed.

'MR BOBOTYANE: I understand - Your Worship I just want to consult my instructing Attorney then I'll come back with...

COURT: The Court will adjourn for a few minutes.

MR BOBOTYANE: As the Court pleases. COURT ADJOURNS: ON RESUMPTION:

MR BOBOTYANE: I've consulted Your Worship with my instructing Attorney, Mr Malwane, in this matter and he instructed myself Your Worship that in the event that then the situation Your Worship then I should withdraw as (indistinct) and then if then the Honourable Court Your Worship does not excuse me from record Your Worship then I've got no choice but to stay on record, but however no questions then I'll be able to ask the witness as now...

COURT: Sir are you now pre-emptying things here by saying that to me.

MR BOBOTYANE: Not really.

COURT: Are you ~ you are, that is what you're doing and I don't take kindly to that.

MR BOBOTYANE: Your Worship I...

COURT: At all.

MR BOBOTYANE: No not really Your Worship.

COURT: No., not really Mr Bobotyane that's really - I'm telling you now and I'm trying to teach you for future reference, that last part you added is not acceptable. When it gets to that...

MR BOBOTYANE: Your Worship my apologies Your Worship. COURT: When it gets to that - when it gets to that you can get up and say something and things can be sorted out. Don't - because it boils down to a threat and I do not take lightly.

MR BOBOTYANE: As the Court pleases.

COURT: Anything like that.

MR BOBOTYANE: As the Court pleases Your Worship my apologies for that last part Your Worship. That is the situation Your Worship I've got instructions to withdraw from this matter Your Worship that is my instructions.

COURT: The reason being - the reason being?

MR BOBOTYANE: Your Worship lack of instructions Your Worship.

COURT: What kind of instructions?

MR BOBOTYANE: As to the merits of the case Your Worship. I believe then the instructing Attorney Your Worship will sort out everything (indistinct).

COURT: Accused 2 your Advocate now requests to be excused, do you v/ish to say anything'? There's no microphone there - sorry accused 1.

ACCUSED 1; What I want to say to the Court Your Worship is that I wish to have a private Attorney representing me in this matter. I don't want a Legal Aid Attorney representing me Your Worship and I cannot also defend myself on this matter. So I want a private - the Attorney of my choice.

COURT: Sir you had four months to finalize those arrangements why did you not do it?

ACCUSED 1: First thing is that Your Worship I'm not working and my family are struggling - they struggled Your Worship to get the money to get to - to collect the money in order to pay the Lawyer so that's why there was a delay.

COURT: Sir on the day we set this trial date you were represented by Legal Aid - a day before the trial started you contacted a private Attorney. I am not going - in the interest of justice remand this, case any further. The witnesses are here, the Prosecutor is ready, your other co-accused is ready, the interpreter is here. In total there are about 20 people that are being affected not just you sc this trial will proceed today. You're excused Mr Bobotyane because I cannot force a legal representative to stay on record because it would be at the end of the day prejudicial to the accused.

MR BOBOTYANE: As the Court pleases.

COURT.

PROSECUTOR: State is ready to put the charge.

COURT: Proceed.

MR BOBOTYANE: Sorry accused 1 wishes to say something Your Worship.

COURT: Yes.

ACCUSED 1: I am not prepared Your Worship to continue with this trial without an Attorney Your Worship - this is not just a (indistinct) this is a murder case Your Worship and (indistinct) not prepared to continue with this case.

COURT: Sir the Court has made an order the trial will proceed today. Unfortunately it is your negligence and your arrangements that caused you to be in the position you are today, it's not the Court's fault, it's not the Prosecutors fault, it's not Mr Bobotyane's fault, it's not Ms van der Westhuizen's fault, it's not the interpreter's fault it is you that instructed an Attorney the day before trial, after four months having lapsed and in the interest of justice J aw not going to prejudice all the other parties for that reason. The trial proceeds today.

ACCUSED 1: Your Worship there is nothing that I will say to the Court if the Court feels that the trial is going to proceed now, but i want to tell the Court that there's nothing that I will say to the witnesses or any - I won't ask any questions because i think it's my right that I be defended by the Attorney that is of my choice. Your Worship ! cannot just continue with this trial on my own I need an Attorney or somebody to represent me in this

matter Even the Legal Aid Attorney that came here was not chosen by me Your Worship ! was not even here in court ~ he just came to me telling me that he was going to postpone the case for trial date. 1 never signed anything or had any documents to say that I'm accepting him as my

Attorney. Even (indistinct) t never signed anything to accept the Legal Aid Attorney as being my Attorney.

COURT: Ms van der Westhuizen was there an application?

MS V.D.WESTHUIZEN: Yes Your Worship (indistinct).

COURT: Sir this is the very last on this. Just like it is your negligence that you are standing without representation today if at the end of the day you do not ask questions and you do not speak to the witnesses it will be your negligence that caused it. The Court will not allow you to hold the rest of the parties' hostage with that kind of attitude. I am going to warn you now to not take that road. If you do take that.road it's going to be on your own head and your own prejudice. You do have a right to have an Attorney of your choice but you do not have the right to unreasonably delay and delay and delay a case before Court. This case was set down for two days four months ago. You did not bring your side to the table. I cannot stop you from doing that but the trial will still proceed and it will be to your prejudice if you do take that road. You may be seated thank you sir. You may continue.

CHARGE (ACCUSED 1 AND 2) *Murder*

COURT: Accused 1 do you understand the charge?

ACCUSED 1: I've said before Your Worship that I am not (indistinct) to nothing because I cannot continue with this trial without my Attorney and I cannot continue with this trial on my own.

COURT: Let me just explain this to you sir. The Criminal Procedure Act makes provision for this kind of attitude. This trial can continue and be finalized without you saying a word and nobody will point a finger at anybody besides you. It is not a very intelligent choice and it's not going to get you anywhere. The Criminal Procedure Act even makes provision for the trial to continue while you sit in the cells if you want to. It ail at the end of the day

comes back to you because you are making that choice. Whether you were advised to do it and whether you're doing it out of your own accord I'm now telling you it is not a wise choice and I suggest that during the lunch break you reconsider because all you are doing is harming yourself. I can help you with the trial while the witnesses are testifying if you co-operate. If you don't and you make that choice I can't do anything to stop that prejudice because that is your own choice and you're bringing it upon yourself. Do you understand the charge?

ACCUSED 1: I said I'm going to answer nothing Your Worship and there's nothing I will ask without an Attorney.

COURT: Then it is as easy as entering a plea of not guilty. Accused 2 do you understand the .charge?

ACCUSED 2: I- understand Your Worship.

PLEA (ACCUSED 2) ' Not guilty."

[22] The First Appellant refused throughout the trial to take any part in the proceedings - he refused to cross examine any State witnesses; he refused to testify; he did not cross-examine the Second Appellant when he gave evidence; he did not address the Court in argument on the merits; he refused to admit his previous convictions (which necessitated a host of police witnesses being called to verify these) and he did not address the Court in mitigation of sentence. On a number of occasions he simply refused to reply when addressed by the Court *a quo.*

[23] In the passage from the transcript referred to above the Regional Magistrate was at pains to point out to the First Appellant that by not participating in the proceedings he was essentially the cause of his own prejudice.

[24] But was this really so? In my respectful view, by refusing Adv Bobotyane a reasonable opportunity to take instructions from the First Appellant the Regional Magistrate effectively

closed the door for the First Appellant on any meaningful participation in the proceedings.

[25] The facts show that the request by Adv Bobotyane for a postponement of the matter on 20 November 2006 for the purposes of taking proper instructions was the first request from the First Appellant for an indulgence from the Court, save for 14 November when the matter could in any event not proceed. In the light of the circumstances then to hand, it was, in my respectful view, a reasonable request. The First Appellant was incarcerated in the Goodwood Prison, not as an awaiting trial prisoner but having been sentenced in another matter and it appears from Adv Bobotyane's address to the Court that his instructing attorney had (for personal reasons) been unable to visit the First Appellant in prison to take instructions to properly brief counsel.

[26] The Regional Magistrate placed the blame for the attorney's alleged inability to take instructions entirely on the First Appellant who, she said, had had four months to find a legal representative and had left it till the very last to find one. The First Appellant explained why instructions had been given at a late stage. It seems to me that the First Appellant (as a layman) was entitled to assume that having found an attorney it was then up to the latter to ensure that he was adequately prepared for trial. The subsequent inability of the attorney to take instructions during the week in which the matter stood down to get the Second Appellant before the Court was due to the attorney's non-availability and was not attributable to any dilatory tactic on the part of the First Appellant.

[27] I am not without sympathy for the Court *a quo* not being able to continue with the matter, particularly since the principal witness for the State had come from the Eastern Cape, was in witness protection and had a small child. But in my view the inconvenience to the Court and the witnesses of a short postponement was far outweighed by the prejudice to the First Appellant who was then effectively deprived of the right to legal representation.

[28] It must be borne in mind that this was no petty crime. The First Appellant was charged with murder and faced a minimum sentence of 15 years imprisonment. The conduct of the Regional Magistrate in those circumstances had the effect of compromising the constitutionally entrenched rights of the First Appellant.

[29] It is correct, as the Regional Magistrate said, that the First Appellant was not the only person that would be prejudiced by the turn of the events. According to her there were *"about 20 people being affected not just you"* and therefore it was in the interests of justice that the matter proceeded without further ado. in my view the inconvenience (there was no mention of any real prejudice to the "20" others) of a short postponement of say a couple of days[2] to enable Mr Bobotyane to take instructions, would have been far less than the manifest prejudice to the First Appellant who was effectively deprived of counsel[3].

[30] In one of the early decisions in the Constitutional Court[4], Acting Justice Kentridge remarked as follows regarding the import of the fair trial provisions of section 25(3) of the Interim Constitution of 1993, which was the fore-runner of section 35(3):

> *"[16] ... The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paragraphs (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force. In S v Rudman and Another; S v Mthwana 1992 (1) SA 343 (A), the Appellate Division, while not decrying the importance of fairness in criminal proceedings, held that the function of a Court of criminal appeal in South Africa was to enquire 'whether there has been an irregularity or illegality. That is a departure from the formalities, rules and principles of procedure according to which our law requires a criminal trial to be initiated or conducted'.*

2 **The matter was. in any event, not disposed of on 20 November and continued on 7 December 2006 and thereafter on 24 January 2007 and was finalised on** *2* **May 2007.**

3 **1 S v Saule 2009 (1) SACR 196 (Ck)**

4 **S v Zuma and Others 1995 (2) SA 642 (CC) at p 651 J**

A Court of appeal, it was said at (377),

'does not enquire whether the trial was fair in accordance with 'notions of basic fairness and justice", or with the "ideas underlying the concept of justice which are the basis of all civilised systems of criminal administration".'

That was an authoritative statement of the law before 27"' April 1994. Since that date s 25(3) has required criminal trials or criminal appeals to give content to those notions".

[31] The Regional Magistrate incorrectly ascribed the First Appellant's inability to proceed on 20 November **to** his negligence: this was a clear misdirection. **I** am **of** the view that the Regional Magistrate did not exercise her discretion to grant or refuse a postponement properly and her decision to refuse a postponement in the circumstances amounted to an irregularity in the proceedings which was of sufficient magnitude that it could readily be said that the First Appellant did not have a fair trial[5]. In the light of the severe prejudice to the First Appellant, this Court is entitled to intervene[6].

[32] In the circumstances the conviction and sentence of the First Appellant fall to be set aside and the matter remitted to the Regional Court for retrial before a different magistrate. Mr Vakele accepted that this was the correct route to follow in the circumstances.

The position regarding the Second Appellant

[33] Throughout the trial in the Magistrate's Court the Second Appellant enjoyed the services of Ms van der Westhuizen. He did not therefore suffer the same fate as the First Appellant. The

5 **S v Seheri 1964(1) SA 29 (A); S v Manguanvana 1996 (2) SACK 283** *(E):* **S v Philemon 1997 (2) SACR 651 (W)**

6 **S v Shabangu 1976 (3) SA 555 (A); S v Maduana en 'n Ander 1997 (1) SACR 646** (T)

question that must however be asked is whether the irregularity committed in respect of the First Appellant so permeated the proceedings that- it could be said that the Second Appellant did not have a fair trial either. To answer this question it is necessary to look at the evidence before the Court a *quo.*

[34] The main witness before that Court was Ms Phumza Ntamo, a daughter of the deceased. She testified that she knew both the First Appellant (who used to be her boyfriend) and the Second Appellant (who was a friend of the First Appellant). She testified that the First Appellant had previously been involved in a shooting incident in Khayelitsha in which he had shot her sister in the foot. The two women were scared and then left the area in an attempt to avoid further contact with the First Appellant. They ended up living with their father at B108 Ngena Street, Du Noon, an informal settlement probably some 25 kilometres to the north of Khayelitsha.

[35] About three weeks before the death of her father Ms Ntamo met the Second Appellant at a neighbourhood beauty contest. He gained her confidence by spinning her a yarn that he was then a police officer and enquired about her sister, Phumeza Ntamo ("Phumeza") indicating that the First Appellant wanted to make contact with her again. Ms Ntamo pointed out her sister to the Second Appellant who then engaged the latter in conversation. Phumeza, however, refused to talk to the Second Appellant saying she did not wish to have contact with any friends of the First Appellant.

[36] Ms Ntamo said that she later concluded that the First Appellant must have sent the Second Appellant to Du Noon to scout around for Phumeza because a couple of days before the shooting the Second Appellant was in her neighbourhood asking after her and her sister.

[37] Sometime after 8 pm on the evening of Thursday, 16 June 2005, Ms Ntamo was at her neighbour's house, no B 107 Ngema Street, watching a popular television "soapie". She was seated near a window from where she had a unimpeded view of her father's yard barelya couple of metres away.

[38] She testified that she heard voices and recognised that of the First Appellant, her former boyfriend, who was in conversation with her father. She looked through the window into the yard which was well lit and saw both the First and Second Appellants, each brandishing a firearm. The First Appellant was looking for Phumeza and was attempting to force his way into the house through the front door where her father was standing.

[39] The First Appellant suddenly opened fire on her *father and* Ms Ntamo instinctively ducked out of sight and closed the curtain. She heard a further two shots. The two Appellants then ran away amongst the houses and Ms Ntamo went to her home where she found her father lying in a pool of blood. The paramedics who later attended the scene pronounced him dead.

[40] The State adduced ballistic evidence to show that all three rounds of ammunition were discharged from the same firearm which, unfortunately, was never recovered. There was also the usual evidence to show that the deceased suffered no further injury until a post mortem was performed on his body, the cause of death having been found to be a gunshot wound to the head.

[41] The second Appellant's defence initially put to Ms Ntamo by Ms van der Westhuizen was that he denied ever being at the scene of the shooting. He claimed too that he did not know either Mr Ntamo, the First Appellant or Ms Ntamo. He denied ever having been at the beauty contest or that he had ever spoken to Ms Ntamo.

[42] Ms Ntamo was surprised by these denials and responded that *"my witness is the photo".* This.was a reference to a photo taken of the two of them together at the beauty pageant. This smart retort caught the Second Appellant completely off his guard and his attorney then asked for a brief opportunity to consult with him.

[43] Thereupon the Second Appellant's version changed and he admitted having met Ms Ntamo at the pageant but denied any knowledge of her sister or of any conversation in relation to her. He persisted in his denial that he did not know the First Appellant.

[44] Under cross-examination the First Appellant struggled to explain his change of instructions to his attorney. He then claimed that he had approached Ms Ntamo at the beauty contest with the intention of starting a relationship with her. This, of course, was never put to the State witness and he had great difficulty explaining the background to this romantic endeavour to the Court.

[45] The Second Appellant was a poor witness who was evasive and mendacious. Ms Ntamo on the other hand was a good witness who had a relatively simple story to tell. Her powers of observation were good and she was able to identify the assailants who were a couple of metres away'from her in the adequately lit yard. In my view, the Regional Magistrate correctly preferred her evidence to that of the Second Appellant.

[46] As far as the Second Appellant is concerned, I am of the view that the State established beyond reasonable doubt that he was in the yard of the Ntamo home on the night in question and that he was armed with a hand-gun. His explanation and denials to the contrary are without merit and fall to be rejected in the light of the direct and credible evidence of Ms Ntamo in that

regard.

[47] The evidence of Ms Ntamo does not conclusively establish that the Second Appellant fired any shots that struck the deceased, or for that matter, any shots at, all. He cannot therefore be convicted as a perpetrator of the crime of murder. The Regional Magistrate found, however, that the Second Appellant was guilty on the basis of *"gemeenskaplike opset"* ("common purpose") with the First Appellant. Her finding in this regard appears to be based on the following facts.

47.1. The Second Appellant went about looking for Ms Ntamo and eventually tracked her down at the beauty contest.

47.2. When he spoke to Ms Ntamo at the contest the Second Appellant made specific reference to the First Appellant and the latter's desire to meet up with her sister.

47.3. The Sunday before the murder the Second Appellant scouted around the neighbourhood and established which was the Ntamo home.

47.4. On Thursday, 16 June he accompanied the First Appellant to the Ntamo home (the inference being that he pointed it out to the First Appellant).

47.5. Both men were armed and stood outside the house with their handguns drawn,

47.6. The Second Appellant kept a look out while the First Appellant did the shooting

[48] The so-called *"doctrine of common purpose"* is a common law principle derived from English law.[7] In **Burchefl and Milton,** Principles of Criminaf Law *2"°* ed, the doctrine Ls described as follows at p 393:

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

7 **R v Garnsworthy and Others 1923 WLD 17**

[49] During the political violence and social upheaval which preceded the advent of the democratic order in South Africa, the doctrine obtained almost pejorative meaning in certain quarters as it was often relied upon in the prosecution of public violence and related offences. In 2003 the Constitutional Court delivered a . comprehensive analysis of the principle and confirmed its constitutionality and itsplace in our criminal law[8]. In the main judgment, Justice Moseneke dealt with the doctrine as follows by way of general introduction;

> *"[19] The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement, express or implied, to commit a common offence. In the second category, no such prior agreement exists or is proved. The liability arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind."*

[50] The Learned Judge then went on to consider *inter alia* the issue of causation in cases of common purpose in the light of various decisions of the Supreme Court of Appeal in the last decade or so[9] and said the following at p 527 D:

> *"[34] In our law, ordinarily., in a consequence crime, a causal nexus between the conduct of an accused and the criminal consequence is* a *prerequisite for criminal liability. The doctrine of common purpose dispenses with the causation requirement. Provided the accused actively associated with the conduct of the perpetrators in the group that caused the death and had the required intention in respect of the unlawful consequence, the accused would be guilty of the offence. 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'* ***(R v Powell and Another; R v English*** *[1997] 4 Ail ER 545 (HI) at 545 H - !). The phenomenon of serious crimes committed by collective individuals, acting in concert, remains a significant societal scourge. In consequence crimes such as murder,*

8 **S v Thebus and Another 2003 (6) SA 505 (CC)**

9 **S v Mgedezi 1969(1) SA 6S7 (A);Sv Petersen 1989 (3) SA 420 (AY, S v Yelani 1989(21 SA 43 (A);S v Jama and Others 1989 (3) SA 427 (A); Magmoed v Janse van Rensburg 1993 (1) S 777 (A): S v Mofaung and Others 1990 (4) SA 485 (A): S v Khumalo en Andere 199!** (4) **SA 3 10 (A); S v Singo ! 993 (2) SA 765 (A)**

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 ineffectual".

[51] The Court went on and dealt with various of the alleged infringements with entrenched constitutional rights such as dignity, freedom, presumption of innocence and arbitrary deprivation of freedom, which the Appellants in that matter contended were occasioned by reliance on the doctrine of common purpose. The Court rejected all of these arguments in confirming the applicability of the principle.

[52] The position then is that the doctrine of common purpose as developed by the Supreme Court of Appeal (and its predecessor in title) over the years is still very much part of our law and has been constitutionally sanctioned.

[53] In **S v Madlala**[10] Holmes J A expressed himself thus in relation to the question of causation in cases of common purpose:

"It is sometimes difficult to decide, when two accused are tried jointly on a charge of murder, whether the crime was committed by one or the other or both of them, or by neither. Generally, and leaving aside the position of an accessory after the fact, an accused may be convicted of murder if the killing was unlawful and there is proof-

a) that he individually killed the deceased, with the required dolus eg by shooting him; or

10 **1969 (2) SA 637 (A) at 640 F - H**

b) that he was a party to a common purpose to murder, and one or both of them did the deed; or

c) that he was a party to a common purpose to commit some or other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of the plan, yet he persisted, reckless of such fata! consequence, and it occurred; see **S *v Malinga and Others*** *1963 (1) SA 692 (A) at 694 F-H and 695; or*

d) that the accused must fall within (a) or (b) or (c) - it does not matter which, for in each event he would be guilty of murder". (Emphasis added).

[54] in the celebrated decision of Botha J A in **S** v **Safatsa and Others**[11] we are reminded, in relation to the aforesaid *dictum* in **Madlala** that:

"In this formulation of the legal position relating to common purpose it is quite clear, in my opinion, that there is no room for requiring proof of causation on the part of the participant in the common purpose who did not 'do the deed' (i.e. the killing). This ' fortifies my view that it was, not intended in ***Thomo's case***[12] *to lay down that a causal connection had to be established between the acts of every party to a common purpose and the death of the deceased before a conviction of murder could ensue in respect of each of the participants".* (Emphasis added).

[55] **Snyman,** Criminal Law (5lh ed) at p 268 deals with the intersection of common purpose and *dolus eventualis* as follows:

"For X to have a common purpose with others to commit murder it is not necessary that his intention to kill be present in the form of dolus directus. It is sufficient if his intention takes the form of dolus eventualis, in other words if he foresees the possibility that the acts of the participants with whom he associates himself may result in Y's death and reconciles himself to this possibility.

Thus if a number of persons take part in a robbery or housebreaking, and in the course of events one of them kills somebody, the mere fact that they all had the intention to

11 **1988 (1) SA 868 (A) at 897 B**
12 **S v Thomo and Others 1969 (1) SA 385 (A)**

steal, to rob or to break in is not necessarily sufficient to warrant the inference that all of them also had the common purpose to kilt. One can steal, rob or break in without killing anybody. Whether the member of the gang who did not directly participate in the shooting or stabbing of or assault upon the deceased also had the intention to murder must be decided on the facts of the individual case. Such an inference may, for example, be drawn from the fact that that particular member of the gang knew that the assailant carried a revolver or a knife and that he might use it, or knew that there would be people inside the house who would resist the housebreaking".

[56] In the present case there can be no doubt that the presence of the Second Appellant at the Ntamo home was to further the commission of an offence. Having reconnoitred the area "a few days before and having established the potential whereabouts of Phumeza, he armed himself with a firearm and proceeded to her house under cover of dark. Given the fact that the Second Appellant knew that there was no longer a relationship between the First Appellant and 'Ms Ntamo and, further, that he knew that the First Appellant wanted to re-establish contact with Phumeza, there could have been iittle doubt in his mind what the purpose of their sortie was. After all, when they met at the beauty contest Ms Ntamo says that the Second Appellant spoke to her as follows:

> *" ... He told me Your Worship that he wanted to meet my sister because he wanted to tell her how can she get hold of Andile [i.e. the First Appellant] because Andile needed somebody who knows how to use the gun so that they can stand face to face and shoot each other".*

[57] In the circumstances I am satisfied that the Second Appellant went to the Ntamo residence knowing that it was the intention of the First Appellant to confront Phumeza and to shoot her. He collectively associated himself with that purpose by accompanying the First Applicant, by taking along a firearm and, most importantly, brandishing his hand-gun while standing just a few paces from the door of the house.

[58] The issue that then arises is what the extent of the Second Appellants collective liability is when the First Appellant shoots not Phumeza, but her father. The Second Appellant's defence was a complete denial of any involvement in the shooting and a denial that he was ever there. It may have been different if the Second Appellant had taken the Court a *quo* into his confidence and, for example, claimed that the First Appellant had gone beyond their intended "collective criminal conduct".

[59] In **S v Moiimi and Another**[13]**,** a case involving a shoot-out when a group of men went on a robbing spree in a shopping mall and a member of the public was shot and killed when a private citizen intervened in the malaise and attempted to apprehend one of the robbers, Cachalia A **J** A (as he then was) said the following:

> *"Once all the participants in the common purpose foresaw the possibility that anybody in the immediate vicinity of the scene couid be killed by cross-fire, whether from a law-enforcement official or* a *private citizen, which in the circumstances of this case they must have done, dolus eventialis was proved".*

While this *dictum* demonstrates, once again, that each matter is case-specific, it does show the extent to which *dolus eventualis* can ultimately be found to exist in circumstances where the original criminal plan was of a somewhat different nature.

[60] In my view, on a consideration of all the evidence, the only reasonable inference is that the Second Appellant must have, and in fact did foresee that someone other than Phumeza couid be injured or killed in the course of their escapade. He would have foreseen that to get to her, they may have had to force their way into a family home and it was likely that they may have to use force, including their firearms, in the process. This is the only reasonable inference to be drawn from the fact that their weapons were drawn and at the ready. The fatal shooting of Mr

Ntamo was therefore foreseen as a possiblity to the Second Appellant and I consider that his *mens rea* in the form of *dolus eventualis* was established by the State.

[61] I am therefore satisfied that the Second Appellant was correctly convicted of murder on the basis of the doctrine of common purpose. Accordingly his appeal against his conviction must fail.

Sentence

[62] The offence with which the Appellants were charged carries a prescribed minimum sentence (in terms of section 52 of Act 105 of 1997) of 15 years imprisonment, unless substantial and compelling circumstances are found to exist. In respect of the Second Appellant the Court a *quo* found that no such circumstances had been established and a sentence of 15 years was therefore imposed. The Regional Magistrate considered the Second Appellant's personal circumstances and found that these warranted that 3 years of the sentence should run concurrently with another sentence that he was serving at the time.

[63] In argument Ms van der Westhuizen urged us to find that the following factors constituted substantial and compelling circumstances which warranted the imposition of a lesser sentence.

63.1. The relatively young age of the First Appellant at the time of the commission of the offence: he was a month shy of his 20th birthday;

63.2. The fact that the Second Appellant was not the principal perpetrator of the offence; and

63.3. The finding that the Second Appellant's *mens rea* was in the form of *dolus eventualis.*

[64] It is true that these factors could be considered mitigatory, but on the other hand, the

Second Appellant has a previous conviction for the unlawful possession of a firearm for which he commenced serving a sentence of four years imprisonment in August 2006. Moreover, the offence itself is all too prevalent - an innocent law-abiding citizen brutally shot in the sanctity of his home.

[65] I am of the view that the sentence of 15 years imprisonment was appropriate in the circumstances, if not a little on the light side, There is therefore no reason to interfere.

[66] The Regional Magistrate ordered that three years of the Second Appellant's sentence run concurrently with the four year sentence referred to above. This she did because she considered that there should be some difference between his sentence and that of the First Appellant, There is no reason to interfere with this consideration of leniency on the part of the Court a *quo.*

Conclusion

[67] In the circumstances I would make the following order;

Ad the First Appellant

1. The appeal against conviction and sentence succeeds.

2. The conviction and sentence are set aside and the matter is remitted to the Regional Court for a hearing *de novo* before a different Regional Magistrate.

Ad the Second Appellant

1. The appeal against the conviction is dismissed.

2. The appeal against the sentence is dismissed.

3. The sentence of 15 years imprisonment imposed by the Regional Court as well as the order that 3 years of the sentence run concurrently with the sentence that the appellant is currently serving, are confirmed. This sentence and order are to take effect on 2 May 2007, the date of sentence by the court a quo.

PAL GAMBLE
Acting Judge of the
Western Cape High Court

I agree.

It is so ordered

W J LOUW

Judge of the Western Cape High Court