

SOUTH AFRICA / JUDGMENT

# S v Gqogqo and Another (CC 35/2021) [2024] ZAECELLC 4 (14 February 2024)

**[2024] ZAECELLC 4****COURT**

Eastern Cape High Court, East London Local Court

**BEFORE**

T Malusi

**CASE / FILE NUMBER**

CC 35/2021

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**Policy****IN****THE HIGH COURT OF SOUTH AFRICA****(EASTERN****CAPE DIVISION, EAST LONDON CIRCUIT)****Case****No: CC 35/2021****In**

the matter between:

THE  
STATE  
and  
ZUKILE  
GQOGQO  
Accused  
1  
WANDISA  
WANDA TIMOTHY  
Accused  
2

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**JUDGMENT**

MALUSI J:

[1] The two (2) accused, Zukile Gqogqo, a 43-year-old male person and Wandisa Wanda Timothy, a 55-year-old female are facing the following charges:

1.1 Robbery with aggravating circumstances as defined in s1 of the Criminal Procedure Act 51 of 1977;

1.2 Murder;

1.3 Unlawful possession of a fire-arm in contravention of s3 of the Fire-Arms Control Act 60 of 2000 (the Act); and

1.4 Unlawful possession of ammunition in contravention of s90 of the Fire-Arms Control Act 60 of 2000 (the Act).

[2] The State alleged that on or about 7 June 2018 and at Ncera village, Kidds Beach in the district of East London the accused acting in common purpose with other co-perpetrators unlawfully and intentionally assaulted Mzukisi Mgudlwa, and did there and there with force take from him the property specified in annexure A to the indictment which was in his lawful possession. It was further alleged that aggravating circumstances were present in that the accused wielded a fire-arm and inflicted grievous bodily harm on Mzukisi Mgudlwa (the deceased).

[3] In count 2 the State alleged that on the same date and place mentioned in count 1 the accused acting in common purpose with other co-perpetrators, unlawfully and intentionally killed the deceased, an adult male person.

[4] In count 3 it was alleged that on the same date and place mentioned in count 1 the accused jointly with other co-perpetrators were in unlawful possession of a fire-arm, namely, a lorcin 9mm pistol with serial number 457574 without holding a licence or permit or authorisation issued in terms of the Act to possess the fire-arm.

[5] In count 4 it was alleged that on the same date and place mentioned in count 1 the accused jointly with other co-perpetrators unlawfully had in their possession 9mm ammunition, the exact number of which is unknown to the state, without holding a licence/s for a fire-arm capable of discharging that ammunition.

[6] The accused pleaded not guilty to all the counts. They elected not to provide an explanation for their respective pleas.

- [7] Accused 2 made formal admission in terms of s220 of the Criminal Procedure Act 51 of 1977 (the Act). As a result of those admissions the identity of the deceased, the post mortem finding, the chain evidence relating to the time the deceased's body was discovered until the post mortem examination, the photographs relating to the crime scene and the photographs relating to the recovery of the Volvo S40 motor vehicle were all no longer in dispute.
- [8] For a better appreciation of the issues that arise in this matter it is necessary that the synopsis of the background be provided. Most of this evidence was either common cause or not disputed by the parties involved.
- [9] The deceased met accused 2 in 1992 and they started a love relationship. They were later married by customary rights and the traditional rituals were performed. In 1997 they were blessed with a child. Initially the marital home was in Mdantsane. During 2011 the deceased and accused 2 relocated to Ncera, Kidds Beach. Over a period of time the couple built an expansive residence. They had erected a 3m high fence with three (3) gates on the perimeter. It is common cause that the deceased was security conscious and ensured that the gates were closed and locked almost at all times. Both the deceased and accused 2 stopped working various times to concentrate on their farming enterprise. They planted vegetables on the property and sold eggs. They also owned a herd of cattle and pigs with a herdsman employed to look after these.
- [10] During 2018 Mbulelo Mthimkhulu was employed as a herdsman by the couple. He stayed on his own inner shack in Ncera. He testified that a few days before 7 June 2018 he was approached by accused 2 who requested him to gouge out the deceased eyes. He understood the request to mean that he must kill the deceased. He flatly refused the request as he told her that he did not have the courage to kill. Accused 2 informed him that she will look for other people to perform the deed.
- [11] A few days later he was informed by accused 2 that the deceased had been murdered. She provided no details to him. Sometime later he was visited by police investigation the death of the deceased. The police took a statement from him. According to him his employment was terminated by accused 2 after the police visit though accused 2 states he was dismissed due to misconduct.
- [12] Andiswa Fembi gave evidence that on 7 June 2018 she received a call on her mobile phone from her boyfriend, Ntsizwa. He instructed her to take the phone to Sifiso Mngwembe in her neighbourhood. She complied and overheard the conversation between Ntsizwa and Sifiso. Ntsizwa requested Mngwembe to come to King William's Town as 'someone' was looking for him. Andiswa was thereafter instructed to provide taxi fare for Mngwembe to come into town. She decided to travel with Mngwembe so that she could immediately claim a refund of the taxi fare from Ntsizwa. She later met Ntsizwa in the presence of Mngwembe in town. She was refunded her loan. She testified that she saw accused 1 in the vicinity where she met Ntsizwa together with Mngwembe.

- [13] Lusanda Sigoyo gave evidence that on 7 June 2018 she was walking past a locally well-known taxi stop in Ncera called the Rock when she saw three (3) unknown males alighting from a taxi. Due to the fact that they were strangers in the close knit village she went to enquire the purpose of their visit. She was very close to them when she engaged the three (3) males in a conversation. She saw them again in the afternoon of the same day coming out of a local Spaza shop after they had bought soft drinks. Again on this occasion she engaged them in conversation. The third occasion was in the late afternoon when she saw the three (3) males in the vicinity of the local creche and the residence of the Mgudlwas. One of the three (3) males had jumped over the fence separating the Mgudlwa residence from the adjacent creche. Based on her various interactions with the three (3) males she gave a description relating to the height, the build, the complexion and the clothing that each of the males had worn. In court she identified accused 1 as being one of the three (3) males.
- [14] Phindile Zakhe is an ex-policeman who is a neighbour to the Mgudlwa household. He testified that on 7 June 2018 he was not at his home during the day as he had left earlier that morning. He returned home in the early evening. Shortly after his arrival a neighbour, Mrs Maxaka came to inform him that the Mgudlwa couple had been attacked. He boarded his mini-bus and drove the short distance to the gate of the Mgudlwa residence. He met accused 2 as she was walking out of the main gate.
- [15] Zakhe testified that accused 2 reported to him that they had been attacked by intruders whose number she could not ascertain. She had met the intruders in the passage leading to the bedrooms and had been forced into one of the bedrooms. Money was demanded from her. One of the intruders took R200.00 in cash that was on the headboard in the bedroom. She reported that she escaped through a bedroom window once she realised that the intruders had left. She further reported that a television set and speakers were stolen.
- [16] Zakhe gave evidence that thereafter he entered the Mgudlwa house accompanied by accused 2. He saw the body of the deceased lying in a pool of blood. He later entered the house through the kitchen door and at that stage informed accused 2 that the deceased had passed away. She reacted with shock and started crying. The police and ambulance personnel arrived shortly thereafter. He departed the scene after the police had arrived.
- [17] Sergeant Vuyo van Rieck is a member of the South African Police Services and was a detective on call at Kidds Beach police station on the evening of 7 June 2018. He proceeded to the crime scene after being alerted about a murder and a robbery at the Mgudlwa household. On arrival he found the deceased sprawled on the kitchen floor in a pool of blood with stones on the scene as depicted in the photo album of the crime scene. Van Rieck testified that accused 2 informed him about the name of the deceased and that he was her husband during his lifetime. He enquired from her what had transpired. She reported that she was inside the house with the deceased. She had gone to put on the lamps as there was a power failure. She felt a blow on her shoulder with a heavy object. She realised that it could not be her husband that hit her so hard. She said she was in the passage leading to her

bedroom at the time. A male intruder had instructed her to get to her bedroom. He then demanded a fire-arm. She handed it over as it was lying on the pedestal. Money was demanded by the intruder and she handed over R200.00. The intruder also took motor vehicle keys and a TV set in the dining room. These were loaded into a green Volvo motor vehicle which belonged to the deceased. Whilst the intruder had left the bedroom she got a chance to lock herself inside the bedroom. She did not know how many intruders were involved. After the intruders had left She later jumped out of the window to seek assistance. The cellphone, laptop of accused 2 and the speakers were all next to the TV so it was reported to him.

[18] Detective van Rieck saw a hammer in the dining room and accused 2 said it had been used to assault her. She said the hammer did not belong to the Mgudlwa couple. She identified the intruder who assaulted her as having worn a red top on his upper body. He did not take a written statement from accused 2 at the time because she appeared to be in shock and was crying. Van Rieck was never able to obtain a statement from accused 2. Months later another police officer obtained her written statement.

[19] Sifiso Mngwembe was called by the State. He was convicted in separate trial as being one (1) of the three (3) intruders. He gave evidence corroborating Andiswa Fembi regarding how Ntsizwa had requested that he attend in King William's Town. Mngwembe testified that on his arrival in King William's Town Ntsizwa had informed him that accused 1 was the 'someone' looking for him. Accused 1 requested his assistance to collect a vehicle that he had borrowed from his sister. He was told that the vehicle was a Volkswagen Jetta. He further gave evidence about how he and accused 1 travelled from King William's Town to East London on 7 June 2018. In East London they met Vumile Thunywashe. The three (3) of them travelled to Ncera village, Kidds Beach. He gave evidence that enroute to Ncera accused 1 was in telephonic conversation with a woman whom the latter claimed was his sister. This woman gave accused 1 directions on where to alight from the taxi. Mngwembe testified that after their arrival in Ncera accused 1 was given directions to the Mgudlwa house telephonically by the alleged sister. The conversation between the alleged sister and accused 1 continued intermittently

until shortly before they committed the offences. At one stage he overheard the woman had informed accused 1 that the deceased had taken his medication.

[20] Mngwembe's testimony effectively corroborated Sigoyo's in material respects. Mngwembe testified that later that day they approached a small gate on the perimeter of the Mgudlwa property. Accused 2 came from inside carrying a fire-arm which she placed on the ground. She then opened the padlock on the side gate for them to enter. She gave the fire-arm to accused

1. Accused 2 led them into the house.

- [21] Mngwembe gave evidence that before he could enter the house he heard the sound of a person falling. Upon entry he saw accused 1 and Vumile attacking the deceased who was lying on the floor. Accused 1 stood over the deceased and hit him three (3) times in the presence of Mngwembe. Accused 2 was standing in the doorway between the kitchen and the dining room with both her hands behind her head. When the assault on the deceased stopped he was struggling to breath.
- [22] Mngwembe testified that after the assault accused 2 took out a set of Volvo keys from the front pocket of her apron. She asked who was going to drive. Accused 1 pointed at him. She directed Mngwembe to the garage. After Mngwembe had started the Volvo motor vehicle there was a warning light indicating low fuel. He informed accused 2 that there was low fuel in the motor vehicle. She gave him R200.00. Vumile and accused 1 removed the household items listed in annexure A of the indictment and loaded those into the Volvo. Accused 2 informed them that she would only report the incident once she estimated that they had reached King William's Town. Accused 2 opened the garage door for them to leave in the Volvo. They then left the Mgudlwa household.
- [23] Mngwembe testified that the music system and the speakers were off loaded in Ndevana. The motor vehicle was abandoned in King William's Town. Accused 1 told Mngwembe that accused 2 still wanted the vehicle and it was not to be damaged. Mngwembe gave the car keys to accused 1. He parted ways with the other two (2) intruders in King William's Town. He gave evidence that after his arrest he made a confession to the police.
- [24] Under cross-examination by Mr Erasmus for accused 1 Mngwembe testified that upon his arrival in King William's Town on the morning of 7 June 2018 Ntsizwa told him that it is accused 1 who sought his assistance. He maintained this position even after his evidence in his own trial was put to him. He testified that he expected to be given something for assisting with driving. On arrival in East London it appeared to him that the meeting between accused 1 and Vumile had been pre-arranged. He admitted that some of his evidence during his trial was false.
- [25] Doctor Solomzi Zondi is the pathologist who performed a post-mortem examination on the body of the deceased. Dr Zondi testified that the deceased died as a result of head injuries sustained from blunt trauma to the head. He listed multiple fractures on the deceased's head and haemorrhage inside his skull. He opined that the injuries he found on the deceased were consistent with an assault using a hammer and blunt object. In his view all the injuries he found were caused by blunt force. He was unable to say when death occurred as the deceased's body had been refrigerated at the time he performed the post-mortem.

- [26] Andiswa Zibi resides in Ndevana location, King William's Town. She testified that Vumile was a friend of her husband. He had borrowed them a Telefunken TV that evidence proved was removed from the Mgudlwa household. The television set was later recovered by the police.
- [27] Ntombina Moss resides at NU 1[...], Mdantsane. She testified that Vumile was her customer in her tavern and they were related by clan names. Vumile had given her an LG music system with one speaker for safekeeping. Approximately 2 ½ months later the police came to her home to collect the music system and the speaker.
- [28] Two trials within a trial were conducted to admit a statement made by a deceased State witness and also pointing out made by accused 1. I ruled that the evidence was not admissible. The statement was made by the late Xolisa Xokoloshe. She had been disclosed to the police by accused 1 after an interrogation that lasted many hours. Initially it was not disclosed to the court that the statement was the proverbial 'fruits of a poisoned tree'. It was only during the second trial within a trial that the full picture emerged that the statement was as a result of a disclosure during the interrogation by the police. The court mero motu reconsidered its earlier ruling that the statement by Xolisa Xokoloshe was admissible.
- [29] After the second trial within a trial it became clear that the interrogation was conducted contrary to the provisions in the Bill of Rights in the Constitution. It would not have been fair to both the State and the defence for the evidence to have been admitted. Accused 1 had a legal representative in another unrelated matter in King William's Town at the time he was interrogated. This fact was known to Detective Maqubela. However, he was not given an opportunity to contact that legal representative to assist him during the interrogation. In my view, the violation of his fundamental right to be legally represented and not to provide incriminating evidence without having been warned of the consequences thereof was unfair. Though the accused ought to have been aware of his rights due to his then pending cases the police were still obliged to inform him of his rights and allow him to exercise an election what he wanted to do before the interrogation was conducted. The information he disclosed to the police was prejudicial and incriminating. In my view, there was also procedural prejudice in the failure to inform his legal representative that he was to be interrogated in this case. It appeared to me that the information that was obtained from him would not have been inevitably discovered by the police.
- [30] It appeared to me that to have admitted the evidence emanating from the interrogation would have been detrimental to the administration of justice. Detective Maqubela was a senior and experienced police detective who deliberately and consciously violated the rights of the accused and was involved in his assault in all probability. The fact that the police were investigating a contract killing did not justify them deliberately and consciously violating the rights of the accused. In the same vein the public interests did not outweigh the accused's rights. The Republic is now a Constitutional democracy and police officials as representatives of the state have a legal obligation to uphold and protect the rights enshrined in the Constitution.

[31] A holistic evaluation of the facts clearly showed that the police officers knew that they were violating the rights of the accused. Not only was that done but they went further and deprived the accused of meals. It appeared to me that Detective Mkupa and Detective Maqubela colluded to cover-up their tracks. It is necessary for the court to convey the message to police officers that the procedures laid down in law must be respected in practice. An aggravating feature of this case was that there was a period of approximately 4½ hours which the police were unable to explain. During that entire time accused 1 was in their custody. It would be wrong and a miscarriage of justice for a court to clothe the police misconduct with judicial respectability by allowing such tainted evidence to be admitted. It is for these reasons that a ruling was made that the evidence was inadmissible.

[32] It is trite with no need for authority to be cited that what needs to be determined at this stage is whether the State had proved the guilt of the accused beyond reasonable doubt. The proper approach is to consider the evidence holistically and not in a piecemeal fashion. It is wrong to consider one piece of evidence in isolation as the mosaic of evidence must be considered as a whole.

[33] The correct approach in the evaluation of evidence in a criminal trial was set out with admirable clarity in *S v Chabalala* where it was stated:

*“The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and*

having done so to decide whether the balance weighs so heavily in favour of the state as to exclude any reasonable doubt to the accused guilt. The result may prove that one scrap of evidence or one defective in the case for either party such as a failure to call a material witness concerning an identity parade was decisive but that can only be an ex post facto determination and a trial court should avoid the temptation to let on to one (apparently obvious aspect without assessing it in the context of the full picture in evidence).”[1]

[34] The main witness and the centre piece of the State’s case against the accused is the evidence of Mngwembe. Mngwembe is an accomplice as he participated in the attack on the home of the deceased. It is settled in our law that the evidence of an accomplice has to be treated with caution due to various factors.[2]

[35] In the Appellate Division (as it then was) the court stated:

*“It is not necessarily expected of an accomplice, before his evidence can be accepted, that he should be wholly reliable, or even wholly truthful, in all that he says. The ultimate test is whether after due consideration of the accomplice’s evidence with the caution which the law enjoins, the court is satisfied beyond all reasonable doubt that in its essential features the story that he tells is a true one.” [3]*

- [36] In Kristusamy it was stated that ‘Members of the criminal classes do not usually come nearly up to so high in standard.’ (Meaning they are not wholly consistent nor wholly reliable nor even wholly truthful).[4]
- [37] Mngwembe testified that he was lured into participating in the incident when he was called into a meeting with Ntsizwa who introduced him to accused 1. This is corroborated by Fembi who was involved in the initial stages of the recruitment of Mngwembe. I find no merit in the submission by Mr Erasmus that there is no link between accused 1 and Mngwembe when the latter arrived with Fembi in King William’s Town. Ntsizwa had told Fembi that ‘someone’ was looking for Mngwembe. Fembi saw accused 1 in the vicinity when she left Mngwembe with Ntsizwa. The attempt to cast doubt about the involvement of a third party is at best opportunistic and certainly speculative. Clearly Ntsizwa was an acquaintance of both Mngwembe and accused 1 according to the evidence.
- [38] Mngwembe gave evidence about what had transpired between King William’s Town and their entry into the Mgudlwa household. His evidence that by the time they arrived at Ncera they were three (3) males is corroborated by Sigoyo. She gave a description of the build, complexion and the clothing worn by the three (3) males. Standing on its own this evidence by Sigoyo may not have been enough proof beyond a reasonable doubt of the involvement of accused 1 if cautionary rule is applied. This is due to the application of the principles set out on an identification and the reliability thereof in Mthethwa.[5] However, Sigoyo’s evidence find support in the evidence of Mngwembe regarding identity of the three (3) males that had arrived in Ncera and alighted from the taxi and spent a number of hours loitering in that village.
- [39] Mngwembe’s evidence regarding the telephone interactions between accused 1 and his alleged sister finds indirect support in the evidence of accused 2. She has given evidence that one (1) of the vehicles in her garage was a Jetta. Mngwembe testified that he was told by accused 1 whilst they were still in King William’s Town that they were to fetch a Jetta from East London. Mngwembe had overheard accused 1 being informed that the deceased had taken his medication that day. Accused 2 confirmed that the deceased had indeed taken his medication. On the evidence it is clear that she was the only person who could have known this at the time. The facts are not mere co-incidence. The proposition by Mr Erasmus that some medical personnel may have been aware that the deceased must have taken his medication is without merit and invites the court to indulge in speculation and conjecture. Mngwembe testified that the three (3) men were directed to the deceased’s residence by accused 2 if one has regard to the totality of the evidence. It is common cause that the three (3) men attacked only the deceased’s home and no other household in Ncera.

[40] Mngwembe was trenchantly criticised by Mr Kilani for his evidence that accused 2 opened the gate for him and his accomplices to enter the Mgudlwa household. The basis of the attack was not only accused 2's denial but also the evidence of Sigoyo that one of the intruders had scaled the fence at the back of the Mgudlwa property to gain entry. It is obvious from this contradiction that one of the two State witnesses is making an error.

However, no single error may destroy the credibility of a witness. It appears to me that Sigoyo made an error about one of the intruders who jumped over the fence. All the witnesses familiar with the property had indicated that the fence was high (estimated by one witness to be 3m) and the probabilities suggest that even for a quiet village it would have been not only brazen but improbable for one of the intruders to scale such a fence in broad daylight. Even with this flagrant error it is still my view that Sigoyo was a credible witness.[6] The version of Mngwembe has a ring of truth to it. Mthimkhulu had also emphasized how secure the fencing was and the need for someone inside the Mgudlwa property to open for any person outside who wished to gain entry.

[41] With regard to the events that took place inside the Mgudlwa home the version of Mngwembe is contradicted by accused 2. The two versions are mutually destructive and one of them has to be false. Mngwembe essentially testified that accused 2 was present during the attack on the deceased and facilitated the escape of the intruders by providing car keys and money for fuel. Accused 2's evidence is that she was shepherded into the main bedroom after having been assaulted. The injuries sustained by the deceased were found by Dr Zondi to be consistent with the version Mngwembe provided to the court. Accused 2 provided no medical evidence to substantiate her allegation that she was assaulted, suffered an injury and was seen by a doctor the next day. I must hasten to add that she is not required to prove her innocence. However, the allegation that she was assaulted is so crucial to her case that supporting evidence ought to have been provided if it were available. She testified that she was examined by a doctor on 8 June 2018. No doctor's certificate was provided to back-up this allegation. If she were examined by a doctor such medical records ought to be retained for at least five (5) years according to the National Health Act. She knew within these five (5) years that she will be facing the current charges. However, she failed to bring evidence which was readily available to her without providing any reason for such failure.

[42] Another crucial evidence was provided by van Rieck who stated that accused 2 mentioned that R200.00 in cash was taken by the intruders. It turns to support the evidence by Mngwembe that he was given R200.00 by accused 2 for fuel. This contradicts her own testimony that she handed over a bag containing the day's taking from her business sales without specifying how much money was in the bag.

[43] Mngwembe testified that accused 2 was inside the house with the intruders throughout the incident until they left. She claims to have locked herself in the main bedroom after handing over the bag of money and later escaping through a window after the robbers had exited the main gate. Strangely, in her report to Zakhe she mentioned items that the intruders had taken from the house. On her version she could not have known these items had been taken.

This knowledge only lends credence to the testimony of Mngwembe that she was inside the house and knew which items had been removed.

[44] I have anxiously considered the evidence of accused 1 regarding his denial of participation in the attack on the Mgudlwa home. I find no merit in his bald denial. The weight of the evidence of Fembi, Sigoyo and Mngwembe is cogent and compelling. The proposition that Mngwembe replaced him instead of the real culprit is without merit, farfetched and contrary to the evidence before court. It is striking that he offers no explanation whatsoever regarding his whereabouts on 7 June 2018. The weight of the evidence and the probabilities point to him as having been the ringleader who organized and led the intruders. It has been stated that the State does not have to close every loophole that ingenuity may suggest to an accused. In my view, accused 1's version was false and stands to be rejected. I say so having considered all the elements in the evidence that favour him. However, these were far outweighed by the evidence that pointed to his guilt.

[45] Likewise, I have anxiously considered the version provided by accused

2. In my view, the weight and cogency of evidence together the probabilities heavily favour the State's version as being true compared to her version. Crucial aspects as outlined above militate against the version of accused 2 being accepted as reasonably possibly true. When the evidence is considered holistically it is clear that accused 2's version is false and must be rejected.

[46] Fembi, Zakhe, Sigoyo and van Rieck were good, honest and truthful witnesses. Mthimkhulu was honest and truthful though he had difficulties and contradictions in his evidence. I attribute these to his level of education and his background. His demeanour and raising his voice at time indicated his honesty. Mngwembe eminently satisfied the test for an accomplice's evidence to be accepted. Though he minimized his and Vumile Thunywashe's role he essentially told the truth.

[47] Accused 1 was a poor witness context to simply deny almost everything. His demeanour struck me as someone who is performing and not acting naturally. He had blank stare and suppressed reaction to anything. He clearly was not honest and truthful witness.

[48] Accused 2 was verbose and poor witness. She gave long and elaborate answers to the most simple questions. Mr Mguqulwa, the interpreter, had a most difficult time due to the long winded answers she provided. She was clearly desperate to absolve

herself. I am satisfied she was untruthful and dishonest in her testimony. Crucial aspects of her evidence contradicted the version put to the State witnesses by her various legal representatives. This is despite the fact that she closely directed the presentation of her defence throughout the trial.

[49] The State had alleged that the accused had acted in the furtherance of a common purpose. The applicable principles are settled in our law. Common purpose may be proved by either a prior agreement or active association/participation in the commission of the crime. It has

been held that it is not required for each participant to know or foresee in detail the exact manner in which the unlawful act and consequence will occur.[7] The legal position is that where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design.[8]

- [50] Accused 1 and 2 must have concluded a prior agreement about the murder of the deceased. I accept Mthimkhulu's evidence that accused 1 requested him to murder the deceased and he refused. She indicated to him that she will get others to commit the crime. Accused 1 knew before his departure from King William's Town that he was going to the home of the deceased but gave a false reason about the purpose to Mngwembe. Throughout the journey to Ncera there was constant communication between accused 1 and accused 2. The hammer use to fatally assault the deceased was brought in a bag indicating planning. I have accepted the evidence that accused 2 facilitated and was physically present during the murder. She took no steps to stop the killing of the deceased. On the contrary all her actions indicate a common intention to kill together with the intruders. Her provision of car keys and money for fuel is a further act of association. The handing over of the fire-arm immediately before the attack is a manifestation of an intention for the intruders to kill the deceased. In the circumstances I am satisfied that the five (5) requirements for active association have been satisfied.[9] In my view the evidence proves that the murder was pre-planned and executed in furtherance of a common purpose.
- [51] It is necessary to consider whether a conviction may ensue on armed robbery in count 1. The essence of the State's version which the court has now accepted is that the removal of the items specified by the state in count 1 was done solely to create the false impression there had been a robbery that had gone wrong and resulted in the death of the deceased. The evidence of Mngwembe which the court has now accepted clearly establishes that accused 2 handed over or allowed the intruders to remove the items from her home.
- [52] In the peculiar circumstance the owner of the property consented to their removal. She was the owner by virtue of the fact that she was married in community of property to the deceased by way of a customary marriage. In my view the evidence before court cannot sustain a conviction on the robbery count against both accused. There is clearly a lack of an intention to rob on the part of accused 1 due to the fact that these items were handed over to him by the owner in an effort to defeat the course of justice. In the strict legal sense one cannot rob herself and her spouse of her own property. Accused 2 ought to benefit from that legal position. Accused 1 clearly lacked the intention to commit robbery.
- [53] On counts 3 and 4 I am satisfied that both accused were in physical control of the fire-arm and ammunition belonging to the deceased when they had no lawful basis to be in such possession. In the circumstances they ought to be convicted of both counts.
- [54] In the result and for the above reasons the accused are found guilty of:

54.1 Murder;

54.2 Unlawful possession of a fire-arm; and

54.3 Unlawful possession of ammunition.

T MALUSI

JUDGE OF THE HIGH COURT

Heard: 6-20 March 2023, 18 July-04 August 2023 , 16-27 October 2023 and 5, 6, 7, 12, 13 & 14 February 2024

. Delivered: 14 February 2024 Appearances: For the State: Advocate Mtsila instructed by Director of Public Prosecutions MAKHANDA For Accused 1: Advocate Erasmus instructed by Legal Aid South Africa KING WILLIAM'S TOWN For Accused 2: Adv Nabela, Mr Manyisane & Advocate Kilani instructed by Legal Aid South Africa KING WILLIAM'S TOWN

[1] 2003

(1) SACR 134 (SCA) at 140A-B.

[2] S v Hlaphezula & Others 1965 (4) SA 439 (AD) at 440D-G; S v Bester 1990 (2) SACR 325 (A).

[3] S v Francis & Another 1991

(1) SACR 198 (A) at paras 24 and 25.

[4] R v Kristusamy 1945 (AD) 549 at 556.

[5] S v Mthetwa 1972

(3) SA 766 (A).

[6] S v Mkhohle 1990 (1) SACR 95 (A).

[7] S v Makhubela & Another 2017

(2) SACR 665 (CC) at para 55.

[8] S v Mzwempi 2011

(2) SACR 237 (ECM) at para 50; S v Thebus

[2003] ZACC 12; 2003 (2) SACR 319 (CC) 341E.

[9] S v Mgedezi 1989

(1) SA 687 (A) at 705I-706B.

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