THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 164/08
No precedential significance

In the matter between:

JONATHAN STREET **APPELLANT**

v

THE STATE **RESPONDENT**

Neutral citation: *Street v The State* (164/08) [2008] ZASCA 133 (26 November 2008).

CORAM: LEWIS JA and LEACH and MHLANTLA AJJA

HEARD: 12 November 2008

DELIVERED: 26 November 2008

Summary: Appeal against conviction of being an accessory after the fact to murder. Court *a quo* making factual findings not justified on the evidence. Conviction replaced with one of common assault and sentence reduced to an appropriate punishment for assault.

ORDER

On appeal from: **High Court, Johannesburg** (Jajbhay and Mabuse JJ sitting as court of appeal).

(1) The appeal succeeds to the extent set out below.

(2) The appellant's conviction as an accessory after the fact to murder and the sentence of five years' imprisonment are set aside. The order of the court below is replaced with the following:

'(a) The appeal succeeds.

(b) The accused's conviction and sentence of 15 years' imprisonment are set aside and replaced with the following:

"The accused is convicted of common assault and is sentenced to a fine of R6 000 or six months' imprisonment, half of which is suspended for three years on condition that he is not convicted of an offence involving an assault committed during the period of suspension and for which he is sentenced to imprisonment without the option of a fine."'

JUDGMENT

LEACH AJA (LEWIS JA and MHLANTLA AJA concurring)

[1] On 29 December 2002, Patrick Perreira Caetano died after having been stabbed during an incident which occurred in Kyalami. The appellant was subsequently charged with the murder of the deceased and tried in the regional court. It was common cause that the deceased died as a result of a stab wound to the stomach. Although the appellant admitted having punched the deceased on the night in question, he pleaded that he was not guilty of murder and denied having inflicted the fatal wound. However, despite there having been no credible evidence that he had stabbed the deceased, the appellant was convicted as charged and sentenced to 15 years imprisonment.

[2] The appellant appealed to the high court which held that in the light of the contradictory evidence which had been led, as more fully set out below, the state had failed to prove beyond a reasonable doubt either that the appellant had been the person who had inflicted the fatal wound or that he had acted with a common purpose with the person who had done so. But while the high court concluded that the appellant's murder conviction could therefore not stand, it found that he had been an accessory after the fact to the deceased's murder. It therefore altered the conviction to one of the latter offence and imposed a sentence of five years' imprisonment. With leave of

the high court, the appellant now appeals to this court against his conviction as an accessory after the fact.

[3] The state's main witness was one Guil Yahav, a man who admitted to having severely assaulted the deceased with a knife on the night in question. It appeared that the deceased had injured Yahav's one eye several years before and, although the deceased had undertaken to pay Yahav R75 000 towards his medical expenses incurred as a result, he had failed to do so.

[4] Yahav testified that on the evening in question he learned that the deceased was at a restaurant known as the Blueberry Grill, and proceeded there in order to confront him about not having paid him as he had promised. He also decided he needed someone to call the deceased out of the restaurant so that he could have a word with him in private and, with that in mind, he telephoned the appellant and asked for his help. Although the appellant was on his way to a casino in the company of two friends, Theuns Kingma and Francois Moller, he agreed to assist.

[5] It is common cause that the appellant drove to the Blueberry Grill together with Kingma and Moller. By the time they arrived, Yahav had already confronted the deceased and was talking to him outside the restaurant. When the appellant and his two companions approached, and the deceased suddenly found himself facing up to four men rather than one, he panicked and ran off. Kingma and Moller set off in pursuit while Yahav and the

appellant, after speaking to a security guard who had approached to inquire what was happening, followed shortly afterwards.

[6] What next occurred is a matter of considerable dispute. According to Yahav, they found that Kingma and Moller had assaulted the deceased and knocked him to the ground. Yahav testified that he went up to where the deceased was lying on the ground and, using a large knife he had earlier taken from a bag the deceased had been carrying, slashed the deceased's face. Having done so, he handed the knife to Kingma. The appellant then took the knife from Kingma, apparently with the intention of also attacking the deceased. Seeing this, Yahav grabbed hold of him and attempted to pull him away from the deceased. However, the appellant slipped his grasp and plunged the knife into the abdomen of the deceased as he lay on the ground. Yahav said that he had extracted the knife from the deceased's body and went off with it. Later, when driving away from the scene, he threw it out of the window of the vehicle.

[7] The appellant's version of the incident was materially different. He alleged that when Yahav had telephoned him, he had asked him to come and fight the deceased. When he, Kingma and Moller arrived outside the restaurant and saw Yahav with the deceased, Yahav told him that he had contacted a policeman friend who was on his way to the scene and who had said that they should keep the deceased there until he arrived. While he agreed that the deceased had run off pursued by Kingma and Moller and that he and Yahav followed shortly afterwards, he stated that Kingma, Moller and

the deceased were standing together when they reached them. He told the deceased to stand still as the police were on their way, but when the deceased heard this he tried to escape. The appellant said he had physically restrained the deceased from making off and, when the deceased unsuccessfully tried to hit him, had punched him hard on the nose, causing him to collapse to the ground. Yahav then proceeded to kneel on the deceased's chest and slash his face with a large knife. Kingma intervened and, grabbing hold of Yahav, pulled him away from the deceased. In the process, Yahav dropped the knife and the appellant picked it up. Kingma and Moller then headed back to where their vehicle was parked. The deceased's face was bleeding so profusely that the appellant was overcome by nausea. He told Yahav that he wanted no part in what was going on, threw the knife down and followed them, leaving Yahav with the deceased. When the appellant reached the spot where he had left his vehicle he found that Kingma and Moller had already driven off. Shortly thereafter, Yahav returned and gave him a lift home. About an hour later, Yahav telephoned him and told him that he had spoken to his friend, the policeman, who had told him that the deceased had died as a result of a broken bone in his nose which had penetrated the brain. He understood this to mean that the deceased had died as a result of the blow he had struck him.

[8] There were therefore two mutually destructive versions before the trial court as to who had been responsible for the fatal stab wound. On the state's case it was the appellant, while on the appellant's version, although he had not been present when it was inflicted, it must have been Yahav. The high

court found that the trial court had erred in rejecting the appellant's version as false beyond a reasonable doubt and held that the state had accordingly failed to show that the appellant was guilty of murder and that such conviction could not stand. However, the high court went on to conclude:

'There can be no question either that the appellant did participate in the assault of the deceased as well as the concealment of the knife that had inflicted the fatal wound. He thus made himself guilty of being an accessory after the fact of that crime. He did not report the true facts of the crime to the police immediately after the event. In fact he colluded with Yahav in trying to conceal important evidence and furnish incorrect statements. In the circumstances the appellant should have been convicted of being an accessory after the fact of murder.'

[9] The findings that the appellant had concealed the knife used to inflict the fatal wound, and that he had acted in collusion with Yahav to conceal important evidence by furnishing incorrect statements, are startling, to say the least. In regard to the concealment of the knife, on the state's version it was Yahav, and not the appellant, who threw it away. On the appellant's version, all he did was drop the knife near the scene. On either version, the appellant did not attempt to conceal it and the finding that he had done so amounted to a gross misdirection. So was the finding in regard to the furnishing of incorrect statements to the police in collusion with Yahav. There is no evidence on record as to either what the appellant had told the police or from which it can be inferred that he had colluded with Yahav in attempting to conceal relevant evidence, nor was it ever suggested that he had done so.

[10] In addition, in regard to the appellant's alleged failure to immediately report the incident to the police, on his version which has not been shown to be false, he learned of the death of the deceased only an hour or so after he had returned home. He was then brought under the impression that he, and not Yahav, had been responsible for the deceased's demise. As he was unaware that Yahav had killed the deceased, he could not have been guilty as an accessory after the fact to that crime. In any event, once under the impression that the deceased had died because he had punched him on the nose, and that he was a potential suspect, he was under no lawful obligation to implicate himself or to provide the police with a statement. Consequently, even if he did fail to immediately report the incident to the police, he cannot be found guilty as being an accessory after the fact to the deceased's murder.

[11] In the light of these considerations, and having regard to the evidence on record, the finding that the appellant was guilty as an accessory after the fact is insupportable and counsel for the respondent conceded, correctly, that the appellant had been wrongly convicted of that offence.

[12] On the other hand, while the conviction as an accessory and the sentence imposed in that regard cannot stand, the appellant on his own version had neither been entitled to physically restrain the deceased from leaving the scene nor to punch him in the face, and in doing so he unlawfully assaulted the deceased. Under s 258(e) of the Criminal Procedure Act, common assault is a competent verdict on a charge of murder and it was conceded by both sides before this court that the appellant should have been

found guilty of that offence. It was also suggested by both sides that, as the appellant is a first offender who has been on bail pending this appeal, a sentence of direct imprisonment is not called for and that a robust fine, with a period of imprisonment for several months as an alternative, would be appropriate.

[13] I agree with this suggestion. I also consider that it would be best to suspend a portion of the sentence to act as an inducement for the appellant to desist from similar conduct in the future.

[14] The appellant's conviction as an accessory after the fact to murder and the sentence of five years' imprisonment are set aside. The order of the court below is replaced with the following:

'(a) The appeal succeeds.

(b) The accused's conviction and sentence of 15 years' imprisonment are set aside and replaced with the following:

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L E LEACH

ACTING JUDGE OF APPEAL

APPEARANCES:

For Appellant:	E S Classen (Attorney) Instructed by David H Botha, Du Plessis & Kruger Inc; Johannesburg Symington & De Kok; Bloemfontein
For Respondent:	D Vlok Instructed by The Director of Public Prosecutions; Johannesburg The Director of Public Prosecutions; Bloemfontein