REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: A545/2014

In the matter between:

JAMES MASILO MAKWELA **APPELLANT**

And

THE STATE **RESPONDENT**

JUDGMENT

MOLEFE J:

The appellant (accused 2 in the Court ***a quo)*** was convicted and sentenced by Motata J on 15 November 2002 in the High Court of South Africa (Gauteng Division, Pretoria) Circuit Local Division held at Tzaneen on the following counts:

1.1 Count 1 - Murder- Life imprisonment;
1.2 Count 2 - Attempted murder- 10 years imprisonment;

1.3 Count 3 - kidnapping - counts taken together for the purpose of sentencing and sentenced to 12 months imprisonment.

[2] The appellant now approaches this court on appeal against his conviction and sentence, leave to appeal having been granted by the court a *quo* on 12 May 2011.

[3] The facts of this matter are briefly that on 17 October 1999, the appellant and his co-accused (accused 1 in the court a *quo)* killed one Mr Norman Dlamini Mohlare near Shikwambana village in the district of Ritavi. On the same day, the appellant and accused 1 attempted to kill Mr Phineas Bonane Malatjie ("Bonane") by assaulting him.

The deceased and Bonane were also kidnapped by the appellant and accused 1 and were deprived of their liberty.

Ad Conviction

[4] The evidence on which the appellant was convicted was based on the testimony of four State witnesses.

4.1 **Inspector M J Shikwambana** testified that on the morning of 18 October 1999, he received a report of a murder at Shikwambana village. He was accompanied by the complainant Bonane to accused 1's house where the murder had occurred. He found the deceased in accused 1's house, lying on his back with his legs and hands tied with a plastic rope. The deceased's whole body and head were swollen, indicating that he had been severely assaulted. Next to his head were two pieces of a broken pick

handle, two hammers, a plier and a slasher. Bohane explained to Inspector Shikwambana that he and the deceased were accosted by the appellant, accused 1 and two men who took them to accused 1's house where they were assaulted with the objects found next to the deceased's body. Inspector Shikwambana testified that he was the first person to arrive at the scene of the murder.

4.2 Phineas Bohane Malatjie, the complainant testified that he knew accused 1 as 'Grego' and the appellant as 'Zorro'. On 17 October 1999 at approximately 20h00, he met two men (unknown to him) in the company of the appellant and accused 1. The four men chased him and the appellant apprehended him. He was hit with a hammer on his head and was taken to the deceased's home where the deceased was also abducted. They were both taken by the four men to accused 1's home. They were accused of stealing accused 1's property from his home. At the accused 1's home, the deceased and Bohane were tied with a plastic rope on both hands and legs by the appellant. Although they both told the men that they did not steal accused 1's property, they were repeatedly assaulted with hammers. The appellant hit Bohane with a pick handle on his head, causing the pick handle to break into two pieces. Accused 1 at some point used pliers to pinch Bohane's testicles. Appellant assaulted Bohane with a slasher, causing him to sustain a wound just above his nipple. The assault continued through the night, with the men exchanging weaponry. He could not tell when the assault ended as at some stage he passed out. The following morning, appellant and accused 1 left the house after telling the deceased and Bohane that when they come back they will kill them. Bohane testified that he managed to free himself by cutting the ropes with a knife. When he tried to wake the deceased up, he realised that he had died. He left the house

through a hole at the back of the house which was made with planks. He went to Lenyenye Clinic where the police were summoned.

Bohane was questioned about the two contradictory statements he made to the police which were admitted as Exhibit K and L. The first statement (exhibit K) was made on 18 October 1999 and the second statement (exhibit L) was made two years after the assault incident. He testified that the first statement was the truth of what happened but the second statement was made after being coerced by the appellant to withdraw the case against him in exchange for the appellant getting him a job. He then made the second statement wherein he testified that the appellant did not assault him. He was cross-examined extensively on the two statements but he stood his ground in his explanation for deviating from the first statement.

4.3 **Lawrence Masilo Shirane** testified that both the appellant and accused **1** were known to him very well and that the appellant was his friend. On 17 October 1999 he met with the appellant, accused 1 and two men who were unknown to him. He accompanied the four men. They met with Bohane and the appellant chased Bohane and apprehended him. The men took him by force to the deceased's home. The deceased was also taken by force by the four men and Bohane and the deceased were taken to accused 1's house. They were questioned about stolen goods but both the deceased and Bohane denied any knowledge of the goods. Lawrence testified that the deceased and Bohane were assaulted by the appellant, accused **1** and the two men with fists inside the house. At some stage he saw the appellant with a pick handle and he decided that he did not want to witness more serious assault and he left the scene.

4.4 **Baldwin Kavana Homu,** a Detective Inspector attached to the South African Police Services testified that he arrested the appellant after he had read Bohane's statement (exhibit K).

[5] Accused 1, **Thomas Masilo Malatjie** testified in his own case. He testified that on 17 October 1999, he came home from Westonaria mine where he worked. He first went to the appellant's home and they both walked to his house where they were confronted by the deceased with a knife and Bohane, who escaped through the back of the house. He raised an alarm and the community managed to capture Bohane and brought him to accused 1's house. Both the deceased and Bohane were tied up because they were fighting back. He admitted that both men were assaulted and he gave them six lashes with a pick handle on their buttocks and a sjambok. Appellant also assaulted them wih a pick handle. They were questioned about accused 1's stolen property. He denied that they used a slasher and hammers in the assault. In the morning they left them in the house to go and report the stolen goods to the police but before he reached the police station he was told by someone that the police were at his house. When he was confronted with the deceased's injuries he conceded that the injuries could have been caused by the appellant with a pick handle and by other people who were also assaulting the deceased and Bohane.

[6] Appellant also testified in his own case. He testified that on 17 October 1999, he was at his house when accused 1 and two men unknown to him came to inform him about his stolen property. He went with the men to look for his stolen property. They first went to Bohane's home and met him on the way. He ran away and they apprehended him. They went to deceased's home and took both the deceased and

Bohane to accused 1's house by force. He did not find his stolen property at accused 1's home. Accused 1 and the two unknown men assaulted the deceased and Bohane with the hammer, pick handle and slasher and the pick handle broke from the assault. He denied ever assaulting the deceased nor Bohane. He testified that he watched the assault for fifteen minutes and then left as he could see that the truth about his stolen property was not coming out from the deceased and Bohane.

[7] The learned judge in the court *a quo* found as follows[1]:

7 *have no doubt in my mind that you had formed a common purpose because each one of you according to* ***S v Naedezi (sic) and Others 1989 (1) SA 687 (A)*** *you did one of the acts required with a prerequisite to get common purpose. There is no doubt about that And if I find I need not go any further, I just have to appiy* ***S v Sefatsa 1988 (1) SA 868 (A)*** *that if I find common purpose i need not show any causal connection between your deed that caused the death of the deceased".*

He further found that *[11] there is no doubt that you deprived them of their liberty, you kidnapped them and kept them in accused Va house[2]".*

[8] It was submitted in the heads of argument on behalf of the appellant that the court a *quo* erred in various instances: the so-called evidence was not proved in that the admitted exhibits did not comply with the provisions of section 212 of Act 51 of 1977 and are therefore inadmissible; no clear findings were made with regard to the credibility

[1] **Record page 197 par 25**
[2] **Record page 198 par 10**

of the State witnesses but the court a *quo* merely accepted their evidence; there were a number of contradictions in the evidence of the State witnesses in particular Bohane's testimony that *"I have a hole, — on my head. I have a crack in my skull"* whereas the doctor who examined him did not mention any such injury. There were also discrepancies in Bohane's police statements.

[9] Appellant's counsel[3] argued that the evidence of the State witnesses was so poor and unreliable that no reasonable court might reasonably have convicted the appellant at the close of the State case. Counsel submitted that the court *a quo* failed to properly evaluate the evidence at the end of the State case and that the court a *quo* wrongly exercised his discretion.

[10] In **S *v Maedezi and Others*[4]** the following five requirements for a finding of guilt by way of common purpose has been stated at ***7051 - 706*** C :

10.1 In the first place the accused must have been present at the scene where the violence was being committed;

10.2 Secondly, he must have been aware of the acts of violence;

10.3 thirdly, he must have intended to make common cause with those who were actually perpetrating the violence;

10.4 fourthly, he must have manifested his sharing of a common purpose with the perpetrators by himself performing some act of association with their conduct;

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[3] **Advocate de Necker**
[4] **1989 (1) SA 687 (AD)**

10.5 fifthly, he must have had the requisite *mens rea* " . . . *so, in respect of the killing of the deceased he must have intended [the deceased] to be killed or he must have foreseen the possibility of [the killing] and performed his own act of association with recklessness as to whether or not death* was *to ensue*"

[11] The Court a *quo's* findings were based upon the totality of the evidence and not that of an individual witness. It is an enshrined principle in the myriad of authorities in our legal system that, in the evaluation of the evidence in a matter, the court has to decide on the totality of the evidence. The requirement of proof beyond reasonable doubt should not be allowed to blur the use of common sense.

[12] Although the honourable judge made a finding that the appellant did one of the acts required to get common purpose, it is clear that the appellant satisfied all the requirements as stated in Mgedezi supra. All factors taken into account, I am satisfied that the appellant's guilt was proven beyond reasonable doubt on all counts and that the convictions must stand.

Ad Sentence

[13] The appellant was convicted of murder and was sentenced to life imprisonment on 15 November 2002. This appeal came before us twelve (12) years after the sentencing.

[14] The minimum sentence provisions set out in section 51 of the Criminal Law Amendment Act 105 of 1997 (CLAA) came into operation on 13 November 1998.

[15] The indictment in *casu* did not stipulate the applicability of section 51 of Act 105 of 1997. The trial court judge also did not prior to the commencement of the trial, inform the appellant of the applicability of these provisions. The trial court judge when sentencing the appellant stated[5]:

"I am trying to exercise my discretion and i can only do so if I find that there are substantial and compelling circumstances. I said to you I cannot find any. In the circumstances there is only one sentence I am going to pass and your counsel has agreed with me if I cannot then you have to go for life"

[16] In ***Taubie v*** S[6] the Supreme Court of Appeal held as follows:

"[20] Failure to forewarn the accused is in conflict with the provisions of section 35 (3) (a) of the Constitution 108 of 1996 (the Constitution) which provides that every accused person has the right to be informed of the charge with sufficient detail to answer it. This court is entitled to raise the issue mero moto, because the irregularity resulted in injustice and w a s *prejudicial to the appellant*

[17] A failure to advise the appellant that he faced an offence which fell within the ambit of the CLAA, and that a possible sentence was life imprisonment, means that it rendered the trial in this respect substantially unfair. See ***S v Leaoa 2003 (1) SACR 13 (SCA): S v Ndlovu 2003 (1) SACR 331 (SCA) and S v Makatu 2006 (2) SACR 582 (SCA1***

[18] In S ***v Ndlovu suora*** the Supreme Court of Appeal held that:

" . . . *where the State intends to rely upon the sentencing regime created by the Act a fair trial wiii generally demand that its intention be pertinently brought to the attention of the accused at the outset of the trial, if not in the charge-sheet then in some other*

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[5] Record page 203 par 15

[6] (635/11) [2012] ZA SCA 133 (27 September 2012)

form, so that the accused is placed in a position to appreciate properly in good time the charge that he faces as well as its possible

consequences . . . . . (w)hat will at least be required is that the accused be given sufTicient notice of the State's intention to enable him to conduct his defence properly" (Paragraph [12] at 337 a-c).

[19] It is trite that the appeal court's power to interfere with the trial court sentence is circumscribed. The appeal court may interfere only when a misdirection is found on the part of the trial court or when the sentence is disproportionate to the offence committed. As to when an appeal court may interfere with the sentence imposed by the trial court, Marais JA enunciated the test as follows in S ***v Malaas 2001 (1*** J ***SACR 469 (SCA) at D 478*** d- a:

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate Court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate Court is at large".

The fact that the provisions of the CLAA were not brought pertinently to the appellant's attention constituted a substantial and compelling reason why the prescribed sentence ought not to have been imposed. These circumstances would therefore justify a lesser sentence (S ***v Ndlovu, supra, par. 14).***

[20] I repeat the sentiments of the trial court that the community must be protected from people of a violent nature like the appellant. The assault on the deceased and the complainant was cruel and gruesome. The appellant and accused 1 took the law into their own hands by assaulting defenceless persons whose hands and legs were tied for six hours.

[21] In the result, I propose the following order:

21.1 The appeal against conviction is dismissed;

21.2 The appeal against sentence is upheld and the sentence imposed by the court a quo is set aside and replaced with the following order:

21.2.1 count 1 - murder- 20 years imprisonment;

21.2.2 count 2 - attempted murder- 10 years imprisonment;

21.2.3 count 3 - kidnapping -12 months imprisonment

The three sentences are to run concurrently, the effective period of imprisonment is thus 20 years.

21.3 In terms of section 282 of the Criminal Procedure Act 51 of 1977, the substituted sentence is ante-dated to 15 November 2002, the date of sentence.

D.S. MOLEFE Judge of the High Court

J. J/STRIJDOM

'Acting judge of the High Court

I agree.
D. FOURIE
Judge of the High Court
I agree. And it is so ordered.

APPEARANCES:

Counsel on behalf of Appellant	**Adv. P J De Necker**
Instructed by	**Coert Jordaan Inc Attorneys**

Counsel on behalf of Respondent	**Adv. J J Kotze**
Instructed by	**State Attorneys**
Date Heard	**3 December 2014**
Date Delivered	**9 December 2014**