

SOUTH AFRICA / JUDGMENT

# Khesa and Others v S (Appeal) (CA49/2021) [2024] ZANWHC 288 (22 November 2024) [2024] ZANWHC 288

## COURT

North West High Court, Mafikeng

## BEFORE

Dibetso-Bodibe, M.E Mmolawa

## CASE / FILE NUMBER

CA49/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST PROVINCIAL DIVISION, MAHIKENG

Case

No.: CA49/2021

SRC143/2013

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: NO

Circulate

to Regional Magistrates: NO

In

the matter between: PATRICK  
KHESA  
1ST APPELLANT  
JERRY  
RATSOENYANE  
2ND APPLICANT  
MOEKETSI  
MTUZE  
3RD APPELLANT  
MONNAPULE  
TAU  
4TH APPELLANT  
RAYMOND  
KAPA  
5TH APPELLANT  
ELIAS  
BOCHEHELI  
6TH APPELLANT  
and  
THE  
STATE  
RESPONDENT

JUDGMENT

DIBETSO-BODIBE AJ

INTRODUCTION

- [1] “The offences in this incident were manifestations of gang-related violence in the notoriously gang infested area ... in which the accused and their victims lived and had grown up... I am acutely conscious of the very real disadvantages to which young persons like the accused are subjected in that environment. The circumstances are such that they and their peers are under significant temptation and enticement to become involved in gang membership and activity. This comes about not only because of pervasive poverty and unemployment, but also because of the prevailing social norms in the area, which seem to accept gang culture as part of the way of life. This is manifest by the way in which the various gangs that operate in the area have carved out territories within the suburb in which one or other of them holds a sway and influence. It is also borne out by the evidence that such is the hold of gang culture in the area that there is little respect for the forces of law and order. The police are openly defied and disregarded on occasion. It is a place where life is treated cheaply, and killings and revenge killings are the order of the day...”[1]
- [2] “Recognition of these factors means that one’s moral condemnation of the accused’s involvement in the gangs and their criminal activities must be measured. They are each of them, persons against whom the odds have been stacked from the outset which in a material

sense is an indictment of our far from perfect society. Recognising these factors however, does not afford proper reason for the adoption by the court of an attitude of maudlin sympathy from them in regard to the very serious offences in which they involved themselves. They knew that what they were doing was criminal and they must be held appropriately accountable for their wrongdoing. Society in general, and the law abiding members of their own community, would be grievously let down if the court were not to mark their misdeeds with the gravity they deserve. I also recognize that it takes courage for many of the civilian witnesses from the community to come to court and testify in such matters. The faith that such persons have shown in the criminal justice system should not be betrayed by misguided show of excess sympathy or understanding for the situation of the accused.”[2]

[3] This is an appeal against the convictions and sentence by the Stilfontein Regional Court on 08 November 2016. Leave to appeal against both convictions and sentence was granted by the court a quo. Appeal against both conviction sentence is in respect of the 1st, 2nd, 4th and 5th Appellants. The 3rd Appellant is appealing sentence only.

[4] The grounds of appeal are that the trial court erred:-

[4.1] In relying on the evidence of a single witness, Mr Khotso Motete (Motete) without applying the necessary caution,

[4.2] In failing to take into account the period of more than three years in custody whilst awaiting trial, and

[4.3] In failing to consider whether the prescribed sentence was just and proportionation in the circumstances of the case.

#### THE EVIDENCE OF THE SINGLE WITNESS – MR MOTETE

[5] Motete testified that he belonged to a gang known as Gheto Rough (GR) and that Accused 1, 2, 3, 4, 5, belonged to Hard Living gang (HL), whilst Accused 6 belonged to Money Lovers gang (ML) an affiliate of (HL). The members of these gangs are resident in Chris Hani, Kanana and their territories are divided by a street.

[6] Motete knew all the Accused and gave the trial court their nicknames.

[7] He was frank with the court that both gangs were rivals and that no peace reign between them. That normally they fight against each other and that their fight is central to the issue of territory.

[8] Motete and the Deceased Abel Mabuza Sasing were friends and belong to the same gang, GR. The Deceased was attacked and killed on 02 February 2013 (the day of the incident).

[9] On that day of the incident Motete was in the company of the Deceased, Deceased's brother and Andile. They went to a tavern called Stigga tavern at around 12h00 and were busy drinking beer until 16h00, whereafter they proceeded to another tavern, Mamazulu tavern.

On their way they came across six members of HL (the six accused before the court) and when the Accused came walking fast towards them Motete ran away and did not notice what happened to the Deceased, the brother of the Deceased and Andile. He ran towards the western side of the GR territory. When he looked back he saw that the Accused held on to the Deceased. He jumped over the fence of a house nearby and hid behind the fence enhanced by evergreen hedges.

- [10] Motete was approximately 20 – 25 meters from where the Accused held on to the Deceased. He was squatting behind the hedges. He was able to see clearly what was happening behind the hedges. He saw the Accused, all six of them busy making stabbing motions towards the Deceased. They all carried weapons and were persistently stabbing the Deceased. When the Deceased started stumbling, some of the Accused, more than one of them, held the Deceased with his belt. Motete was not able to see who the Accused were as they encircled the Deceased.
- [11] When asked if it was a case that the Accused were attacking and stabbing the Deceased one by one, his response was that the Accused stabbed the Deceased simultaneously. Motete stated that he was not able to see how many times each Accused stabbed the Deceased. He described the weapons each Accused had in their possession. Accused 1 had a knife, a Rambo knife, Accused 2 had a three star pocket knife, Accused 3 had a panga and a garden fork. Accused 4, 5 and 6 had knives in their possession.
- [12] Only the Accused attacked the Deceased, there were no other people at the scene.
- [13] When he realised that the accused might see him from his hiding place behind the hedges, he jumped over the fence and landed inside a yard of Mamazulu tavern and went inside to get help. Mamazulu, the owner of the tavern hid Motete in one of her bedrooms. From the bedroom where Motete was hidden, he was able to see through the window which was facing the gate. When he looked through the window, he saw Accused 5 stab Tefo, the boyfriend to Mamazulu, on the right upper arm. He also saw Accused 2 hitting someone with a broken empty beer bottle. This person was later identified as “Big House”. At this stage he saw all the Accused arriving at the premises of Mamazulu tavern. Mamazulu called the police and the group sped away. He did not see where the Deceased was left.
- [14] Motete was there when the police arrested Accused 1, 2, 5 and 6. He showed them to the police. He was not present when Accused 3 and 4 were arrested.
- [15] During cross-examination, Motete conceded that during his evidence-in-chief he did not mention the fact that apart from the stabbing motions, the Accused were also kicking at the Deceased.
- [16] He was extensively cross-examined on the fact that he saw all the Accused making stabbing motions towards the Deceased he responded: “wat ek sien is almal maak steek bewegings maar dit kan moontlik wees dat nie almal het maar steek bewegings gemaak maar onder daardie omstandighede het dit voorgekom asof almal steek bewegings maak”. Loosely

translated he said that what he saw was all making stabbing motions but that can become difficult to see that not all of them made stabbing motions but under the circumstances it appeared as if all were making stabbing motions.

- [17] He testified that he was able to see what happened at the gate of the tavern through the window which was dressed with a lace. He confirmed that Tefo was stabbed with a knife once and not with a bottle.
- [18] Motete was asked why during examination-in-chief he told the court that Accused 4 had a normal knife but in his statement he told the police that Accused 4 had an axe. His response was that Accused 4 had a knife at the scene where they apprehended the Deceased but when he came to Mamazulu tavern, he had an axe.
- [19] Accused 1 and 3 pleas of alibi was put to Motete and his response was that he saw them. The versions of the Accused were put to Motete that all of them deny stabbing the Deceased except for Accused 4. His response was that he does not know that story.
- [20] Tefo, the boyfriend to Mamazulu, told the court that they received a message that the gangs are fighting and the other group is chasing a person who was running towards their tavern. He immediately went to close the gate but whilst still waiting for the lock a group appeared and they started hitting the gate with pangas and he and Mamazulu retreated back to the house.
- [21] The group together with Accused 5 opened the gate and went inside the yard and Accused 5 approached him with a knife and stabbed him on the right upper arm. This evidence corroborated that of Motete in all respects. In its judgment the court a quo stated that in fact Accused 5 was found guilty for stabbing Tefo with a knife.
- [22] Tefo said the group had pangas, knives, spade and garden fork. He only knew Accused 5 and could not identify the other accused. It was put to him that Accused 5 stabbed him with a broken beer bottle and not a knife and he responded that it was a knife.
- [23] Dr Rhada Moorad, a forensic pathologist, conducted post-mortem on the body of the Deceased on 6 February 2013. The report was handed in as exhibit D.
- [24] According to her evidence all wounds were inflicted at more or less the same time and were listed under recent injuries. Different types of injuries were noted by her. A1 was abrasions caused by blunt force trauma by blunt object, A2 was an incised wound on the side of the palm, caused by a sharp long object. This was noted as a defensive wound. A4 was an oval incised wound on the chest wall measuring 10 millimeters by 4 millimeters caused by a sharp object. A5 was a penetrating incised wound thus a stab wound, the depth of the wound is greater than the length. A6 was an incised wound on the right frontal scalp, 12 millimeters by 58 millimeters. Three incised wounds were also noted on the left side of the scalp, one in a star shape measuring 45 millimeters by 25 millimeters. A8 referred to three oval linear abrasions caused by blunt force trauma. A9 was a penetrating

incised wound or stab wound on the right lower back, 16 millimeters by 15 millimeters. A10 was an abrasion caused by blunt force trauma. A11 was an incised wound on the right upper back, 48 millimeters by 18 millimeters. A12 was an incised wound on the left mid back, 30 millimeters by 12 millimeters. A13 was an abrasion on the mid back. A14 was an incised wound on the right scalp, 85 millimeters by 30 millimeters.

- [25] Dr Moorad concluded that there were a variety of injuries on the body of the Deceased, blunt force trauma, superficial injuries, sharp force injuries and penetrating sharp force injuries meaning that it was unlikely that the injuries were caused by the same object. The fatal wound in the neck referred to as A5 caused the death of the Deceased. But all the other wounds would also have resulted in blood loss.
- [26] The State also called Miriam Mosia, the owner of Plaatjies tavern, to come and testify regarding the incident at the tavern. She was not useful in that regard as she was not at the tavern on the day of the incident. However she shed light on the dealings of gangsterism at Chris Hani, Kanana, were the rival gangs involved in this matter reside. She said Accused 1, 2, 3, 4 and 5 were the patrons at Plaatjies tavern. She did not know Accused 6.
- [27] Accused 1 testified that he was at Plaatjies tavern between the hours 09h00 and 10h00. He was in the company of Seun, Mpopi and Lesego. Between 11h00 and 12h00 they left the tavern to Orkney to go and collect the bank card from the bank. When they found the bank closed they visited Maria's tavern. They later went back to Kanana and Accused 1 went home and took a bath at around 16h00. He never visited Mamazulu tavern. Earlier on that day he did see Accused 2 and 6 at Plaatjies tavern. He belongs to Money Lovers gang.
- [28] He knew the Deceased from primary school, he never had any problems with the Deceased and does not know how the Deceased was killed.
- [29] During cross-examination he testified that the police arrested him at home after bathing. Lesego and Seun were present but were not arrested. He did see Accused 2 and 6 at Plaatjies tavern and they left them at the tavern when they went to Orkney. He testified that there were territorial fights between HL and GR gangs and members of GR were not allowed in the territory of HL and vice versa. Mamazulu tavern is in the territory of GR while Plaatjies tavern is situated in the territory of HL. These gangs protect their taverns in their respective territories. Accused 1 gave instruction to his attorney not to put any version to Motete concerning the problems they have encountered.
- [30] Accused 2 went to Plaatjies around 10h00 and he was in the company of Mpo, Accused 4 and 5. At 12h00 they received a message from Mosiwa, owner of the tavern that there was a group that was fighting in the area and was on their way to Plaatjies tavern. Accused 4 and 5 jumped over the fence at the back of the tavern. The group arrived at the tavern armed with stones and weapons and they pelted stones at the patrons who fought back by throwing crates at the group. During the

altercation the gate was opened and he and the other patrons chased after the group. He followed one person who entered the house of Mkhize. Whilst Accused 2 was still talking to Mkhize that person walked away. He went back to the tavern, nothing happened and he left Plaatjies between 15h00 and 16h00. He was alone and proceeded to Mamazulu tavern.

- [31] When Accused 2 arrived at Mamazulu tavern, the gate was closed but he was able to see Big House holding his head as he was injured. He saw that Tefo was also injured on the upper arm. He testified that he also saw Motete inside the yard holding a knife. According to his evidence, Motete was also involved at the incident that happened at Plaatjies tavern earlier on. He then asked Motete what the problem was as they were eager to sort the problem out with him. Instead Motete responded by insulting him and he insulted him in return. At the time, he went back to Plaatjies in the company of one Sebata. Later on he went to his residence. He was arrested on the day of the incident on his way from the shop. Motete was a passenger in the police van and he pointed him out.
- [32] During cross-examination Accused 2 said that when he arrived at Plaatjies tavern he was still intoxicated as he never slept the previous night. He said he saw Accused 6 sleeping on the ground outside the tavern. He denied having a three star knife (as was described by Motete). However he was in possession of a pocket knife which he had in his possession when he was chasing the person from the group which came to Plaatjies tavern.
- [33] He testified that he never saw the Deceased on that day but assumed that Motete just implicated him because they had an altercation at Mamazulu tavern. He said that he forgot to mention that Accused 1 did visit Plaatjies tavern around 10h00 in the company of Seun, Lesego and Serge. He said that the person that he chased is known as Setomo and is the member of GR. He got involved in this incident though he is a member of Watos Lokos.
- [34] Mosiwa, owner of Plaatjies testified on behalf of Accused 2. He testified that the group of attackers arrived at Plaatjies tavern around 12h00. Accused 1 and 3 were not present. He immediately closed the gate and the group started pelting stones. At that time Accused 2, 4, 5 and 6 jumped over the wall at the back of the tavern and once the group left Accused 2, 4, 5 and 6 returned to the tavern. He saw them entering the premises through the gate.
- [35] He was aware of gangsterism and the infights between the gangs and that is why only members of HL are guests at his tavern. They have a good relationship and in his absence or that of the security the gang maintains law and order at the tavern.
- [36] During cross-examination when confronted with the version of Accused 2 that only Accused 4 and 5 jumped at the back of the tavern and returned later he changed his version saying that he could have made a mistake as many of the patrons jumped over the fence and that it could be possible that only Accused 4 and 5 jumped the fence. When confronted further that according to Accused 2 he returned to the tavern alone, he said that Accused 2 would be in a better position to give evidence in that regard. He maintained that he saw Accused 4 and 5 at the gate where Accused 2 was.

- [37] He said that he went inside the tavern and did not notice that the group was chased away by patrons by throwing crates and running after them. To this end he was confronted with his evidence-in-chief that he went to close the gate when the group arrived and that he saw what happened.
- [38] He was further confronted with their conflicting versions with Accused 2. The latter said that Accused 6 was sleeping outside the tavern whilst he said that Accused 2, 4, 5 and 6 were drinking together before the group came and his response was that he does not know Accused 6 very well.
- [39] Accused 3 testified that he is a member of HL. On the day of the incident he was at Plaatjies tavern since the previous evening until around 09h00 when he left the tavern. He did not see Motete on the day of the incident. He knows that Motete was a member of Desera gang and that HL and Desera gangs were enemies and that is why Motete gave false evidence on what happened. He never saw the Deceased on the day of his demise and he never visited Mamazulu's tavern on the day of the incident.
- [40] During cross-examination he said that he went home which is not far from Plaatjies to sleep until 12h00 and then went to see his friend Mpapa where they consumed alcohol until 18h00. He disputed the evidence of the owner of the tavern, Mosiwa, that he saw him in the company of Accused 1 on the day of the incident. He stated that he knew Accused 1 who does not stay far away from his parental home. He said that although Accused 2 was at the tavern, he was not in his company. He acknowledge that Accused 2 and 4 were his friends and the rest were acquaintances. In fact Accused 4 stays together with him at his parental home.
- [41] Accused 4 testified that he was at Plaatjies tavern at around 11h00 on the day of the incident and that he was in the company of Accused 2 and 5. He had already consumed alcohol and he was under the influence of alcohol. He saw Accused 6 at the tavern. They received information from Mosiwa that a group of people was on their way to Plaatjies. The group came and attacked patrons by throwing stones.
- [42] He jumped over the fence together with Accused 5 and Madoda and were attacked by three members of GR gang. They were pelted with stones and he got injured on his right ear. One of the attackers was struck by a stone thrown by Madoda and when he fell his friends retreated. When we advanced one of the attackers was lying on the ground with a knife next to him.
- [43] Accused 4 testified that he picked up the knife of the person lying on the ground and stabbed him with it on the head as he was crawling in the direction of a nearby house. He did not know the person he stabbed but when the photo album was shown to him, he recognised the Deceased as a person he stabbed.

- [44] He then chased after the other two men and when he could not find them he returned to Plaatjies tavern. When he chased the two men he left Madoda and Linka with the Deceased and he did not see what they did to the Deceased. He left the tavern at about 13h00 and returned at about 19h00.
- [45] He testified that he stabbed the Deceased because the Deceased was aware that they were not allowed in the area and further that the group challenged them by throwing stones at them.
- [46] He told the trial court that he was a member of HL and that group that attacked them belonged to GR and the two gangs were enemies. He said that he knew Motete and that Accused 3 who stays at his parental home is his nephew and Motete used to visit him before he became a member of GR in 2012. He testified that since Motete became a member of GR, there was never peace between the two of them because Motete became something else.
- [47] He testified that he never visited Mamzulu tavern on the day of the incident. He was arrested at 02h00 on Sunday, 03 February 2013. During cross-examination he said that he was aware that a person could die as a result of being stabbed on the head with a knife.
- [48] Accused 4 told the court that Accused 2, 5 and 6 were together and he joined them after Accused 3 left. He never saw Motete on the day of the incident and he was not one of the people who chased him. He failed to clarify the statement put to Motete by his legal representative that he was never in the company of Accused 5.
- [49] He stated that the statement of Motete that he picked up the knife of the Deceased and stabbed him once on the head and the Deceased fell to the ground and stood up and ran into the yard cannot be correct. His evidence was that the Deceased fell after being struck by a stone and his knife was lying next to him and he picked it up and stabbed him on the head as he was trying to crawl to the nearby house.
- [50] He further distanced himself from the version of accused 2 that when Accused 2 arrived at Plaatjies tavern he found Accused 4 in the company of Accused 5. According to him he arrived at the tavern in the company of Debets and Accused 2 was already at the tavern. He said that he could not see Accused 1 at the tavern for a short while. He was unable to clarify why he did not mention this during his evidence-in-chief.
- [51] He does not agree with the evidence of Mosiwa that he, Accused 2, 5 and 6 jumped over the fence at the back of the tavern premises. His version is that when he jumped the fence he was with Accused 5 and Madoda and that he never returned to the tavern in the company of Accused 2, 5 and 6 as stated by Mosiwa. He returned alone to the tavern.
- [52] Accused 5 testified that he was a member of HL. He arrived at Plaatjies tavern at around 11h00 on the day of the incident. He joined Accused 2 and 4 whilst Accused 6 was sitting at another table. He had already consumed alcohol. Mosiwa told them that members of GR gang were on their way to Plaatjies tavern.

- [53] A group arrived and threw stones at patrons. Accused 2 moved to the gate and kept it closed. He fled and jumped the fence at the back of the tavern and hid behind a brick wall where he was able to see the attackers throwing stones. He noticed Accused 4 and Madoda jumping over the fence. The attackers at the gate ran away and when Accused 2 opened the gate some of the patrons chased after the group. He also joined in the chase and he saw Accused 4 stabbing a man (the Deceased). He and Debets chased after two GR member but could not catch them. As they were walking home and passing at Mamazulu tavern, they realised that the gate was closed.
- [54] Accused 5 had an altercation with Tefo, the boyfriend of Mamazulu. According to him Tefo was very aggressive and told him that he was not wanted in the premises. He testified that he became angry and broke an empty beer bottle in his possession and stabbed Tefo in his arm. After that he returned to Plaatjies tavern. He had too much alcohol to drink.
- [55] During cross-examination he said he returned to Plaatjies tavern alone after the group which came to attack them had left and none of the Accused were present until he left for his residence. To this end he did not agree with the evidence of Mosiwa that he, Accused 4 and 5 returned together to Plaatjies tavern after the incident.
- [56] According to him the Deceased was running into the yard when Accused 4 stabbed him from behind on the back. He did not agree with the statement put to Motete by his legal representative that the Deceased was standing when Accused 4 stabbed him. His instruction was that the Deceased was running into the yard and Accused 4 stabbed him.
- [57] Accused 6 went to Plaatjies tavern on the day of the incident at around 10h00. He was in the company of Stase and Mabuda. When he arrived at the tavern Accused 1, 2, 4, 5, were already at the tavern. He was not in their company. They received a report that the GR gang was on its way to Plaatjies tavern. The group came and they started throwing stones. The patrons in return chased the GR members. However he did not chase the group, he assisted Mosiwa, the tavern owner, to clean the tavern.
- [58] According to his evidence he did not sleep on the ground outside the tavern. He had a headache. He was arrested near the place where the body of the Deceased was lying when he was on his way home. He did not have any problems with Motete. His suspicion is that the GR gang members told Motete to implicate him in the killing of the Deceased.
- [59] During cross-examination he disputed the evidence of Mosiwa that he, Accused 2, 4 and 5 jumped over the fence at the tavern, when the group arrived and that they all returned later. He confirmed his evidence that he never left the premises of the tavern as he was helping Mosiwa to clean the tavern, a version that Mosiwa could not remember.

#### THE STATE WITNESS AS A SINGLE WITNESS

- [60] The evidence that connects the Accused to the commission of the offence is that of a single witness, Motete. His evidence therefore must be treated with caution. Section 208 of the Criminal Procedure Act 51 of 1977 (the CPA) provides that an accused may be convicted of any offence on the single evidence of any competent witness.
- [61] “the provision should only be applied when the single witness is clear and satisfactory in every material respect, has no interest or prejudice, did not contradict himself, does not have any previous convictions for dishonesty, had a proper opportunity for observation and so on”[3]
- [62] However, “there is no rule of thumb test or formula to apply when it comes to consideration of the credibility of a single witness. The trial court will weigh his evidence, will consider its merits and demerits and having done so, will decide whether it is trustworthy and whether, despite the fact that there are shortcomings or defects or contradictions in the testimony he is satisfied that the truth has been told... the appeal must succeed if any criticism however slander, of the witnesses’ evidence were well founded ... the exercise of caution must not be allowed to displace the exercise of common sense.”[4]
- [63] The incident of the killing of the Deceased took place around 14h00, visibility and eyesight of Motete could not have been obscured. From the position that Motete was hiding he saw the Accused making stabbing motions towards the deceased. He saw Accused 4 stab the Deceased once on the head. This fact has been admitted by Accused 4 except for the difference in their evidence concerning the position of the Deceased when he was being stabbed. Motete’s version is that the Deceased was stabbed whilst standing and thereafter he ran to the nearby yard whilst Accused 4’s evidence is that the Deceased fell after being struck by a stone, his knife fell to the ground next to him and he took that knife and stabbed the Accused who was crawling to the nearby house.
- [64] After he ran to Mamazulu tavern and was hid in the bedroom, Motete saw Accused 5 stab Tefo with a knife on the upper arm. Tefo confirmed this fact during his evidence. Accused 5 who admitted to stabbing Tefo, disagreed with them only regarding the object used to stab Tefo. Motete and Tefo told the court that Tefo was stabbed with a knife whilst Accused 5 said that he stabbed Tefo with a broken beer bottle.
- [65] Motete told the trial court that the Accused were in possession of weapons and he thereafter described the weapons each Accused had in their possession. Tefo also told the court that the group that came to Mamazulu were in possession of pangas, knives, garden fork and a spade. Motete also gave a similar description of the weapons as weapons which were used to attack the Deceased.
- [66] Critical to Motete’s evidence is that the Accused were stabbing the Deceased spontaneously: When Dr Moorad, the forensic pathologist gave evidence of the injuries he observed on the Deceased body, she confirmed that the types of objects used were different types of objects, others sharp and capable of penetrating, others blunt and causing blunt trauma. Around fifteen injuries were described and the different types of object used to inflict those injuries.

Her findings were that the Deceased died from the stab wound on the neck but that does not rule out the fact that there was loss of blood from other inflicted wounds. In my view, it can only be the weapons of the six accused as was described by Motete which inflicted the injuries on the body of the Deceased.

[67] Concerning the Accused, their testimonies were not compromised or polished when it came to their stern belief in culture of gangsterism with territorial protection being in the forefront. When evaluating their evidence and that of Mosiwa, the witness for accused 2, one can safely draw an inference that the taverns in Kanana are indirectly controlled by the gangs. The tension of limiting evidence from court of law cannot therefore be overruled. But the court cannot and must not surrender the baton of justice at the feet of the lawlessness of gangsterism. The Constitution of the Republic of South Africa remains

our bolstering pillar of support.

[68] In the circumstances, nothing influenced Motete's observations, his knowledge of the Accused and their affiliation to the different gangs. The Accused also admit to knowing him prior to the incident. In my view, whether the killing of the Deceased occurred from an attack of a number of people or not, Motete was able to identify all of them. The trial court described him as a credible and reliable witness whose evidence was not swayed during cross-examination.

[69] The evidence of the Accused is that they found themselves at Plaatjies at the time of the incident. Accused 1 and 3 pleaded alibi as regards the time of the incident but due to overwhelming contradictions in their evidence an inference may be drawn that there may have polished their evidence to remove themselves from the scene except for Accused 4 who admitted to stabbing the Deceased on the head.

[70] Although Motete belongs to a gang which is a rival to that which the Accused belong one may not rule out the possibility of an interest or bias adverse to the Accused but based on his evidence before this court, that will not be sufficient reason to find that his evidence is not credible. Nothing in his evidence suggest that he was hellbent to falsely implicate the Accused. There is no semblance of evidence other than his admission to being a gangster, that leads to the fact that he was out and out to falsely implicate the Accused. If one were to accept that reasoning, no evidence of a person admitting on their own to being a gangster would ever be believed in any court of law.

[71] The Accused, on the analysis of their evidence did not come up as good witnesses. Their evidence is contradictory and they were not good witnesses in the instances highlighted. They were not credible witnesses and the trial court correctly rejected their evidence.

#### APPLICATION OF THE COMMON PURPOSE DOCTRINE

[72] “Where two or more people... actively associate in a joint unlawful enterprise, each will be responsible for specific criminal conduct committed by one of their number within their common design. Liability arises from their common purpose to commit the crime...

the conduct of each of them in the execution of that purpose is imputed to the others. These requirements are often couched in terms which relate to consequences such as murder.”[5]

[73] “The liability requirements of a joint criminal enterprise fall into two categories. The first arises where there is a prior agreement,

express or implied, to commit a common purpose. In the second category, no such prior agreement exists or is proved. The liability

arises from an active association and participation in a common criminal design with the requisite blameworthy state of mind.”[6]

[74] In the present matter, the evidence does not prove any such prior fact. In other words their common purpose is by active association and participation in a common criminal design with a requisite blameworthy state of mind and “where the prosecution relies on common purpose as a basis of criminal liability in a consequence crime such as murder, a causal connection between the conduct of each participant in crime and the unlawful consequence caused by one or more in a group is not a requirement.”[7]

[75] In the circumstances, I am satisfied that the court a quo correctly applied the doctrine of common purpose in this case as relied on by prosecution.

#### SENTENCING BY THE COURT A QUO

[76] On of the ground of appeal is that the court a quo erred in failing to take into account the accused’s period in custody whilst awaiting trial. At the commencement of trial the court explained to the Accused that the minimum sentence of 15 years imprisonment is prescribed for the offence in terms of the Criminal Law Amendment Act 105 of 1997. From the trial record it appears that the defence in mitigation placed before the court for consideration in sentencing the Accused the fact that the Accused spent more than three years in custody whilst awaiting trial. My understanding is that the trial court did take into consideration the length of time it took to bring the case to finality, however, the period spent in custody awaiting

trial must be weighed alongside other factors to determine if it constitute substantial and compelling circumstances. The trial court considered the mitigating factors alluded to on behalf of the Accused and concluded that the aggravating circumstances in the matter far outweighs the mitigating factors.

[77] A plethora of legal authority support a cautious approach to be taken by a court of appeal when considering the sentence imposed by the trial court and the Constitutional Court had this to say in this regard:

*“Ordinarily sentencing is within the discretion of the trial court. An appellate court’s power to interfere with sentences imposed by courts below is circumscribed. It can only do so where there has been an irregularity that results in a failure of justice, the court below misdirected itself to such an extent that its decision on sentence is vitiated, or the sentence is so disproportionate or shocking that no reasonable court could have imposed it.”[8]*

[78] In the circumstances, the sentences imposed were in accordance with the prescripts of Section 51(2) of the CLLA. This Court has no reason to interfere with the sentences imposed and is satisfied that the sentences are proportionate to the offence committed

[79] In the premises, the appeal cannot succeed and the following order is made:

ORDER

The appeal is dismissed.

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O.Y DIBETSO-BODIBE

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

I agree

M.E MMOLAWA

Delivered: This judgment is prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties or their legal representatives by email and by release to SAFLII

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- [1] S v Jordaan and Others (CC20/2017) [2018] ZAWCHC 10 (7 February 2018) (Jordaan) at para [3]
- [2] Jordaan ibid at para [4]
- [3] R v Mokoena 1932 OPD 79 at 81
- [4] S v Sauls 1981(3) SA 172 (A) at 180E-G
- [5] Thebus and Another v S (CCT36/02) [2003] ZACC12 (28 August 2003). (Thebus) at [18]
- [6] Thebus ibid at [19]
- [7] Thebus ibid at [22] the CCT referencing from Section 2(12) of the Canadian Criminal Code and the effect of the judgment of S v Mgedezi and Others 1989 (1) SA 687 (A) on the application of the doctrine of common purpose
- [8] Bogaarels v S (CCT 120/11) [2012] ZACC (28 September 2012 at para [41]

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