



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

Reportable

Case No: 348/2019

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG DIVISION, PRETORIA**

APPLICANT

and

RETHABILE AMOGELANG POOE

RESPONDENT

Neutral citation: *Director of Public Prosecutions: Gauteng Division, Pretoria v Pooe* (348/2019) [2021] ZASCA 55 (30 April 2021).

Coram: SALDULKER, MBHA AND DLODLO JJA and LEDWABA and MABINDLA-BOQWANA AJJA

Heard: 10 November 2020 and 24 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 30 April 2021.

Summary: Criminal law and procedure – application for leave to appeal by the State in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013 against the refusal by the trial court to reserve questions of law in terms of s 319 of the Criminal Procedure Act 51 of 1977 – whether correct procedure followed – whether questions of law properly reserved where facts not fully set out by the State – application dismissed.

ORDER

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

The application for leave to appeal is dismissed.

JUDGMENT

Saldulker JA (Dlodlo JA concurring)

Introduction

[1] This is an application by the Director of Public Prosecutions, Gauteng (the State) for leave to appeal, referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013 (the Superior Courts Act),¹ and, if successful, the determination of the appeal itself. The State seeks leave to appeal against the refusal of leave by the Gauteng Division of the High Court, Pretoria (Hattingh AJ) (the trial court) to reserve questions of law for decision by this Court, in terms of s 319 of the Criminal Procedure Act 51 of 1977 (the CPA), following the acquittal of the respondent, Mr Rethabile Amogelang Poee, at the conclusion of the trial.

[2] The respondent, Mr Poee, was 16 years old when he was charged in the trial court on five counts, namely murder, robbery with aggravating circumstances, kidnapping, unlawful possession of a firearm and the unlawful possession of ammunition. The respondent pleaded not guilty to all counts and made a statement in terms of s 115 of the CPA. On 10 September 2018, the trial court found Mr Poee not guilty on all counts.

¹ Section 17(2)(d) of the Superior Courts Act 10 of 2013 reads:

‘The judges considering an application referred to in paragraph (b) may dispose of the application without the hearing of oral argument, but may, if they are of the opinion that the circumstances so require, order that it be argued before them at a time and place appointed, and may, whether or not they have so ordered, grant or refuse the application or refer it to the court for consideration.’

[3] Dissatisfied with the outcome of the trial, the State then requested the trial court to reserve four questions of law in terms of s 319 of the CPA for consideration by this Court. The trial court refused the application. The State then challenged the decision by applying to this Court for an order granting it leave to appeal in terms of s 17(2)(b) of the Superior Courts Act against the respondent. This Court ordered that the application for leave to appeal is referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act, and the parties were forewarned that they must be prepared, if called upon to do so, to address the court on the merits. This Court heard argument from both parties on the application for leave to appeal and on the merits.

Application for leave to appeal

[4] Whether the procedure followed by the State results in this Court lacking jurisdiction to hear the appeal must be determined at the outset. The State's application in terms of s 17(2)(b) of the Superior Courts Act was in line with the process followed in this Court in *Director of Public Prosecutions, Limpopo v Mokgotho* [2017] ZASCA 159 (SCA). It does not appear from a reading of that judgment that the procedure adopted by the State was challenged in *Mokgotho*. This Court, however, in *Director of Public Prosecutions, KwaZulu-Natal v Ramdass* [2019] ZASCA 23; 2019 (2) SACR 1 (SCA), without reference to *Mokgotho*, held that the correct jurisdictional path for the State to follow, where the trial court refused its application to reserve questions of law in terms of s 319, was the process prescribed in s 317(5) of the CPA² (as referred to in s 319(3) of the CPA), dealing with appeals against such refusal, by way of a petition to the President of the Supreme Court of Appeal (SCA).

[5] In *Ramdass*, the State did not apply to this Court in terms of s 317(5) of the CPA, but in terms of s 319(1) of the CPA read with s 16(1)(b) of the Superior Courts Act, asking for special leave to appeal against the refusal. The question arose as to whether the State had followed the correct procedure. This Court in *Ramdass* said, at paras 4 and 5, as follows:

² Section 317(5) of the Criminal Procedure Act 51 of 1977 reads:

'If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular or not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply.'

'The starting point in determining the correct jurisdictional path that should have been followed by the State, is s 319 of the CPA. The relevant provisions of the section are ss 319(1) and 319(3) which provide as follows:

"(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) . . .

(3) The provisions of sections 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section."

If the trial judge refuses the application to reserve questions of law, the provisions of s 317(5) of the CPA (as referred to in s 319(3)), dealing with appeals against such a refusal, are the next step in the process and provide that:

"If an application for condonation or for a special entry is refused, the accused may, within a period of 21 days of such refusal or within such extended period as may on good cause shown, be allowed, by petition addressed to the President of the Supreme Court of Appeal, apply to the Supreme Court of Appeal for condonation or for a special entry to be made on the record stating in what respect the proceedings are alleged to be irregular and not according to law, as the case may be, and thereupon the provisions of subsections (11), (12), (13), (14) and (15) of section 316 shall *mutatis mutandis* apply".'

And at para 9 stated further:

'The application followed the incorrect procedure and was defective in two respects:

(a) First, special leave was not required. The State only required the ordinary leave of this court and the provisions of s 16(1)(b) of the SC Act were not applicable. That section deals with appeals against any decision of a division of the high court taken on appeal to it, where the special leave of this court is required.

(b) Second, the definition of "appeal" contained in the SC Act provides that "appeal" in Chapter 5, which includes ss 16 and 17, does not include an appeal in a matter regulated in terms of the CPA. As the appeal in the present matter is regulated in terms of the CPA, it should follow that these sections of the SC Act do not apply.'³

³ See the definition of appeal in s 1 of the Superior Courts Act: "appeal" in Chapter 5, does not include an appeal in a matter regulated in terms of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), or in terms of any other criminal procedural law'.

[6] Thus, in terms of the decision in *Ramdass*, the present application should not have been an application for leave to appeal in terms of s 17(2)(b) of the Superior Courts Act, but in fact a petition in terms of s 317(5) of the CPA. However, there appears to be essentially no difference in the process followed in terms of s 17(2)(b) of the Superior Courts Act and that followed in terms of s 317(5) of the CPA. In respect of both, the question for determination is essentially whether an appeal on the proposed questions of law will be justified. In *Ramdass*, this Court, at para 19, said that the irregularity can be condoned even though such a procedure was defective. In any event, the respondent suffered no prejudice as a result of the State using the incorrect procedure. This Court condoned the incorrect process in *Ramdass* and proceeded to hear the application. Similarly, in the circumstances, the State's failure to lodge the appeal in terms of the correct procedure is condoned. I turn to consider the merits.

Facts

[7] The questions of law that the State requested the trial court to reserve arose out of the following tragic events, which are common cause. The respondent and Mr Keorapetse Shabalala (Chabi) were learners at Rabonni Christian School (Rabonni) in Brits. They were in the same class in grade 9 at the time of the incident, having met in 2015 whilst in grade 8. They were friends (albeit the nature of the friendship was qualified by the respondent, who claimed to have befriended Chabi to stop him from bullying him (the respondent)). The two of them spent a lot of time together at school, sharing food and used the same transport to and from school, a taxi which was owned by Chabi's parents. They were seen in each other's company by others, who also saw them as friends.

[8] On the morning of 22 November 2016, after writing exams, they did not return home with their usual taxi but simply handed their schoolbags to the taxi driver and remained on the school premises. Before school started that morning, Chabi had told the respondent that he had a firearm and showed him ammunition. They went to the school caretaker, a Mr van der Walt (who was a State witness) to ask for some masking tape which he provided. They waited at school for a number of hours sitting on the pavilion and later went to sit by the deceased's vehicle, a VW Golf. A witness by the name of Mr Kgodisho Tau, a fellow learner, approached and asked them what they were waiting for. They told him that they were waiting for a lift from the deceased. He

enquired why they did not ask for a lift from another teacher who was already by the vehicles leaving and they said that they would rather wait for the deceased.

[9] When the deceased arrived at her vehicle the respondent asked for a lift, to which she agreed. As they were driving Chabi held a firearm at her waist and ordered her to drive to the industrial area. Once they reached the area where the incident occurred, the hands of the deceased were tied by the respondent using the masking tape they had obtained from Mr van der Walt. The deceased managed to break the tape. Chabi shot the deceased, following which he and the respondent left the scene with the deceased's vehicle. They first went to Chabi's home and spoke to his mother. They then went to the taxi driver to ask for money which was later used to fill petrol into the deceased's vehicle. They then drove to the respondent's house where he was dropped off by Chabi. Chabi returned to his house and asked for permission to leave the vehicle in someone else's yard. He took the keys along with him and the deceased's bag that contained a laptop and other items. During the evening, the respondent's parents asked him what was wrong and he assured them that nothing was wrong. The next day they used the same taxi to school. During the assembly, the headmaster of the school asked that any learner who had seen the deceased leaving school was to come to the fore. In response, Tau, who had approached the two the previous day, told Chabi and the respondent that they needed to reveal that they had been in the company of the deceased. He then went forward with them.

[10] The rest of the evidence is disputed. Perhaps to shed some light, it would be useful to briefly outline the defence put forward by the respondent. The respondent testified that Chabi bullied him while in grade 8. He befriended him in order to stop the bullying, which worked as the two became friends at school. In regard to the day of the incident, he stated that he and Chabi had asked for a sellotape because Chabi said he wanted to fix his books. He allowed the taxi that he and Chabi usually used as transport to leave without them and remained at school with Chabi for many hours because he wanted to fetch his textbook at Chabi's home because they were writing exams on the subject the following day. The plan was to first accompany Chabi to the taxi rank to gamble. Chabi told him he was going to use the firearm at the taxi rank for protection when gambling. Chabi suggested they wait for the deceased to give them a lift. He (the respondent) asked the deceased to drop them at the taxi rank to which she agreed.

He was scared and confused when he saw Chabi pointing a firearm at the deceased in the vehicle and knew nothing of the plan. Chabi instructed him to search the deceased's purse. He told Chabi he did not want to be part of what he was doing, but was scared and did what he was told. Chabi took the tape they had gotten from school to tie up the deceased's hands. Responding to a leading question by his counsel that Chabi had instructed him to tie the deceased's hands, he mentioned that Chabi's actual words were 'Hey man. Tie up Madam's hands there'. He did as he was instructed by Chabi. The tape got torn as the deceased managed to twist her hands around. Chabi instructed him in harsh terms to do it again. He (the respondent) rolled the tape four times. He complied, because he was scared and Chabi had a firearm. He believed that Chabi would kill him. He did not run away because he was scared of being killed by Chabi. Chabi attempted to put the deceased in the boot of the vehicle, but she resisted. He tripped her and she fell down, while he had placed the firearm in his pants. Chabi took the firearm, the respondent turned away and he heard two gun shots. After the deceased was shot at, Chabi instructed him to take the firearm to his side, which he did. Although in possession of the firearm, he did not know how to use it and was scared. The respondent repeatedly testified in cross-examination that Chabi neither threatened to shoot nor kill him. He also never, at any stage, pointed a firearm at him during the incident. It was after the deceased was shot as they drove off in the vehicle, that Chabi warned him against telling the police. When the respondent got home he decided not to tell his parents, nor anyone. He thought Chabi would kill him if he told the police. His plan was to disclose this incident after moving house from Brits.

[11] The respondent was called to answer on various charges, namely that of murder, kidnapping and joint possession of an illegal firearm and ammunition, along with his former co-accused Chabi. Chabi pleaded guilty and was convicted and sentenced to a period of 25 years' imprisonment. He testified as a State witness in this case.

[12] In evaluating the evidence of the respondent and Chabi, the trial court said that the respondent had maintained throughout his testimony that there existed no prior agreement between himself and Chabi in relation to the hijacking of the deceased's vehicle. Chabi testified that it was the respondent who had come up with the plan that the deceased's motor vehicle must be taken to utilise its parts to repair a similar vehicle

at his house. However, this testimony stood in contradiction to Chabi's guilty plea, where he had stated that they had agreed on the day before the incident that they needed a motor vehicle 'to drive around with'. The trial court said further that if the intention was to take the motor vehicle, and strip it for parts to repair a similar vehicle at the respondent's house, then why would Chabi retain the deceased's vehicle, the keys and other movable assets belonging to the deceased. The trial court thus rejected Chabi's version that there was an agreement between him and the respondent concerning the taking of the deceased's vehicle.

[13] In assessing the respondent's case, the trial court did however note that there were inconsistencies and contradictions in his testimony. Most importantly, these related to the respondent not trying to disassociate himself from the commission of the crime. The trial court said that it had taken into cognisance the defence of necessity in the form of compulsion and/or coercion raised by the respondent. He had given some explanation as to why he did not disassociate from Chabi, that he was scared of Chabi and feared for his life and that of his family. Moreover, the trial court held that the respondent had, in any event, been of little assistance to Chabi in the commission of the offences, as the deceased managed to break free from the tape around her wrists. The trial court said that it was Chabi who had shot the deceased, took control of her vehicle, took possession of her personal effects and retained everything, with the respondent not sharing in the spoils of the crime.

[14] Accordingly, on a conspectus of the evidence, the trial court held that the State had failed to prove its case beyond reasonable doubt against the respondent, concluding, inter alia, as follows: 'In the end I find that the State did not prove its case beyond reasonable doubt. I reject the version of the State witness, Keorapetse Shabalala [Chabi], insofar as he testified about the existence of an agreement between himself and the accused [the respondent] to take the motor vehicle of the deceased. His testimony was riddled with inconsistencies and contradictions in terms of the alleged agreement between himself and the accused [the respondent] on material aspects. The above coupled with the fact that Keorapetse Shabalala was a single witness, that presuppose[s] a cautionary rule on this court, the court, on the totality of the evidence, finds that the accused [the respondent] is not guilty, on all the charges against him'.

[15] The fact that the trial court acquitted the respondent lies at the heart of the State's complaint. In its application, in terms of s 319 of the CPA, the State sought to reserve four questions before Hattingh AJ. These were formulated as follows:

'(i) Whether the trial court failed to evaluate the evidence in accordance with accepted legal principles, ie in totality and taking into account the probability and improbability of the respective versions.

(ii) Whether the trial court erred in acquitting the accused without evaluating his version of alleged duress in light of applicable case law and the evidence before court and without finding that his version may be reasonably possibly true.

(iii) Whether the trial court erred in effectively disregarding the corroboration that the objective evidence and probabilities provided for the version of the second state witness [Chabi].

(iv) Whether the court erred in focussing solely on the question of the existence or not of a prior agreement, failing to consider that the accused may be guilty on the proven facts without there having been a prior agreement.'

[16] Before the hearing of the matter, the registrar of this Court, on the instructions of the presiding judge addressed a letter to the parties, the contents of which read as follows:

'The Presiding Judge has directed that the parties' attention be drawn to this court's recent judgments in *DPP Limpopo v Molope* and another (Case no 1109/19 [2022] ZASCA 69 (18 June 2020). And *DPP Western Cape v Schoeman* [2019] ZASCA 158. The parties are required to deal comprehensively with these judgments and make written submissions on or before 31 October 2020.'

Both parties submitted further heads of argument, and this Court is grateful for their assistance.

Legal Principles

[17] Section 319 of the CPA provides as follows:

'(1) If any question of law arises on the trial in a superior court of any person for any offence, that court may of its own motion or at the request either of the prosecutor or the accused reserve that question for the consideration of the Appellate Division, and thereupon the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record and that a copy thereof be transmitted to the registrar of the Appellate Division.

(2) The grounds upon which any objection to an indictment is taken shall, for the purposes of this section, be deemed to be questions of law.

(3) The provisions of sections 317(2), (4) and (5) and 318(2) shall apply *mutatis mutandis* with reference to all proceedings under this section.’

[18] This Court in a recent judgment, *Director of Public Prosecutions: Limpopo v Molohe and Another* [2020] ZASCA 69; 2020 (2) SACR 343 (SCA); [2020] 3 All SA 633 (SCA), said at paras 39-41:

‘The provisions of s 319 of the CPA are peremptory and require strict compliance, as its purpose is to limit appeals by the State. It should be mentioned that s 319 has been subjected to a detailed analysis in a number of judgments, both by this Court and the Constitutional Court. Its principles have accordingly been firmly established in our law.

Two decades ago, in *Director of Public Prosecutions, Natal v Magidela and Others* this Court eloquently and commendably set out the position of the relevant law stating that:

“The provisions of section 319 and its predecessors have been the subject of judicial interpretation over the years and in order to see whether the requirements of the section were complied with in this case it is important to consider how the section has been construed. *The first requirement is not complied with simply by stating a question of law. At least two other requisites must be met. The first is that the question must be framed by the Judge “so as accurately to express the legal point which he had in mind” (R v Kewelram 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This requires the court to record the factual findings on which the point of law is dependent (S v Nkwenja en ‘n Ander 1985 (2) SA 560 (A) at 567B-G). What is more, the relevant facts should be set out fully in the record as part of the question of law (S v Goliath 1972 (3) SA 1 (A) at 9H-10A). These requirements have been repeatedly emphasised in this Court and are firmly established (see, for example, S v Khoza en Andere 1991 (1) SA 793 (A) at 796E-I). The point of law, moreover, should be readily apparent from the record for if it is not, the question cannot be said to arise ‘on the trial’ of a person (S v Mulayo 1962 (2) SA 522 (A) at 526-527). Non constat that the point should be formally raised at the trial: it is sufficient if it “comes into existence” during the hearing (R v Laubscher 1926 AD 276 at 280; R v Tucker 1953 (3) SA 150 (A) at 158H-159H). It follows from these requirements that there should be certainty not only on the factual issues on which the point of law is based but also regarding the law point that was in issue at the trial.*” [Original emphasis.]

Furthermore the authors Du Toit et al in the *Commentary on the Criminal Procedure Act* state: “The trial court must refer to those facts in its judgment as part of the reserved question of law (*S v Nkwenja en ‘n Ander* 1985 (2) SA 560 (A) 567B). Furthermore, whenever the State has a question of law reserved which rests on particular facts, *the State must have*

those facts fully placed on record and in particular as part of the setting out of the question of law”. (My emphasis.) (Footnotes omitted.)

[19] The approach in *Magidela* has been endorsed by this Court in *Director of Public Prosecutions: Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA), where this Court said at para 39:

‘The State has a right of appeal only against a trial court’s mistakes of law, not its mistakes of fact. Indeed, Du Toit, De Jager, Paizes, Skeen and Van der Merwe stress that this “restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly”. Before a question of law may be reserved under s 319 three requisites must be met. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law.’ (My emphasis.) (Footnotes omitted.)

And at para 40 the court said:

‘Unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point, which the trial court arrived at, are. Where it is unclear from the judgment of the trial court what its findings of fact are, it is therefore necessary to request the trial judge to clarify its factual findings. Where this is not done, the point of law is not properly reserved.’ (My emphasis.) (Footnotes omitted.)

Application for condonation by the State for not setting out the facts fully in its s 319 application

[20] On the first day of the hearing, the State’s application in terms of s 319 for the reservation of the questions of law, which served before the trial court, was not part of the record. The State asserted that it was not necessary for this Court to have sight of that application, as it was only the petition that had to be adjudicated upon. This Court deemed it necessary that the s 319 application be placed before it, and the matter was then postponed for 24 November 2020 for that purpose. In my view, the s 319 application that the State brought before the trial court, ‘the first-mentioned court’, was of the utmost importance, as it would serve to indicate the grounds upon which the State had sought to reserve the points of law.

[21] An examination of the s 319 application before Hattingh AJ revealed that the grounds upon which the questions of law were sought to be reserved by the State were set out in a summary form of the evidence of the trial court, but the factual basis upon

which they supposedly pivot were not.⁴ The State did not set out the factual findings on which the reserved questions of law ought to have been considered. Thus, the facts upon which the point hinged were not clear, nor were they fully set out by the State. It is also not certain from the trial court's judgment on the merits which facts it accepted to be the facts proved in this case. In these circumstances the State ought to have requested the trial court to clarify its findings of facts. This the State regrettably failed to do. As already mentioned, at para 40 of *Schoeman*, unless the State does this, it may not be possible for a court of appeal to establish with certainty what the conclusions on the legal point which the trial court arrived at, are. There are thus serious shortcomings in the s 319 application brought by the State.

[22] A further problem is that it is also not apparent from the trial court's judgment that it considered the law relating to the s 319 applications as set out decades ago in *Magidela*. The trial court, without elaborating whether the requirements as set out above were complied with by the State, nevertheless concluded that the State had failed to successfully raise any questions of law, and dismissed the s 319 application, concluding, inter alia, as follows: 'The court lastly draw[s] attention to the Commentary on the Criminal Procedure Act, series 48, 2012, page 31-38A where it stated: "*It is not permissible for a trial judge to reserve, at the request of the state, questions which are essentially questions of fact. This restriction will not be relaxed by the fact that the trial judge considered the facts incorrectly. Furthermore, if the alleged question of law is nothing more than the question whether the judge had correctly considered the facts, this remains a question of fact which may not be reserved at the request of the State*" (S v Coetzee 1977 (4) SA 539 (A) at 544H–545A)'. (Emphasis added by trial court.)

⁴ See also *Director of Public Prosecutions: Limpopo v Molohe and Another* [2020] ZASCA 69; 2020 (2) SACR 343 (SCA); [2020] 3 All SA 633 (SCA) paras 44 and 45, where the State had similarly summarised the evidence that was led in the trial court without setting out the trial court's factual finding in its s 319 application. Even though the trial court did not frame the question of law in its judgment, nor did it record the factual findings on which the purported point of law was dependant, the State did not request the trial court to clarify its findings. Despite these shortcomings, the trial court accepted that there were questions of law that had to be reserved and granted the State's 319 application. On appeal, this Court said that the requirements of s 319 had not been complied with, and it was incumbent on the State to request the trial court for its factual findings so that the questions of law could be properly framed and considered; See also *Director of Public Prosecutions: Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 44, where the trial court had refused the s 319 application. On appeal to this Court, the State had not complied with the requirements for reserving questions of law under s 319, and therefore the State had not properly reserved its points of law.

[23] Ms Coetzee, for the State, conceded at the outset that the facts upon which the points of law hinged were not set out fully in its application in terms of s 319 before the trial court. However, the State asserted that this Court was in a position to condone this shortcoming, as the factual basis had been set out in the application for leave to appeal before this Court, and that this Court could not solely rely on the application before the trial court to adjudicate the State's s 319 application.

[24] In considering an application for the reservations of questions of law in terms of s 319, where the facts upon which the point hinges are not fully set out in the record, and the trial court has not been asked to clarify its factual findings, it will be difficult for an appeal court to frame the questions of law and set out the facts upon which the points of law hinges. Certainty must exist in regard to all the facts to which the question relates or on which the legal point hinges.⁵ Otherwise, the points of law will not be properly reserved.⁶

[25] The State has argued that it would have been a futile exercise to approach the trial court to clarify its factual findings, because the trial court did not make any factual findings in regard to the nature of the errors complained of, and neither was the respondent's defence assessed, nor was there an evaluation of the evidence in accordance with accepted legal principles. It is so that in this case the trial court's factual findings do not appear from the judgment, and thus it is unclear as to what the factual findings are. However, if this was indeed a reason why the State was unable to set out the facts fully, then it should have requested the trial court to clarify its findings of fact in order to obtain certainty with regard to the facts underpinning the points of law it sought to reserve.

[26] In my view, it is problematic at the appeal stage to complain that the trial court did not set out the factual findings. More especially in a case such as this, where it is unclear from the trial court's judgment on the merits which facts it accepted to be the facts proved in this case, it would be difficult to glean from the judgment the factual findings of the trial court which gave rise to the dispute over the points of law, and

⁵ *S v Boekhoud* [2011] ZASCA 48; 2011 (2) SACR 124 (SCA) para 34.

⁶ *Director of Public Prosecutions: Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 40.

which were material to formulating the questions of law, without difficulty or contestation. Moreover, as the State did not request the trial court to clarify its factual findings, it is not known which facts the State relied upon in its s 319 application to reserve the questions of law. Had the State done so, there would be no misunderstanding between the parties as to what the trial court's factual findings were. A perusal of the heads of argument of the respective parties, indicates that there is a discord between the facts set out by the State in its application before this Court, its heads of argument, its petition and the respondent's heads of argument.

[27] What should resonate is what this Court said in *Schoeman* at paras 45-46:

'If we were to entertain the appeal on the merits, we would face the task of having to ascertain the relevant facts. To this end, we would have to read the entire record and re-evaluate all of the evidence, thereby second-guessing the trial judge who was best placed to do this. We would thus have to approach the matter as if this were a full appeal on the merits. The problem does not end there. Having embarked on this task, we would have to decide whether the facts established by us accord with those found by the trial court. It is only if we find that the factual findings of the trial court were wrong and the result of a legal error would we be obliged to interfere with the decision of the trial court.'

This is why courts of appeal require strict adherence to the requirement for the State to set out the factual basis for the reservation of any point of law before it will entertain it. Here the State has not even attempted to comply with this requirement. We thus hold that the State has not properly reserved its four points of law. That ought to be the end of the matter. We consider it necessary, however, to deal further with the issue.' (My emphasis.)

[28] In this case the factual bases for the reservation of the questions of law were not set out in the record. They also did not appear fully from the judgment of the trial court, and regrettably the State did not request the trial court to return a special finding on the facts upon which the points of law hinged. Accordingly, it ought to be the end of this matter.

[29] It bears emphasis that what the State is ultimately seeking is condonation of facts that are self-serving, which it has compiled and presented to this Court in its petition. It is clear that the facts upon which the points of law were said to hinge were not set out fully or otherwise by the State in its s 319 application. For all the foregoing reasons, the application for condonation by the State must be refused. There would be

good reasons for this Court to dismiss the application based on the State's concession alone. But I do not think that this course should be adopted. I thus nevertheless consider it necessary in this matter to deal further with the issues raised.

Are the questions raised by the State questions of law or fact?

[30] I turn to consider whether the questions of law raised by the State are questions of fact or questions of law.

The respective contentions of the parties

[31] The State contended that the proposed questions of law were not based on the dissatisfaction with the manner in which the trial court went about evaluating the evidence, nor the correctness of its conclusion, but instead: (i) with the consequent approach of the trial court that only some of the evidence required evaluation, whilst others would not avail the court in reaching the conclusion it sought to reach; (ii) with the trial court's failure to scrutinise and evaluate the respondent's version of duress and his *viva voce* evidence in support thereof, so as to be able to reach a finding that the said version is reasonably possibility true; and (iii) with the trial court equating the existence of a prior agreement to an essential element of the crimes of kidnapping, robbery and murder. The State contended that this approach was flawed, which inevitably led to a wrong conclusion in that the respondent was acquitted. This was tantamount to an error of law. With regard to the third question of law, the State was of the view that it had been subsumed by the first question of law.

[32] The nub of the State's contentions lies in paras 99 and 102 of the trial court's judgment, where the trial court pertinently said:

'It is also important to take note that the court in *S v Texeira* stressed that, in evaluating the evidence of a single witness, "*a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities*". It is indeed so that corroboration, which is a common safeguard against the dangers of relying on the evidence of a single witness, has been defined as other evidence which supports the evidence of the State witness and which renders the evidence of the accused less probable on the issue in dispute. *The present case clearly demonstrates that the existence or non-existence of an agreement to rob the deceased of her motor vehicle, was allegedly found on a private and personal agreement between the accused [Poee] and Keorapetse Shabalala [Chabi], without any knowledge of*

third parties. This clearly excludes the evidence aliunde and the court has to be almost exclusively reliant on a credibility finding of the accused [Pooe] and Keorapetse Shabalala [Chabi], including an assessment of probabilities.' (My emphasis.) (Footnotes omitted.)

And at para 102:

'This court is clearly seized with the dilemma that to find the existence or non-existence of an agreement between the accused [Pooe] and Keorapetse Shabalala [Chabi]. It would be important for the court to compare the nature and quality of the evidence of Keorapetse Shabalala [Chabi] with that of the accused [Pooe]. This court draws some sol[a]ce from the matter of *S v Maake* where the court was satisfied that the magistrate had properly, cautiously and correctly approached the evidence of both the appellant and the complainant. His reasoning could not be faulted. He had properly assessed the quality and nature of the complainant's evidence as well as the fact that her version of the events immediately after the alleged rape had been corroborated in material respects by an independent witness. This court however does not have the benefit of an independent witness when it comes to the existence or non-existence of an intimate agreement to kill the deceased and to take her motor vehicle and certain movable assets.' (Footnotes omitted.)

[33] The State contended that there was a material misdirection in the trial court's approach in the foregoing paragraphs, as it expressly said it was excluding evidence. The trial court's approach was based on the premise that the evidence of all State witnesses apart from Chabi could be ignored and that it would not be considering such evidence, as the alleged private and personal agreement between Chabi and the respondent had been reached without any knowledge of third parties. The court concluded at paragraph 99 that '[t]his clearly excludes the evidence aliunde and the court has to be almost exclusively reliant on the credibility finding of the accused [Pooe] and Keorapetse Shabalala [Chabi], including an assessment of probabilities'. The same sentiment was also expressed in paragraph 102 of the trial court's judgment as set out above, where the trial court said that there is no independent witness that can assist the court 'when it comes to the existence or non-existence of an intimate agreement to kill the deceased and to take her motor vehicle and certain movable assets'. The State contended that other witnesses' evidence which may have assisted the trial court in determining the objective probability of the respective versions, was simply ignored and not considered. Furthermore, the trial court had failed to evaluate the probabilities of the respective versions. Failure to take into account relevant and admissible evidence constituted an error of law. The absence of any reference to any

of these aspects in the trial court's evaluation of the evidence constituted a materially flawed approach and an error in law. All the evidence had to be accounted for in its totality, and no evidence could simply be disregarded. The State contended that the trial court failed to evaluate all the evidence in its totality. The test for the evaluation of evidence in a criminal trial, as set out in *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449j-450b, was the accepted legal position.

[34] In contrast, counsel for the respondent argued that the State had failed to comply with the requirements of s 319 of the CPA, and that all of the questions raised by the State were questions of fact. As the factual findings did not appear from the record, it was incumbent on the State to have approached the trial court to set out the findings of fact, which regrettably it did not do. In the circumstances, there were no points that could properly be reserved. The trial court had regard to all the evidence, and although the trial court had not mentioned all of the aspects it had taken into account in its judgment in acquitting the respondent, there was no misdirection in respect of the legal principles that the trial court had applied. The State could only appeal if there was an issue relating to a mistake of law, and there was none in this case.

Discussion

[35] In many cases the decision of whether a question is one of fact or one of law poses considerable difficulty. This Court, in *Schoeman*, having found that the court had erred in the matter of *Director of Public Prosecutions, Gauteng v Pistorius* [2015] ZASCA 204; 2016 (2) SA 317; [2016] 1 All SA 346; 2016 (1) SACR 431 (SCA), said the following at paras 73-74:

'It seems, therefore, that this court in *Pistorius* erred, with respect, in finding, albeit obiter in our view, that where a trial court ignores evidence or displayed a lack of appreciation of its relevance, that this amounted to an error of law. As we have demonstrated, this conclusion is at odds with a long line of authority in this court, endorsed by the Constitutional Court. We do not agree that the test for the applicability of s 319 is whether the judicial process is adversely affected by the error made by the trial court. That test would have the effect of making almost every material error of fact an error of law. That is not what is envisaged by s 319. As Corbett CJ pointed out in *Magmoed*, even where there are "strong indications" from the evidence that there were cogent reasons to convict an accused '[t]hese considerations must not . . . be

allowed to obscure one's perception of the legal and policy issues involved in permitting s 319 to be utilized in the manner the prosecution in this case wishes to use it; or to weaken one's resolve to maintain what appears to be sound legal practice.

Put simply, the mere fact the judicial process has become flawed by the way a trial court goes about assessing the evidence before it, does not justify permitting s 319 to be used by the prosecution to reserve a point of law for what is in truth misdirection of fact. That impermissibly undermines the clear language of the section and the deliberate choice of the legislature to restrict appeals in terms of the section to questions of law. The law as reflected in Canadian cases cited in *Pistorius* does not reflect the position in our law.'

[36] In my view the answer to all of the contentions raised by the State lies in what was said by this Court in *Schoeman* at paras 73 and 74, as quoted in the foregoing paragraph above. It is clear from *Schoeman* that even if a trial court ignored evidence or displayed a lack of appreciation for its relevance, this does not amount to an error of law. Furthermore, even if the trial court did not mention something specifically in its judgment, this also did not amount to an error of law. In any event, this Court cannot rule out that the trial court actually did consider all of the evidence when it said that it had considered the totality of the evidence, and that the defence of duress was considered when the trial court said that the respondent had testified that he was scared of Chabi, feared for his life and that of his family. In addition, it also does not appear from the judgment of the trial court that it focused only on the existence of a prior agreement between the respondent and Chabi. The prior agreement had been raised by Chabi in his s 112 statement and had to be dealt with.

[37] In my view it was clear from the judgment of the trial court that it was satisfied from a totality of the evidence that the State had not proved its case beyond a reasonable doubt against the respondent. It is trite that the onus rests on the State to prove the respondent's guilt. Failing that the respondent must be acquitted. It was not for the trial court to go further and evaluate the respondent's case if there were shortcomings therein to convict.

[38] Furthermore even if this Court were to determine that the trial court has incorrectly applied legal principles in its evaluation of the evidence and the respondent's guilt, this Court could only reserve questions of law and not questions of

fact. As decided by this Court in *S v Basson* 2003 (2) SACR 373 (SCA) paras 10-11: 'When a question of law arises as aforesaid, the trial court, or, where it refuses to do so, this court has to decide on application by the state whether to reserve a question of law for consideration by this court. When this court considers an application by the state for leave to appeal against a refusal to reserve a question of law by the trial court, as with any other application for leave to appeal, it will only exercise its discretion in favour of the state where there is a reasonable prospect that if the mistake of law had not been made, the accused would have been convicted.'

And at para 6 of *Basson*, this Court said:

'The only way in which the state can appeal against the decision of the trial court in terms of the Act is therefore by way of the reservation of a question of law in terms of section 319. The state has no right of appeal in terms of the Act in respect of erroneous findings of fact by the trial judge. Only if the trial court has given a wrong decision due to a legal error can the state appeal. In order to determine whether the trial court committed an error of law, it must be determined on what factual basis it based its decision. After all, another factual basis cannot give an indication as to whether the judge committed a legal error. Whether the trial court's findings of fact are right or wrong is therefore totally irrelevant in order to determine whether he erred in law. It follows that a legal question arises only when the facts on which the trial court bases its ruling may have a different legal consequence than the legal consequence that the trial court found. For the aforesaid reasons (a) there must be certainty as to the point of law at issue and of the facts on which the trial judge based his finding; and (b) when a question of law is reserved, it must be clearly stated, not only which point of law is involved, but also the facts on which the trial court based its finding (see *Director of Public Prosecutions, Natal v Magidela and Another* 2000 (1) SACR 458 at para 462g-463c). When the state has such a legal question reserved, it is therefore necessary for the state to compile the specific facts properly and in full as part of the exposition of the question of law (see *S v Goliath* 1972 (3) SA 1 (A) at 9H).'

[39] The gravamen of the State's complaint is that the respondent has been acquitted when he ought to have been convicted for very heinous and serious crimes. Undoubtedly, there are aspects of the trial court's judgment that are troubling. Given the circumstances, it is disquieting that the trial court, having found that the respondent did not disassociate himself from the crime, and that there were inconsistencies in his evidence, nevertheless appeared not to pay much attention to the conduct of the respondent. So viewed, and in the light of the evidence, as well as the judgment of the

trial court, the State's complaint may justifiably be valid. However, as stated by this Court in *Molope* at para 55:

'This is a court of appeal, its function is not to seek to discover reasons adverse to the conclusions of the trial judge. The inquiry before this Court is whether the question of law was properly reserved, which question, in view of all the foregoing, must be answered in the negative. It is true that no judgment is perfect and all-embracing, but it does not necessarily follow that, because certain aspects were not mentioned in the judgments, they were not considered.'

Conclusion

[40] This court is precluded from entertaining an appeal from the State on the facts. As an appellate court, it is not sitting in judgment on the factual circumstances of this case, but adjudicating on whether the questions raised by the State are questions of law. For all the reasons set out above, all of the questions raised by the State are questions of facts and not of law. In view of all the foregoing, the State's application in terms of s 319 of the CPA falls short of what is required, and therefore must be dismissed.

[41] What must be borne in mind is that an innocent woman lost her life in very tragic and violent circumstances. Her murder was carried out with complete disregard for human life. It was a callous and senseless killing. The State did not bring a frivolous or vexatious application. Therefore, in the circumstances, there appears to be no good reason to mulct it with costs.

[42] In the result, I would dismiss the application for leave to appeal.



H SALDULKER
JUDGE OF APPEAL

Mabindla-Boqwana AJA (Mbha JA and Ledwaba AJA concurring)

[43] I have read the judgment prepared by my colleague, Saldulker JA. While I agree with my colleague that the application for leave to appeal should fail, in my view, such failure should not be on the grounds of non-compliance with s 319(1), but on the basis of the merits of the application.

[44] Section 319(1) of the CPA provides:

‘(1) If any question of law arises on the trial in the superior court of any person for any offence, *that court* may of its own motion or at the request either of the prosecutor or the accused *reserve that question* for the consideration of the Appellate Division, and thereupon *the first-mentioned court shall state the question reserved and shall direct that it be specially entered in the record* and that a copy thereof be transmitted to the registrar of the Appellate Division.’ (Emphasis added.)

[45] This section does not permit the framing of questions of fact as questions of law. It has been stated however that ‘the distinction between questions of law and questions of fact is notoriously difficult to draw’.⁷ The requirements to be met when seeking reservation of a question of law were restated in *Schoeman* as:

‘Before a question of law may be reserved under s 319 three requisites must be met. First, it is essential that the question is framed accurately leaving no doubt what the legal point is. Secondly, the facts upon which the point hinges must be clear. Thirdly, they should be set out fully in the record together with the question of law.’⁸

[46] In terms of s 319, the duty is placed upon the court to state the question of law it has decided to reserve. It must also direct that the question be specially entered into the record and a copy thereof be dispatched to the registrar. In *Magidela*,⁹ it was held that ‘. . . *the question must be framed by the Judge* “so as accurately to express the legal point which *he had in mind*” (*R v Kewelram* 1922 AD 1 at 3). Secondly, there must be certainty concerning the facts on which the legal point is intended to hinge. This

⁷ *Director of Public Prosecutions: Western Cape v Schoeman and Another* [2019] ZASCA 158; 2020 (1) SACR 449 (SCA) para 1.

⁸ *Ibid* para 39.

⁹ *Director of Public Prosecutions: Natal v Magidela and Others* [2000] ZASCA 4; [2000] 2 All SA 337 (A); [2000] JOL 6331 (A) para 9.

requires *the court to record* the factual findings on which the point of law is dependent (*S v Nkwenja en 'n Ander* 1985 (SA) 560 (A) at 567B-G) . . .'. (Emphasis added.)

[47] These requirements are to ensure that the court of appeal can establish with certainty what the conclusions on the legal point are. If the findings are not clear in the judgment of the trial court, it is necessary to request the trial judge to clarify such factual findings, for where that is not done, the point of law is not properly reserved.¹⁰

[48] In *S v Petro Louise Enterprises (Pty) Ltd and Others*,¹¹ where the magistrate failed to comply with the requirements in relation to the recital of the facts and the formulation of the question of law involved, the court cautiously allowed the appeal to proceed. It remarked as follows:

'Generally speaking, I think that this Court will decline to hear an appeal under sec. 104 *where the magistrate* has failed in a material respect to comply with the requirements of formulating a stated case in terms of sec. 104(1) and Rule 67(10), in spite of the unfortunate prejudice and inconvenience that may result to the appellant and the respondent from such a step – which is all the more reason, of course, why magistrates should be meticulous in performing their duties in this regard. In the present case, the stated case is so pronouncedly defective that there would have been ample justification for us to have refused to entertain the appeal. However, when this possibility was mooted at the outset of the argument, counsel on both sides, *stressing that the problem was not of their or their clients' making*, urged us to be indulgent and to listen to their arguments. We allowed ourselves to be persuaded to do that. The fact that we were prepared to hear the present appeal, in the particular circumstances present here, should not, however, be regarded as a precedent that in future cases of a similar nature this Court will be equally indulgent.' (Emphasis added.)

[49] In *Molope*,¹² this Court recognised that in certain instances courts have cautiously allowed the appeal to proceed. It remarked:

'Notwithstanding the strict application of the section and the law that has been adopted in this matter, courts have, in the past, albeit with a note of caution, reluctantly allowed the appeal to proceed even though the requirements were not met.'¹³

¹⁰ Ibid fn 1 para 40.

¹¹ *S v Petro Louise Enterprises (Pty) Ltd and Others* 1978 (1) SA 271 (T).

¹² *Director of Public Prosecutions: Limpopo v Molope and Another* [2020] ZASCA 69; [2020] 3 All SA 633 (SCA); 2020 (2) SACR 343 (SCA).

¹³ Ibid para 57.

[50] This indicates that the court always has a discretion, although it must exercise it sparingly. This was underscored by the minority judgment in *Molope*, wherein it was stated that:

‘The State’s failure to comply with the requirements of s 319 was not exclusively of its making. It was faced with an unclear judgment by the trial court and its failure to state the facts upon which it reserved the point of law. *Secondly, as I shall demonstrate below, it is possible to glean the factual findings of the trial court, which give rise to the dispute over the point of law, without difficulty or contestation. And finally, as I shall also demonstrate, despite the shortcoming in its formulation of the point of law, in substance what we are concerned with here is a dispute over a point of law and not merely dispute over the trial court’s assessment of the facts. These factors cumulatively outweigh whatever prejudice the respondents may suffer by allowing the appeal to proceed.*¹⁴ (Emphasis added.)

[51] I do not read the line of authority, and in particular *Molope*, to suggest that failure by the State to set out facts fully in its s 319 application, as explained in various judgments, is not condonable. What is important, in my view, is whether the question of law sought to be reserved and the facts upon which the findings hinge can be ascertained from the judgment and the record. This case, in my view, is not one of those where the appeal court will need to trawl through the record to learn what the factual findings of the court are, inadequate as they may be.

[52] Counsel for the applicant conceded that the factual findings upon which the proposed questions of law hinge were not fully set out in the application, as required by the judgments in *Molope* and *Schoeman*. This case, in my view, is distinguishable on the facts from *Schoeman* and *Molope*. In *Schoeman* and *Molope*, factual findings underlying the conclusion that the court reached in those cases were found to be unclear. In that sense, facts had to be clarified in order to adjudicate the correctness of the decision. In the present case, however, the facts are clear. The trial court’s conclusions giving rise to the query over the points of law raised can be clearly gleaned from the judgment without any difficulty.

[53] The thrust of the trial court’s findings was that there was no prior agreement established on the facts. The facts pointed out being the evidence led by Chabi on the

¹⁴ Ibid para 13.

fact that he and the respondent had an agreement to rob the deceased's vehicle the day before the incident. That is central to the entire judgment. The following key findings are apparent in the trial court's judgment:

'[95] It is quite clear that the evidence by Keorapetse Shabalala in terms of an agreement between him and the accused falls within the ambit of section 208. Keorapetse Shabalala was the only witness by the state that can testify about an agreement that existed between himself and the accused.

[. . .]

[99] . . . The present case clearly demonstrates that the existence or non-existence of an agreement to rob the deceased of her motor vehicle, was allegedly found on a private and personal agreement between the accused and Keorapetse Shabalala, without any knowledge of third parties. This clearly excludes the evidence aliunde and the court has to be almost exclusively reliant on a credibility finding of the accused and Keorapetse Shabalala, including an assessment of probabilities.

[. . .]

[102] This court is clearly seized with the dilemma that to find the existence or non-existence of an agreement between the accused and Keorapetse Shabalala. It would be important for this court to compare the nature and quality of the evidence of Keorapetse Shabalala with that of the accused. This court draws some sol[a]ce from the matter of *S v Maake*¹⁵ where the court was satisfied that the magistrate had properly, cautiously and correctly approached the evidence of both the appellant and the complainant. His reasoning could not be faulted. He properly assessed the quality and nature of the complainant's evidence as well as the fact that her version of the events immediately after the alleged rape had been corroborated in material respects by an independent witness. This court however does not have the benefit of an independent witness when it comes to the existence or non-existence of an intimate agreement to kill the deceased and to take her motor vehicle and certain movable assets.

[. . .]

[123]. There were also inconsistencies and contradictions in the evidence of the accused. Most prominently are those that relat[e] to the fact that he never tried to disassociate himself with the commission of the crime. He however told the court that he was scared of Chabi. It was furthermore strange to the court that when Chabi eventually dropped him off close to his house in Elandsrand he still did not confide in his parents nor the police about what happened. He however gave the court some explanation of the reasons why he did not disassociate. He testified that he feared for his life and that of his family. He furthermore rationalized that he has

¹⁵ *Maake v Director of Public Prosecutions* [2010] ZASCA 51; 2011 (1) SACR 263 (SCA); [2011] 1 All SA 460 (SCA) paras 6-8.

only one subject left to write examination on whereafter he and his family is going to move to Rustenburg and that would be the best way to come clean on this issue.

[. . .]

[127] In the end I find that the state did not prove its case beyond reasonable doubt. I reject the version of the state witness, Keorapetse Shabalala, insofar as he testified about the existence of an agreement between himself and the accused to take the motor vehicle of the deceased. His testimony was riddled with inconsistencies and contradictions in terms of the alleged agreement between himself and the accused on material aspects.

[128] The above coupled with the fact that Keorapetse Shabalala was a single witness, that presuppose a cautionary rule on this court, the court, on the totality of the evidence finds that the accused is not guilty on all the charges against him.'

[54] To the extent that there were any inadequacies in setting out the facts in the trial court's main judgment, in its judgment refusing the reservation of the point of law (refusal judgment), the trial court set out the facts upon which its findings were based in para 35 as follows:

'It was in fact the objective evidence in its totality that played a major role in the trial court rejecting Chabi's version of the existence of an agreement between himself and the accused. In this regard Chabi's evidence was of a very poor quality. The objective evidence that refuted Chabi's version are, but not limited to, the following:

35.1 The material contradictions in the evidence of Chabi when it relates to the reason why they needed the vehicle of the deceased's. See in this regard paragraph [110] and [117] of the judgment.

35.2 The version of Chabi that he shot the deceased in self-defence is highly unlikely.

35.3 Evidence by the accused that Chabi bullied him, which was to some extent corroborated by witnesses and more specifically, Mr Chris Benade and Mrs Mohau Grootboom.

35.4 The fact that Chabi stated that after they asked the witness, Andries Van der Walt, for the masking tape they went back to class, was clearly a lie. See in this regard paragraph [107] point 6 of Chabi's guilty plea. Also paragraph [111] of the judgment.

35.5 Chabi in his *viva voce* evidence said he tried to deceive the police by intentionally handing the wrong tape to the police. See paragraph [115] of the judgment.

35.6 Finally, W/O M.B. Mmatli testified that Chabi's father stated that Chabi admitted that the accused pulled the trigger of the firearm that killed the deceased. Chabi only later confessed that he pulled the trigger. See paragraph [43] of the judgment.'

Based on what is stated above, I am of the view that non-compliance with the requirements should be condoned.

[55] I now turn to consider the merits. While the applicant put forward four points of law, there are in essence only two questions worth considering in my view: First, whether the trial court erred in law by focusing solely on the question of prior agreement as an element of common purpose to the exclusion of other elements, and in the process purposely excluding other evidence; second, whether the trial court's failure to assess and make a finding that the respondent's version was reasonably possibly true, and fell within the scope of the defence of necessity, amounted to an error of law. These are the fourth and the second questions the applicant seeks to reserve. The first and third questions are questions of fact. I will accordingly not deliberate on them any further.

[56] In *Magmoed v Janse van Rensburg and Others*,¹⁶ the court affirmed the well-known dictum of De Villiers CJ in *Queen v Judelman*¹⁷ that reflects the essence of what qualifies as a question of law, that is '[w]hether certain facts constitute a definite crime is a question of law'.¹⁸ Elaborating on the meaning of this dictum, in *Magmoed*, the court held that:

'It is a genuine question of law (a) whether the evidence against an accused was such that there was a case to go to the jury or that there were grounds upon which the jury could legally convict the accused of the crime charged; or (b) *whether the proven facts bring the conduct of the accused within the ambit of the crime charged*. Category (a) above is more relevant to question 6 and I shall consider it more fully when I come to deal with that question. As the quotation from the judgment of Feetham JA indicates, *category (b) involves an enquiry as to the essence and scope of the crime charged by asking whether the proven facts in the particular case constitute the commission of the crime. This is clearly a question of law*. But, in my opinion, a question of law is not raised by asking whether the evidence establishes one or more of the factual ingredients of a particular crime, where there is no doubt or dispute as to what those ingredients are.'¹⁹ (Emphasis added.)

[57] The applicant alleged that Chabi and the respondent acted with common purpose. In order to convict the accused on the charge of murder, the applicant needed to prove that the respondent had acted in common purpose (by prior agreement or

¹⁶ *Magmoed v Janse van Rensburg and Others* [1992] ZASCA 208; 1993 (1) SA 777 (AD); [1993] 4 All SA 175 (AD); [1993] 1 All SA 396 (A).

¹⁷ *Queen v Judelman* (1893) 10 SC 12.

¹⁸ *Ibid* at 15.

¹⁹ *Magmoed* paras 27-28.

active association) together with the requisite intent.²⁰ The acts of Chabi would then be imputed to the accused. The above must be borne in mind when determining whether the proven facts fell within the scope of these offences.

[58] The meaning of common purpose was summarised as follows in *Magmoed*: 'Where it appears that the accomplishment of the common aim involved, either directly or indirectly, the unlawful killing of another human being and *where it appears that a participant (A) knew this or foresaw it as a possibility and yet persisted in his participation reckless of the consequences*, then if an unlawful killing did ensue such a participant will be guilty of murder irrespective of the fact that another participant actually perpetrated the murder and irrespective of the fact that there was no causal connection between his (A's) own conduct and the death of the deceased.'²¹ (Emphasis added.)

[59] As can be seen from the findings of the trial court, its point of departure was that it was *only* the prior agreement that would need to be proven in order to secure the conviction of the respondent. It is apparent that the fourth question of law that the applicant seeks to reserve is one that falls under category (b) noted in *Magmoed* above. What fortifies the question as being one of law and not fact is that there appears to have been a material misdirection on the part of the trial court in construing what the elements of common purpose are; specifically, that common purpose could have been constituted by either prior agreement or active association. 'A finding that a person acted together with one or more other persons in a common purpose is not dependent upon proof of a prior conspiracy. Such a finding may be inferred from the conduct of a person or persons.'²²

[60] When the trial court constrained itself to prior agreement as the basis for common purpose, it expressly excluded the evidence *aliunde* and restrained itself to the evidence of the respondent and Chabi regarding the alleged existence of an agreement. This is in spite of the fact that the court had simultaneously implied a finding that there was an active association, specifically that the respondent 'never tried to

²⁰ *Molope* para 15.

²¹ *Magmoed* para 37.

²² C R Snyman *Criminal Law* 4 ed (2002) at 260.

disassociate himself with the commission of the crime . . . He however gave the court some explanation of the reasons why he did not disassociate’.

[61] The trial court, in my view, not only erred in law by constraining itself to the question of prior agreement, but erred in a further respect, in that, by expressly excluding other evidence, it went against a trite principle to be applied in criminal trials as set out in *S v Van den Meyden*,²³ and endorsed in numerous decisions, that the trial court ‘must account for all the evidence. Some of the evidence might be found to be false; some of it might be found to be unreliable and some of it might be found to be only possibly false or unreliable, but none of it may simply be ignored’.

[62] The trial court’s approach of assigning itself to comparing the evidence of only two witnesses, Chabi and the respondent (on the issue of the agreement) without considering the impact that the other evidence placed before the court might have on the credibility of the two witnesses was a material misdirection of the law. The intentional exclusion of direct evidence of objective individuals in respect of the relationship between the two witnesses constituted a material error of the law.

[63] The issue however does not end there. While the court misdirected itself by focusing solely on prior agreement, which need not be shown to prove common purpose, the trial court proceeded to make a finding that the respondent ‘feared for his life and that of his family’. A factual finding, albeit scant, has been made that the respondent acted out of necessity, which is the reason the trial court attributed to the respondent’s failure to disassociate himself from the commission of the crime. The trial court did not demonstrate how it reached that conclusion. In its refusal judgment, the trial court referred to its summary of the evidence, detailed case law on necessity, and its finding which were captured in one sentence stating, ‘there was thus no duty upon the accused to sacrifice serious injury or his life to protect the deceased from harm and/or death’.

[64] While one may be critical of the trial court’s clear failure to assess the evidence of the respondent as against the requirements of necessity (particularly the fact that

²³ *S v Van der Meyden* 1999 (1) SACR 447 (W) at 449H.

the respondent accepted that his life was not threatened at any stage by Chabi during the commission of the crime), that issue remained a question of fact, which this court is not at liberty to interfere with. It is an enquiry that involves judicial process of evaluating evidence. In the end, the fact that the trial court erred by confining itself to the question of prior agreement becomes academic.

[65] For these reasons, the application for leave to appeal is dismissed.



N P MABINDLA-BOQWANA
ACTING JUDGE OF APPEAL

Appearances

For appellant:

A Coetzee

Instructed by:

Director of Public Prosecutions, Gauteng

Director of Public Prosecutions, Bloemfontein

For respondent:

D J Combrink

Instructed by:

Du Toit Attorneys, Centurion

Lovius Block Attorneys, Bloemfontein