



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Not Reportable

Case no: 723/16

In the matters between:

MESHACK MALELE

Applicant

and

THE STATE

Respondent

Case no: 724/16

SIPHO SIDWELL NGOBENI

First Applicant

BONGANI KOLISI

Second Applicant

LINDA SOLOLO

Third Applicant

and

THE STATE

Respondent

Neutral citation: *Malele v S* (723/16) and *Ngobeni v S* (724/16) [2016] ZASCA 115 (13 September 2016)

Coram: Mpati AP

Heard: In Chambers

Delivered: 13 September 2016

Summary: Leave to appeal – refusal of application by two judges of the SCA in terms of s 17(2) of the Superior Courts Act 10 of 2013 – application to the President of the SCA in terms of s 17(2)(f) to refer the decision to the court for reconsideration and, if necessary, variation – a grave injustice constitutes exceptional circumstances.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Bam J, sitting as court of appeal):

1. Condonation is granted to the applicants in both applications (case numbers 723/2016 and 724/2016 for the late filing of their applications.
2. The decision of this court dated 3 May 2016 dismissing the applicants' application for special leave to appeal against their conviction and sentence is referred to the court for reconsideration and, if necessary, variation, in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013.
3. The applicants are directed to lodge with the registrar of this court six (6) copies of their respective applications in case numbers 723/2016 and 724/2016 in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013, as well as six (6) copies of their initial application (case no. 232/16) to this court for special leave to appeal, within one month of the date of this order and thereafter to comply with the rules of this court relating to the conduct of appeals.

JUDGMENT

Mpati AP

[1] This judgment covers two applications lodged in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Act). Mr Meshack Malele, the applicant in case no 723/16, was the first accused in a criminal trial in the Gauteng Division of the High Court, Pretoria (Bam J), in which he, together with the three applicants in case no 724/16 (the second application) and five others, faced a charge of murder. The applicants in the second application were accused numbers 5, 7 and 8 respectively. I shall refer to all the applicants in the two applications collectively as 'the applicants' and individually as they were referred to at the trial. The applicants and four of their

co-accused were all convicted as charged on 25 August 2015 and each sentenced, on 11 November 2015, to 15 years' imprisonment. Accused 9 was found not guilty and discharged. The applicants' application for leave to appeal was dismissed on 11 December 2015.

[2] On 3 May 2016 their joint application for special leave to appeal was dismissed by two members of this court. They have now applied to the President of this court, in two separate applications under the above case numbers, for a referral of the order dismissing their application for special leave to appeal to the court for reconsideration and, if necessary, variation (s17(2)(f) of the Act). They also seek condonation for the late filing of their applications.

[3] In its judgment the trial court set out the summary of the substantial facts relating to the murder charge as follows:

'[I]t is alleged that on [26 February 2013] the deceased [Silvesta Jossefa Marcia], a taxi driver, was confronted by accused 1 and 2 concerning a traffic rule violation, in that he was obstructing other traffic. An argument ensued during which the deceased's driver's licence was taken and his vehicle attached. Back-up assistance of about 6 other policemen was obtained. The deceased was handcuffed to a police bakkie whilst his body remained outside. The police vehicle then drove off dragging the deceased behind it, with another police vehicle following. Between the time of the deceased being dragged and the time he was booked in at the Daveyton Police Station, the deceased sustained injuries to which he succumbed whilst in custody. It was further alleged that, at all relevant times the accused acted with a common purpose.'

[4] The trial court recorded the 'final diagnostic analyses on the cause of death' to include the following:

- '(i) Back lap dissection on second post mortem showed extensive soft tissue injuries which in a dark-skinned person would not be apparent.
- (ii) The scrotal eversion technique from inside the pubes showed injuries to the testes which were not visible from the outside examination.

- (iii) The toxicology results done by Dr G Perumal states as follows: Cerebral oedema and generalised congestion of the brain and lungs.¹

The pathologist, Dr Solly Skhosana, concluded that the cause of the deceased's death was 'extensive soft tissue injuries and hypoxia'.²

[5] In relation to the time and place where the injuries were sustained by the deceased the trial court said (at para 46):

'Apart from the soft tissue injuries the deceased could have sustained during the struggle, [ie during the arrest] it is clear that no other injury was directly inflicted by the policemen [accused 1 and 2].'

And further:

'Accordingly, it has to be inferred that the majority of the injuries could only have been sustained during the dragging episode and later in the cells. It necessarily follows that the fact that blood was later noticed in the bakkie means that the deceased was probably bleeding from an injury sustained during the dragging episode.'

Having considered the evidence before it the court found that 'accused 2 to 8 assaulted the deceased in the cell, thereby seriously injuring him'. It also found that '[t]here can be no doubt that they foresaw that the injuries may result in his death'.³

[6] There appears to be no doubt that the deceased was assaulted after he had been placed in the police cell, where it was later discovered that he had died. However, the single witness to the assault, Warrant Officer Ngamlana, testified that when the deceased fell down inside the cell he was surrounded by the policemen (accused 2 to 8) and that he could not see what was happening, but heard what sounded like open hand claps.⁴ It is therefore not clear from the judgment whether only one or more of the policemen inside the cell assaulted the deceased. The basis

¹ Paragraph 5.7 of the judgment.

² Paragraph 5.7 of the judgment.

³ Paragraph 62 of the judgment.

⁴ Paragraph 5.5 of the judgment.

for the finding that ‘accused 2 to 8 assaulted the deceased in the cell’ is, therefore, not clear from the judgment of the trial court.

[7] The trial court, however, made the following finding in respect of the dragging incident:

‘There can be no doubt that all the accused foresaw that in being dragged behind the bakkie the deceased would sustain serious injuries which could result in death, yet they persisted in their conduct of not stopping, or preventing it to continue, thereby clearly reconciling themselves with the event and the eventual result.’⁵

That the trial court considered the failure of the applicants and others to intervene when the deceased was dragged behind the police vehicle (bakkie) to be an act of association manifesting their showing of a common purpose with the driver of the bakkie, is clear from the following extract from its judgment, with reference to accused 1:

‘It is clear that accused 1, on his own evidence, dismally failed in this regard. In considering his mental state of mind, concerning *mens rea*, that he foresaw that the injuries sustained by the deceased, before and during the dragging episode, could result in his death, and reconciled himself with that event, his conduct, in the circumstances, in not attending to the deceased in the cells and not immediately arranging for the necessary medical attention, is confirmatory of his intention in the form of *dolus eventualis* in respect of the death of the deceased.’

[8] I have grave doubts, with respect, about the appropriateness of the trial court’s application of the doctrine of common purpose in the case before it. In my view a correct application of the doctrine as enunciated in *S v Mgedezi & others* (415/1987) [1988] ZASCA 135; 1989 (1) SA 687 (A) at 705I – 706B⁶ and affirmed in *S v Thebus & another* (CCT 36/02) [2003] ZACC 12; 2003 (2) SACR 319 (CC) might well yield a different result than a murder conviction. The trial court accepted, for example, that accused 2 and 8 attempted to assist the deceased when the bakkie to which he had been attached drove off and dragged him, by lifting his legs off the

⁵ Paragraph 47 of the judgment.

⁶ See also *S v Jama & others* 1989 (3) SA 427 (A) at 436D-H.

ground, but then let go of him when the bakkie accelerated. Yet, the court found that the two officers' initial attempt to assist the deceased 'did not remedy their situation or justify their conduct of not doing anything else.' Their attempt 'was of no avail to them and cannot absolved them', the court said (at para 42).

[9] I also question the trial court's conclusion that the applicants' form of intent (*mens rea*) was *dolus eventualis*. In my view, another court might find differently.

[10] It is now convenient to mention that in a separate application to this court for leave to appeal, one of the applicant's erstwhile co-accused, Mr Bonginkosi Mdluli, who was accused 4 before the trial court, was granted leave on 24 May 2016 to appeal to the Full Court of the Gauteng Division against his conviction and the sentence imposed on him. The applicants rely heavily on this fact and have advanced the submission in their applications, that the granting of leave to their former co-accused 'on the same facts' is a compelling reason for their appeals also to be heard.

[11] In my view, the mere fact that the applicants' former co-accused's application for leave to appeal was successful does not necessarily mean that the applicants should, without more, also be granted leave to appeal. The judgment of the trial court reveals that when he saw the deceased being dragged behind the bakkie accused 4 jumped into another police vehicle and followed, signalling, by flashing the lights of his vehicle, with the aim of catching the attention of the driver of the bakkie. It appears that his efforts were successful because the bakkie indeed stopped. The deceased was then placed in the back of the bakkie. Notwithstanding these facts, however, the trial court did not differentiate between accused 4 and the other accused when it made the finding that all the accused persisted in their conduct of not stopping or preventing the deceased from being dragged behind the bakkie. The position of accused 4 was, therefore, different.

[12] But it is not necessary to say more on this aspect. In my view, and considering what has been said above, a grave injustice may otherwise result were I to refuse to refer the decision of 3 May 2016 dismissing the applicants' application for special leave to appeal to the court for reconsideration and, if necessary, variation. That in itself constitutes exceptional circumstances enabling me, *mero motu*, to refer the decision of 3 May 2016 to the court for reconsideration.

[13] In the result, I make the following order:

1. Condonation is granted to the applicants in both applications (case numbers 723/2016 and 724/2016 for the late filing of their applications.
2. The decision of this court dated 3 May 2016 dismissing the applicants' application for special leave to appeal against their conviction and sentence is referred to the court for reconsideration and, if necessary, variation, in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013.
3. The applicants are directed to lodge with the registrar of this court six (6) copies of their respective applications in case numbers 723/2016 and 724/2016 in terms of s 17(2)(f) of the Superior Courts' Act 10 of 2013, as well as six (6) copies of their initial application (case no. 232/16) to this court for special leave to appeal, within one month of the date of this order and thereafter to comply with the rules of this court, particularly rule 7, relating to the conduct of appeals.

L MPATI
ACTING PRESIDENT

Appearances in *Malele v S*:

For the Appellicant:

Messrs Krauses & Ngobeni
Springs

For the Respondents:

C Mnisi
Director of Public Prosecutions, Pretoria

Appearances in *Ngobeni v S*:

For the Appellant:

Messrs Van Wyngaard
Benoni

For the Respondents:

C Mnisi
Director of Public Prosecutions, Pretoria