



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 723/2016

Not Reportable

In the matter between:

MESHACK MALELE
SIPHO SYDWELL NGOBENI
BONGANI KOLISI
LINDA SOLOLO

FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT
FOURTH APPLICANT

and

THE STATE

RESPONDENT

Neutral citation: *Malele v The State* (723/2016) [2017] ZASCA 173
(1 December 2017)

Coram: Navsa ADP, Swain, Mathopo JJA and Mokgohloa and Ploos van Amstel AJJA

Heard: 1 November 2017

Delivered: 1 December 2017

Summary: Reconsideration in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 of a decision of two judges of the court refusing leave to appeal – principles in relation to the application of the doctrine of common purpose to be considered – reasonable prospect that another court may overturn the murder convictions.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Bam J sitting as court of first instance):

The decision of this court dated 3 May 2016 is set aside and the applicants are all granted leave to appeal their convictions to a full court of the Gauteng Division of the High Court, Pretoria.

JUDGMENT

The Court:

[1] The present case flows from a decision of the then President of this court (Mpati P), in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013¹ to refer a decision of two judges of this court, dismissing an application for leave to appeal, for reconsideration by this court. The background is set out hereafter.

[2] The four applicants who at relevant times were all members of the South African Police Service are linked to an event which, because of disturbing images recorded on video, received wide public attention. It is common cause that on 26 February 2013, Mr Silvesta Jossefa Marcia was arrested near a taxi rank in Daveyton by police stationed at the Daveyton Police Station. During his arrest, handcuffs placed on him became attached to a steel bench in the back of a police vehicle. The vehicle drove off after the police appeared to feel threatened by a crowd that had gathered. It departed with Mr Marcia still attached to a bench at the back of the police vehicle and with part of his lower body on the ground behind it. Mr Marcia was dragged behind the vehicle for a distance of approximately 200 metres. Subsequently, he was transported to the Daveyton Police Station, a short distance

¹ That section reads as follows:

'The decision of the majority of the judges considering an application [for leave to appeal] referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

away. It is common cause that, upon his arrival at the police station, the deceased was conscious. He was placed in a holding cell and died a few hours thereafter. In a subsequent trial the applicants who were all said to have been involved in the deceased's arrest, together with five other accused, faced murder charges. The State's case was that in addition to sustaining injuries as a result of being dragged along the road by the police vehicle, he was also assaulted in the holding cells and that the combination of the two events led to his death.

[3] The version of the applicants was that some of them were unaware that the deceased was being dragged along the road by the police vehicle and that the fourth applicant and co-accused two, who had seen this had attempted to come to his assistance by lifting him off the ground but shortly thereafter dropped his legs when the vehicle increased its speed. Furthermore, so it was pointed out, one of the applicants' co-accused, accused four, drove behind the police vehicle in order to gain the attention of the driver, accused six. Accused four ultimately succeeded in gaining the driver's attention and caused him to bring the vehicle to a halt. Each of the applicants denied assaulting the deceased. Thus, they all denied that they had committed any offence at all.

[4] The cause of the deceased's death, as recorded in the post-mortem report and testified to by the State pathologist, Dr Skosana, was said to be 'extensive soft tissue injuries and hypoxia'. Simply put, it appears from his evidence that a lack of oxygen due to the extensive soft tissue injuries is what caused the deceased's death. Dr Skosana conceded that some of the injuries could have been sustained during the initial scuffle with the police when the deceased resisted arrest and further that some of the injuries could have been sustained during the time that he was dragged behind the vehicle and that some of the blunt trauma could have been caused by the deceased falling with his head against a hard bench in the police cells. The direct evidence on behalf of the State, in relation to the alleged assault of the deceased in the holding cells, was that of a fellow policeman, who, it must be said, did not identify anybody specifically in relation to the alleged assault in the police holding cells.

[5] The court below (Bam J) held that the State had proved beyond reasonable doubt that the applicants and their co-accused *all* knew that the deceased was being dragged behind the police vehicle. Bam J, although accepting that accused two and the fourth applicant had attempted to assist the deceased when the police vehicle drove off, dragging the deceased behind it, concluded that this did not remedy their failure to do anything further. The court below accepted that accused four, as described in the preceding paragraph, had caused the vehicle to which the deceased was attached to come to a halt, but nevertheless held that he was indeed aware of and associated himself with the dragging of the deceased in the manner described above.

[6] Bam J linked the dragging of the deceased with the assault in the holding cells and, even though accepting that the first applicant was not present in the cells at the time of the alleged assault, nevertheless held, ostensibly on the basis of common purpose, that the applicants and their co-accused were all guilty of murder and convicted them accordingly. He sentenced each of the applicants to 15 years' imprisonment.

[7] Applications by the applicants for leave to appeal their convictions were refused by the court below. An application for leave to appeal to this court was dismissed by two of our colleagues. The applicants then applied to the then President of our court, Mpati P, in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 to refer the matter to the court for reconsideration, and if necessary, variation. Mpati P decided in their favour. As stated at the commencement of this judgment, it is that decision that led to the matter being before us.

[8] Mpati P provided a judgment setting out his reasons for referring the decision by our colleagues refusing leave to appeal for reconsideration. He considered it material that the single witness to the alleged assault in the holding cells, warrant officer Ngamlana, stated that the deceased was surrounded by accused two to eight (which included applicants two, three and four), but that he could not see what was happening and that it was not clear whether only one or more of the policeman within the cells assaulted the deceased. Furthermore, Mpati P had regard to the court below's reasoning, that the applicants' failure to intervene

when the deceased was being dragged behind the police vehicle was an act of association, manifesting a common purpose with the driver of the vehicle. Mpati P had 'grave doubts' about the court below's application of the doctrine of common purpose. In this regard, he noted that the court below had accepted that two of the policeman attempted to assist the deceased when the police vehicle drove off by lifting his legs off the ground but then let go of him when the vehicle accelerated, yet found that because they had not done anything else to assist the deceased, they were not 'absolved'. At para 9 of the reasons supplied by Mpati P, he said the following:

'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.'

[9] In setting out his misgivings about the application by the trial court of the doctrine of common purpose, Mpati P referred to the prerequisites for liability set out in the judgment of this court in *S v Mgedezi & others* [1988] ZASCA 135; 1989 (1) SA 687, at 705I–706C² and confirmed by the Constitutional Court in *S v Thebus & another* 2003 (2) SACR 319 (CC).

[10] In referring the matter for reconsideration, Mpati P recorded that in a separate application for leave to appeal, accused four had been granted leave by this court to appeal against his conviction and related sentence to the full court of the Gauteng Division of the High Court, Pretoria. He stated that this did not mean, without more, that the applicants should also be granted leave to appeal. He noted, however, that accused four had succeeded in attracting the attention of the driver of

² At 705I – 706C the following appears:

'In the absence of proof of a prior agreement, accused No 6, who was not shown to have contributed causally to the killing or wounding of the occupants of room 12, can be held liable for those events, on the basis of the decision in *S v Safatsa & others* 1988 (1) SA 868 (A) , only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. (As to the first four requirements, see Whiting, 1986 SALJ 38 at 39.) In order to secure a conviction against accused No 6, in respect of the counts on which he was charged, the State had to prove all of these prerequisites beyond reasonable doubt. It failed so to prove a single one of them. It follows that the appeal of accused No 6 must succeed in respect of all 5 counts.'

the vehicle behind which the deceased was dragged and caused him to bring the vehicle to a halt. Mpati P was rightly concerned that, notwithstanding that fact, the court below did not differentiate between accused four and his co-accused.

[11] Since we are dealing solely with the question of whether leave to appeal should be granted we will, for obvious reasons, refrain from making final evaluations in relation to specific parts of the evidence. We do, however, share Mpati P's misgivings. In our view there is a reasonable prospect that another court will hold that the murder convictions should be overturned. Whether there are other lesser offences of which the applicants might rightly be convicted is a matter best left to the court adjudicating the appeal. It will no doubt have regard to questions of sufficiency of evidence in relation to each of the applicants and questions of causation will undoubtedly form part of a determination of the guilt of each.

[12] It is necessary to record that both in heads of argument and before us, the State conceded that it was in the interests of justice that leave to appeal be granted.

[13] For the reasons set out above, the following order is made:

The decision of this court dated 3 May 2016 is set aside and the applicants are all granted leave to appeal their convictions to a full court of the Gauteng Division of the High Court, Pretoria.

M S Navsa
Acting Deputy President

K G B Swain
Judge of Appeal

R S Mathopo
Judge of Appeal

F E Mokgohloa
Acting Judge of Appeal

J Ploos van Amstel
Acting Judge of Appeal

Appearances:

For the Appellant:

M van Wyngaardt

Instructed by:

Pretoria Justice Centre, Pretoria

Bloemfontein Justice Centre, Bloemfontein

For the Respondent:

C Mnisi

Instructed by:

Director of Public Prosecutions, Pretoria

Director of Public Prosecution, Bloemfontein