IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)

Case No: CC 41A/2023

In the matter between:

THE STATE

and

THEMBA DINGELA Accused

JUDGMENT

METU AJ

"To every man upon this earth Death cometh soon or late. And how can man die better Than facing fearful odds, For the ashes of his fathers And the temples of his Gods."[1]

INTRODUCTION

1. The Accused and his cohorts concocted and crafted a plan as far back as May 2023 to rob an Isuzu bakkie in order to rebuild a similar bakkie belonging to their member. A bakkie belonging to the late Ms. Zoleka Gantana ("Zoleka") was identified as the perfect fit for this purpose.

2. Arising out of a spate of events that occurred between 08 July 2023 and 10 July 2023, Zoleka a 57-year-old female person and her shop assistant, Ms. Kholosa Mpunga ("Kholosa"), who was a 27-year-old person were robbed *(with aggravating circumstances)*, kidnapped, murdered, and their mortal remains were burnt, chopped into fist-sized pieces and thrown into a river stream. The Accused faced the charges outlined below.

[1] Thomas Babington Macaulay, Horatius

3. The Accused was charged with six (6) counts, comprising two (2) counts of robbery *(the first being that of the bakkie and the stock in the shop, the second being of the bank card)* with aggravating circumstances, two (2) counts of kidnapping and two (2) counts of murder.

4. The Accused pleaded guilty to the two (2) counts of robbery with aggravating circumstances; two (2) counts of kidnapping and not guilty to the two (2) counts of murder.

5. He was legally represented. Mr. Geldenhuys submitted a plea explanation statement in terms of Sections 112 and 115 of the Criminal Procedure Act, 51 of 1977 ("CPA"). The statement was accepted and entered as exhibit "A."

6. In the plea explanation in paragraph 3, the Accused confirmed being guilty of the two (2) counts of robbery (*simpliciter*) and the two (2) counts of kidnapping.

7. In the statement made in terms of Section 112, the Accused set out the events that preceded the offences and his role in the commission of the offences.

8. At the trial, the Accused confirmed that he understood the charges proffered and confirmed the contents of his plea explanation statement.

9. Ms. Turner, the legal representative appearing for the state, indicated that the indictment explicitly stated that the provisions of Sections 51 (1) (*a*) and 51 (2) of the Criminal Law Amendment Act 105 of 1997 ("CLAA") *(the so-called minimum sentences legislation)* applied respectively to the counts of murder and robbery.

10. What was accepted by the Accused in his plea materially differed from the indictment. Essentially, the Accused was pleading guilty to lesser offences.

11. The Accused did not admit to all the allegations made in the indictment. By way of illustration, in paragraph 6 of the plea explanation, the Accused stated that his role was to transport his cohorts to the place where they had planned to rob a bakkie; he then dropped his cohorts and left for the farm where he resides. According to the

Accused, the plan was for him to wait for them on their return and open the gate for them. On the other hand, the indictment placed the Accused at the scene of crime where together with his cohorts, acting in the execution of a common purpose or conspiracy, unlawfully and intentionally assaulted the two (2) women they found at the shop, took by force a white Isuzu bakkie with registration letters and numbers **H[…]**, and stock from the shop valued at **R6 930.88.**

12. The same analogy is applicable in respect of the counts of kidnapping. For instance, in paragraph 7 of the plea explanation, the Accused stated that he only noticed (for the first time) the two (2) women when he was next to the gate of the farm where he resided. This is in contradistinction to the indictment that places the Accused at the scene of the crime where the robbery took place. Subsequent to the robbery of the bakkie and the stock from the shop, the two women were unlawfully and intentionally deprived of their freedom of movement by being tied with cable ties. Thereafter, they were removed forcefully and deposited into the back of the Isuzu bakkie, wherein they were taken to Daninge Farm in Peddie.

13. Having regard to the above, a proper approach was to correct the plea of guilty to that of not guilty, which is *in favorem innocentiae* to the Accused and as envisaged in Section 113 of the CPA.

14. Effectively, the Accused's statement was that its value and effect on the proceedings was formal admissions and proof of relevant facts.

15. The Defence admitted documentary evidence collected and collated by the State to buttress its case.

16. The State called Detective Warrant Officer Lawrence Human ("D/W/O Human"), who was number 14 on the list of State Witnesses, as the first witness to testify. He took oath and stated that he was based at Kidd's Beach, with thirty-one (31) years of service with the South African Police Services ("SAPS") and was the Investigator in this matter.

17. D/W/O Human further testified that originally, there were four Accused, but the other three Accused pleaded guilty on 04 March 2024 and were sentenced on 08

March 2024. The trial for the Accused in this matter was separated from that of the rest of his cohorts.

18. A report of two missing women was made to the police on 09 July 2023. Upon receiving the report, the police visited the place where Zoleka had a house and was also operating a shop in the same yard. Photos were taken, and the photo album was accepted as documentary evidence and marked “Exhibit B.”

19. D/W/O Human stated that in Photo 3 of “Exhibit B,” there are flip-flops belonging to Kholosa. Then he said Photos 8 to 11 showed a robbery, as items were strewn on the floor, and the shop was dishevelled.

20. He further stated that at the crime scene, they found a lens for spectacles at the back of the shop door. D/W/O Human stated that Photo 23 depicted cable ties that were used to bind the two deceased women.

21. D/W/O Human interviewed Zoleka’s son, Uve, and daughter, Nobuntu. He established that items, including an Isuzu bakkie, were missing. There was no sign of Zoleka and Kholosa. He arranged for an extensive search that included the canine unit, the diving unit, the mounted unit, and the crime intelligence.

22. A breakthrough only came on 12 July 2023, while he was conducting an interview with Nobuntu. Nobuntu’s cellphone rang, and she was informed in that call that her mother’s bakkie had been found in Gcinisa village. Subsequent to this information, D/W/O Human solicited backup, and they proceeded to Gcinisa village and found the Bakkie stuck in the mud.

23. When they got there, people had already gathered around the bakkie. Fingerprints were taken from the bakkie, and the accused's fingerprints were found in it. Subsequently, the Accused was arrested.

24. D/W/O Human further testified that community members informed him they had seen the Accused driving around in the bakkie. They said the Accused went around the local farms asking for assistance to pull the bakkie out of the mud.

25. At this stage, the bakkie's registration plate was different from the one reported to the police. It had no canopy and no registration plate on the front. As the bakkie was submerged in the mud, a brick was in front of the rear right wheel, which indicated that someone was trying to get traction from that wheel to get the bakkie out of the mud.

26. D/W/O Human proceeded to Daninge Farm, where the Accused resided. He was in the company of a photographer and Nobontu, where he found the Accused's wife and father. The photo album in this regard was submitted and accepted as documentary evidence marked as "Exhibit D". Photos were taken on 12 July 2023 and another batch was taken on 13 July 2023. D/W/O Human stated that the Photos numbered 21 to 26 show grocery items found at the backyard flat. Photos 94 to 96 show a wallet found hidden between the mattress and the base in the bedroom of the backyard flat.

27. The photos on pages 94 to 96 show a wallet that belonged to Zoleka. This wallet was concealed between the mattress and its base.

28. Nobuntu identified her mother's handbag. Photos 145 to 146 of Exhibit "D" show the handbag being retrieved from the plastic container.

29. D/W/O Human established that the Accused and his wife occupied the backyard flat whilst the accused father stayed in the octagon hut[2].

30. According to D/W/O Human he established that the Accused had been on Daninge Farm.

31. The mounted unit found a kit bag containing some robbed from Zoleka's shop. The Photos numbered 197 to 208 show this kit bag.

32. Nobuntu recognised a piece of red cloth that was used at her mother's shop to cover the cash register machine. At night, it had a light beam that could be seen from outside. This is in Photo 252 of "Exhibit B".

[2] See photos 1 and 2 of "Exhibit D"

33. D/W/O Human turned to photo 258 which had a beanie that had been turned into a balaclava by poking holes for the eye area.

34. According to D/W/O Human, another breakthrough occurred after the Accused was arrested on 14 July 2023 because this resulted in his pointing out the crime scene. He testified that he was not part of this process as, in terms of policy and procedure, he is not allowed to participate.

35. However, during the pointing out procedure, photos were taken on 14 July 2023 and 18 July 2023, which were then bound together in a photo album submitted and admitted in evidence as Exhibit E.

36. In Photo 7 of Exhibit E, the Accused could be seen pointing at an area marked “A” according to the Key to Photographs. This is an area in the sandpit where the two women were allegedly placed and subsequently set alight by their assailants.

37. D/W/O Human further elucidated that this was a far-flung area that was uninhabited, and there were no buildings in sight. He stated that no one could hear you even when you raised an alarm.

38. D/W/O Human testified that there was an indication that there had been a fire made in the area marked as “A” to which the Accused was pointing.

39. Points marked “B” and “C” were areas where freshly cut bark of trees remained.

40. He testified that Photos 33 to 51 of “Exhibit E” were half-brick-sized body parts retrieved from the river pond and placed in a blue body bag used by the diving unit.

41. Then Photos 52 to 55 were the charred effects on the sandpit area. Photos 56 to 57 were the remnants of charred false teeth (dentures). D/W/O Human contended that Nobuntu confirmed that her mother wore dentures.

42. In Photo 66, the Accused points out some tools kept inside the octagon hut. These implements could be used to dig and chop wood.

43. The second witness to be called by the State was Mr. Mandla Qosho (“the Accomplice”), who took oath and testified that during the month of May 2023, he and his cohorts, including the Accused before Court, planned and conspired to rob a bakkie to rebuild the one belonging to Sigagene Mgwatyu (“Sigagene”), which had overturned. In the main case, Sigagene was accused no. 4. They would call each other in planning for the robbery. Their intention was to use the bakkie whenever they would be doing some robberies.

44. The Accomplice stated that he got along well with the Accused, as they had been convicted before. They got along so well that when he visited the Accused’s place, he would even get milk or sour milk, as the Accused have cows on the farm where he resides.

45. They identified Zoleka’s bakkie as suitable for the purpose. He stated that he stayed in close proximity to Zoleka. When he was at his house, he could see the shop and Zoleka's house.

46. According to the Accomplice, the plan was that he would not speak because Zoleka could identify his voice. On the day of the executing their mission, they had collected a side cutter, balaclavas, gloves, cable ties, and his firearm.

47. The Accomplice further testified that he was Accused no. 1 in the main trial, whilst the Accused in these proceedings was Accused no. 2 in the main trial. The Accomplice testified that he was serving two life terms for each of the murders, 15 years for each of the two robbery counts and 8 years for each of the two kidnappings.

48. On 08 July 2023, his cohorts arrived at his place, having taken a taxi to the village. They did not go directly to Zoleka’s shop. They cut a hole in the fence and hid next to the door, waiting for Zoleka and Kholosa to come out. The Accomplice and the Accused hid next to the door, waiting to pounce when the two women came out.

49. Indeed, the door was opened and the Accused entered first and he followed with a firearm in hand. The other cohorts followed, although he could not tell who exactly came after him. According to the plan, Siyanda Makeleni ("Siya") then accused no. 3 in the main case, was supposed to be the one speaking, but at the crucial time, it appeared Siya was busy with something else. This compelled the Accomplice to speak and order the two women to lie down. The two women's hands were tied in the front using cable ties. They asked for keys to the bakkie, which they got. Siya fetched the bakkie and brought it closer to the shop door. They then loaded stock from the shop into the back of the bakkie, which had a canopy. They left some space on which they deposited the two women. The Accused and one Tiger, *aka* Ntshebe, who is still at large, rode at the back with two women and the stock.

50. According to the Accomplice, they drove to Daninge Farm, where the Accused opened the gate, whereafter they offloaded the stock. The Accused and the Accomplice went to look for a place where the two women would be put. The accused knew the place better, as it was his homestead, so he led him to a shack that he had never seen before nor knew of its existence.

51. They returned to fetch the two women and took them to the shack. The Accused left the Accomplice. He did not see him as well as the other cohorts. At about 03H00, the accused arrived in the company of Tiger *aka* Ntshebe, who came into the shack carrying a brownish bag. In the bag was a wallet with bank cards. Tiger *aka* Ntshebe and the Accused demanded pins for the bank cards. Zoleka gave them the pin number of one of the cards in which a sum of R200.00 was first withdrawn then shortly thereafter R800.00 was withdrawn.

52. At the time the Accused's cohorts came to ask for the pin numbers, the two women were still handcuffed with cable ties.

53. Later, Sigagene came bringing food for the Accomplice and the two women. The two women refused to eat. At about 19H00, the Accused just came and said, "Cousin, (signalling time by pointing at his wrist) it's time for us to go with the women".

54. They descended a path towards a river wherein, after a distance of about 1 ½ kilometres, they stopped at a sandpit and the Accused asked Zoleka to borrow him Kholosa. The Accused and Kholosa went behind the bushes and after a while they came back. The Accomplice noticed that Kholosa was adjusting her pair of jeans, although she was still handcuffed by the cable ties. The Accomplice also observed that the Accused was adjusting his trousers.

55. At this stage the accused said to the Accomplice he must proceed. The Accomplice testified it was not easy to shoot the two women as there was some tussle and resistance from them. However, he shot both of them in the head and there were three (3) shots in total that he fired. After the shooting both, he and the Accused went back to the house and collected an old tyre, an axe with a long iron handle, a spade and a bushcutter.

56. Back at the sandpit, they cut down some trees to start up the fire. They put the wood together with the old tyre, on which they burnt the two bodies. The Accused and the Accomplice took turns to burn and turn the bodies in the fire. The Accomplice said this took a long time as it was drizzling. They returned to the farmhouse where the accused told the Accomplice that he would sleep in his bedroom with his wife. The Accomplice slept at the octagon hut.

57. On Monday morning, 10 July 2023, the Accused came to the Accomplice, telling him that they must go to finish up their task. The Accused was carrying a panga. On arrival where they had left the two bodies the previous night, the Accused started to chop the charred remains of the two women. They took turns to cut the charred remains of the two women. Each piece that they had chopped they would throw into the river.

58. They then used a spade to put sand over the bloodstains where they had earlier killed and cut up the mortal remains of Zoleka and Kholosa. The accomplice testified that it took them time to chop up the charred mortal remains of Zoleka and Kholosa. According to the Accomplice, this was a difficult task that one person could not accomplish alone.

59. On their return to the farmhouse, the Accomplice put the Panga on top of the chicken enclosure and could not see the bakkie in the yard. He then asked the Accused to show him the bakkie before he left. They went somewhere and he pointed at it from a distance. He saw the white bakkie, and at that stage, it still had a canopy.

60. On Wednesday night, 12 July 2023, the Accomplice returned to Daninge Farm to collect his share of the stock and noticed that the padlocks had been changed.

61. Under cross-examination, the Accomplice stated that he did not despise the accused. He was content to serve jail term for what he did. He had no problem being sentenced to life imprisonment for something that he knew he did. This did not make him resent the Accused.

62. After closure of the State case, the Accused took the witness stand and testified that he was 53 years old and resided at Daninge Farm.

63. He confirmed that he had pleaded guilty to Counts 1 to 4 and not guilty to counts 5 and 6.

64. The Accused confirmed that he and his co-perpetrators had planned to rob Zoleka of her bakkie. They had started to map out a plan for this robbery around May 2023. They would call each other in order to solidify their plan.

65. They wanted the bakkie belonging to Zoleka because his brother had a bakkie like that, which had overturned. The plan was to strip Zoleka’s bakkie and use its parts to rebuild Sigagene’s damaged one.

66. The Accused stated that the idea of robbing that particular bakkie came from the Accomplice because he was a neighbour to Zoleka he had better information and details.

67. On the day of the robbery, the Accused was driving his Toyota Tazz, which he used to fetch his co-perpetrators from Parkside in East London and transport them to the Accomplice's place.

68. When they were at the Accomplice's place, they discussed how they were to do the robbery. The Accused later told his co-perpetrators that he would have to rush home because he had left the gate keys.

69. While driving back home, he received a call from his cohorts, who informed him that they would go to Daninge Farm instead of Middledrift as originally planned.

70. When the Accused's cohorts arrived at the gate of Daninge Farm he went on foot to open for them and was surprised to find the two women. According to the Accused, it was the first time that he saw in a robbery people would be abducted. He reasoned with his cohorts that they should let go the women. The Accomplice would have none of it, and he just became a changed person digging on his heels, refusing that the two women be released.

71. The Accused opened the front of the bakkie and found a litre of Coke bottle that had been drunk to about three- quarters. He then hit this bottle on the wheel's rim and used the broken bottleneck to cut cable ties on the women. They then went to offload the stock at the back of the bakkie at the farmhouse.

72. When they returned from offloading the bakkie, they noticed that it was running out of fuel. The Accused said they must go with the women. He ended up leaving with Sigagene and Siya to hide the bakkie.

73. After hiding the bakkie, the other two went to hitch a hike to Parkside and he walked back to the farm and slept in his bedroom.

74. In the morning, he looked for the Accomplice and the two women in the shack. When he got there, he found no one.

75. On Monday morning, when he was out feeding his chickens, he saw the Accomplice in front of the flat where he stayed. The Accused went about his business

of feeding chicken. Only after finishing his chore did he enquire about the women. The Accomplice informed him that he had escorted them to the hiking spot and requested that they go and check if they managed to get the hike.

76. They took the footpath that crossed over the river, whereupon when they were about the sandpit, the Accomplice showed him two charred bodies. There was a log which was emitting smoke, which the Accomplice threw into the river. The Accused then asked the Accomplice if this was what he had done. He was cross with the Accomplice and called Sigagene, informing him what the Accomplice had done. He left for the farmhouse. He then saw the Accomplice at about 12H00, whereupon they had tea. Thereafter, the Accomplice left.

77. The Accused got a call from Sigagene who instructed him to burn the bakkie. He went to fetch the bakkie where he had hidden it and deliberately drove it into a muddy area off the road for it to be stuck. He left the bakkie there with the key in the ignition switch.

78. The Accused went to his Toyota Tazz, which was not parked far from where he had submerged the bakkie in the mud. He drank liquor in the Toyota Tazz and during the night, he patrolled towards the bakkie to check if no one was taking it away.

79. The Accused spent the whole night there and slept in the Toyota Tazz. He was then arrested the following day Tuesday 11 July 2023. The police took the Accused back to Daninge Farm, where he pointed out where he had seen the charred bodies.

80. According to the Accused, it was the intelligence of the Police Officer who had taken him to the crime scene that discovered that the remains were thrown into the river. He had no knowledge that the charred remains were thrown into the river.

81. The Accused stated that he was only complicit to the crime by being involved in its planning. He was not at the shop when the bakkie and stock were robbed.

OBSERVATIONS

82. During the course of the proceedings, the Accused would raise his hand and stand up, which, owing to the benefit I had facing the Court, would alert his legal representative and afford him an opportunity to give instructions to his Counsel. The import of this observation is that when the Accused accomplice testified, he made an insinuation that the Accused raped Kholeka just behind the bushes before they were killed in the sandpit.

83. There was no reaction, which could be expected from a person who was alive in the proceedings and did not hesitate to give instructions to his legal representative.

84. In the wake of the insinuation of rape, a natural reaction would have been to want to dispel this, more so, that rape is not even in the indictment. No reaction came from the Accused and this allegation was not challenged in cross-examination.

DOES THE ACCUSED'S EVIDENCE RAISE DOUBT?

85. The accused has put different versions before this Court, which he would adjust and tailor-make according to what would suit the question he sought to answer. This leaves the Court with at least three of his versions.

86. Except for denying that he was present at Zoleka's place when the robbery of the bakkie and stock took place and the two women were kidnapped, which fact on his own he had accepted to be complicit in the facts recorded as formal admission after his plea explanation was changed to that of not guilty, he does not bring any evidence that raises doubt that either actively participated in the commission of the offences or aligned himself with their commission.

87. The Accused does not come up with a cogent story even with regard to how he was shown the charred bodies on the Monday morning when according to his version the Accomplice asked that they must go and see if the two women managed to get a hike. His reaction, if there is any credence to his story, is incongruent and not in sync with a person who was surprised about what had been done by the

Accomplice. This must also be viewed with a lens that these bodies were on his father's farm. Therefore, how they were to be removed must have been important to him. By not informing the police or a close member of the family, *viz* his father or wife about what he had just witnessed is out of kilter to someone who had nothing to do with the killing of Zoleka, whom he had testified he knew, and Kholosa.

88. For him to say he was cross ("sulking") that the Accomplice had murdered Zoleka and Kholosa does not raise any doubt, having regard to the whole conspectus of facts before this Court, that he had at common purpose that they be killed.

ANALYSIS

89. Professor J M Burchell deals with the doctrine of common purpose in *Principles of Criminal Law* 3ed (2008) at 574 where in essence he sets out what the doctrine of common purpose is:

> *"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."*

90. The State's case rests on the evidence of Mr. Mandla Qosho ("the Accomplice"), who was accused no.1 in the original case before the trial was separated. It is pivotal that the Accomplice's evidence be properly evaluated in this matter.

91. The Accomplice did not downplay his involvement and participation in the commission of the offence. With clarity, he would place the Accused at the crime scene. These were not challenged in cross-examination. For instance, he stated that the Accused was the first to enter the shop and he followed him holding his firearm.

92. After loading the stock at the back of the bakkie, the Accused rode at the back with the two women and Tiger *aka* Ntshebe. This also was not rebutted.

93. The Accomplice states at what time the Accused came back and indicated to him that it was time they had to take Zoleka and Kholosa from the shack to a spot

where they unfortunately met their demise. The Accused did not rebut this version. He does not even provide an *alibi* as to where he was if he was not with the Accomplice busy with the heinous acts so described by the Accomplice that they did on that fateful night of Sunday, 09 July 2023. On the other hand, the Accomplice did not hesitate to say that he was the one who pulled the trigger that killed both Zoleka and Kholosa.

94. On Monday morning, they continued with the desecration of the mortal remains of both Zoleka and Kholosa. The Accomplice's version is demonstrably possible true as opposed to that of the Accused, which is not reasonably possibly true. He stated that they cut the charred remains, with each piece thrown into the river. This is where the diving unit retrieved what was left of Zoleka and Kholosa, following a pointing out by the Accused.

95. In as much as the Accused did not himself pull the trigger that took the lives of Zoleka and Kholosa, it must be borne in mind that the Accused acquiesced to the use of the firearm in the robbery. He was aware that the Accomplice still had the firearm when they took the two women from the shack towards the sandpit, where they were eventually shot and killed. Different to *S v Mbanyaru and Another* 2009 (1) SACR 631 (C), in this matter, the Accused manifested a common purpose that the two women be murdered. The Accused's conduct even after their demise is consistent with this common purpose. He and the Accomplice went back to the farmhouse to collect an old tyre, spade, an axe with a long iron shaft, *etcetera* to make fire that was meant to burn their bodies to ashes. Therefore, I am of the view that the killing of Zoleka and Kholosa was a joint unlawful enterprise between the Accused and the Accomplice.

96. In scrutinising the evidence of the Accomplice in this matter, and in want of making a proper evaluation, I am guided by Schreiner JA *R v Ncanana* 1948 (4) SA 399 (A) at 405 - 406, where he aptly stated:

> *"…[C]aution in dealing with the evidence of an accomplice is still imperative. The cautious Court or jury will often properly acquit in the absence of other evidence connecting the accused with the crime, but no rule of law or practice requires it to do so. What is required is that the trier of fact should warn himself, or, if the trier is a jury, that it should be warned, of the special danger*

of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof aliunde that the crime charged was committed by someone; so that satisfaction of the requirements of sec. 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec. 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."

97. In *S v Mahlabathi and Another* Potgieter JA said:

"It is clear from the authorities that if corroboration was required it had, for the purpose of the so called cautionary rule, to be corroboration implicating the accused and not merely corroboration in a material respect or respects."

98. The Accomplice has clearly implicated the Accused in this matter. The Accused was not an impressive witness, his version changed from time to time plagued with impossibilities and inconsistencies. Overall, the Accused was not a credible witness. For instance, it is reasonably improbable that the Accused cut the cable ties on the two women's wrists with a broken bottleneck without injuring them.

99. The Accomplice, on the other hand, was a reliable witness. He gave a first-hand account of the incident, and little detracted from the quality, integrity, and independence of his recollection of events.

100. It is trite that the State bore the onus of proving the guilt of the Accused beyond reasonable doubt. A plethora of cases tell us that an accused is entitled to be acquitted if there exists a reasonable possibility that he might be innocent.

101. In assessing whether or not the guilt of the accused has been established this court in *S v Hadebe & others* 1998 (1) SACR 422 (SCA) at 426 E - H approved of the approach adopted in *Moshephi & others v R* (1980-1984) LAC 57 at 59 F - H in which the following was stated:

> "*The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees."*

102. In *S v Hlapezula and Others* 1965 (4) SA 439 (A) Holmes JA formulated the cautionary rule, as applied to accomplices as:

> *"It is well settled that the testimony of an accomplice requires particular scrutiny because of the cumulative effect of the following factors.* ***First, he is a self-confessed criminal. Second, various considerations may lead him falsely to implicate the accused, for example, a desire to shield a culprit or, particularly where he has not been sentenced, the hope of clemency. Third, by reason of his inside knowledge, he has a deceptive facility for convincing description - his only fiction being the substitution of the accused for the culprit.*** *Accordingly, even where sec.* 257 *of the Code has been satisfied, there has grown up a cautionary rule of practice requiring (a)*

recognition by the trial Court of the foregoing dangers, and (b) ***the safeguard of some factor reducing the risk of a wrong conviction, such as corroboration implicating the accused in the commission of the offence, or the absence of gainsaying evidence from him, or his mendacity as a witness, or the implication by the accomplice of someone near and dear to him; see in particular ..."***

(Court emphasis)

103. The Constitutional Court in *Thebus & another v S* 2003 (2) SACR 319 (CC) (para 45) is instructive. The Constitutional Court aptly stated:

"A collective approach to determining the actual conduct or active association of an individual accused has many evidentiary pitfalls. The trial court must seek to determine, in respect of each accused person, the location, timing, sequence, duration, frequency and nature of the conduct alleged to constitute sufficient participation or active association and its relationship, if any, to the criminal result and to all other prerequisites of guilt. Whether or not active association has been appropriately established will depend upon the factual context of each case."

104. The fate of the Accused hinged on the cogency or otherwise of the evidence. I have weighed up all the elements which point to the guilt of the Accused and have concluded that he is guilty of the offences with which he is charged and there is no reasonable doubt about his guilt.

105. Petse DP in *Tshiki v S* [2020] ZASCA 92 *(unreported)* @ paragraph 40 had this to say:

"I accept, as my colleague has pointed out in her judgment, that the fate of this appeal hinges in large measure on the evidence of Maluleke who was a single witness in respect of the events leading up to and including the commission of the murder and its aftermaths. Accordingly, it behoves a court in evaluating such evidence to determine whether, having regard to its shortcomings, defects or contradictions, the truth has been told. (See in this regard: ***R v Mokoena*** *[1956] 3 All SA 208 (A) at 212-213;* ***S v Sauls and Others*** *1981 (3) SA 172 (A) at 180 E-F.)*

[my underlining]

106. It is important to note that there were no serious or tangible contradictions due to the Accomplice's cross-examination; any minor infractions that may be there did not raise doubt about the truthfulness of his evidence in totality. In paragraph 62, Petse DP in *Tshiki* above, writes:

> *"It is a fact that Maluleke's evidence is not entirely without blemish. This is, however, hardly surprising given that we are here dealing with someone who is an accomplice. Accordingly, it should be remembered, as this Court emphasised in* ***S v Francis*** *1991 (1) SACR 198 (A) at 205 C - E, that it is not expected that the evidence of an accomplice should be wholly consistent and wholly reliable, or even wholly truthful. It is sufficient that in its essential features it has a ring of truth."*

107. The only test in criminal trial is whether the Accused guilt has been proved beyond reasonable doubt. I am persuaded that the State has met this threshold.

108. With the foregoing, I find that the Accused is as guilty as his cohorts who had pleaded guilty and have been sentenced for their frolic and spate of gruesome acts.

109. In *S v Makwanyane & another* 1995 (2) SACR 1 (CC) at paragraph 117 the Constitutional Court propounded:

> *"The need for a strong deterrent to violent crime is an end the validity of which is not open to question. The State is clearly entitled, indeed obliged, to take action to protect human life against violation by others. In all societies there are laws which regulate the behaviour of people and which authorise the imposition of civil or criminal sanctions on those who act unlawfully. This is necessary for the preservation and protection of society. Without law, society cannot exist. Without law, individuals in society have no rights. The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy, and the creation of development opportunities for all, which are primary goals of the Constitution. The high level of violent crime is a matter of common knowledge and is amply borne out by the statistics provided by the Commissioner of Police in his amicus brief. The power of the State to impose sanctions on those who break the law cannot be*

doubted. It is of fundamental importance to the future of our country that respect for the law should be restored, and that dangerous criminals should be apprehended and dealt with firmly. Nothing in this judgment should be understood as detracting in any way from that proposition. But the question is not whether criminals should go free and be allowed to escape the consequences of their anti-social behaviour. Clearly they should not; and equally clearly those who engage in violent crime should be met with the full rigour of the law…"

VERDICT

110. The Accused is guilty of count 1 being robbery with aggravating circumstances. I accept the version of the Accomplice that the Accused was present at the shop on 08 July 2023 and was the first to enter the shop followed by the Accomplice who was wielding a gun, and the other cohorts followed. The shop was ransacked and stock valued at R6 930.88 was taken. The provisions of Section (1) (1) (b) (i) of the CPA are invoked.

111. The Accused is further found guilty of counts 2 and 3 in that on the same day a 57-year-old Zoleka was kidnapped together with her employee Kholosa who was then 27 years of age. The two women were kidnapped and bound by cable ties from the evening of 08 July 2023 until they met their horrific demise on the night of 09 July 2023 whilst still under shackles.

112. Finally, I find the accused guilty of murder in respect of both Zoleka and Kholosa.

MITIGATING AND AGGRAVATING FACTORS

113. The guide in *S v Blaauw* 1999 (2) SACR 295 (W) at 311 is appropriate, where it was held:

"... a Court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation but view them cumulatively and if, in doing so, the Court forms the view that, bearing in mind

all the factors, aggravating as well as mitigating, a sentence of life imprisonment would be grossly disproportionate to the crime committed or, to put it differently, startlingly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence ..."

114. In this matter, the Accused is 51 years of age, married with two minor children, a 13-year-old son and a 4-year-old girl. They stay at Daninge Farm, which belongs to his father. He earns R20 000.00 a month and his highest level of education is Standard 9 (Grade 11).

115. On the other hand, the Accused has previous convictions:

115.1. Rape for which he was sentenced to 5 years' imprisonment on 10 November 1992;

115.2. Robbery committed on 25 October 2000; and

115.3. Robbery committed on 01 February 2001.

116. The accused has not shown a scintilla of remorse during the proceedings instead the manner he conducted himself during the trial digging to his heels and making bald denial opened up wounds to the members of the family. Clearly, the Accused has not been deterred by the previous convictions and serving time in jail.

117. Two members of each of the families of the deceased testified and were still in pain and have been able to find closure as they could not even see their loved ones. Striking is the fact that some parts of the remains that were retrieved could not be identified as to whom they belonged as they were burnt together and could not be extricated. The families had to take a painful decision to share those pieces, which means there are pieces of Zoleka in the last resting place of Kholosa, *vice versa*.

118. In *S v Valley* 1998 (1) SACR 417 (WLD) at 420 the court put it thus:

"The crimes which the appellant committed are extremely serious. We live in a society which is becoming increasingly lawless; firearms are frequently used in robberies and victims are not uncommonly shot to death or badly wounded. Persons who perpetrate such crimes must be punished severely. Society

demands this and it is absolutely necessary that the message goes out to the world that people who commit these sorts of crimes will be punished severely."

SENTENCE

119. In determining an appropriate punishment and jail time, I take guidance on the triad of *Zinn*[3] where it was propounded:

"what has to be considered is the triad consisting of the crime, the offender and the interests of the society"

120. This became the law, which requires the trial court to balance these three different elements of the triad to be in a balance. In *S v Mandlozi* 2015 (2) SACR 258 (FB), the trial court, despite its consideration of all the relevant factors and being commended for a good judgment, was faulted on not balancing the *Zinn-triad*:
"The court a quo somehow excessively stressed the gravity of the crime together with the harm to society's interest at the expense of the profile of the appellant. As a result of the imbalance the court a quo inappropriately imposed a sentence which tended to be more retributive than deterrent in effect."

121. Considerations that have come into play in this matter especially that the convictions fall within the ambit of Sections 51 (1) and (2) of the CLAA, I have taken heed of the warning bells sounded in a myriad of cases that the Court is not give a clean slate upon which to inscribe whatever sentence it may deem fit for the specified crimes[4].

122. Suffice to say, I find no substantial and compelling reason warranting deviation from the prescribed minimum sentence in terms of the CLAA.

123. It is important that this Court maintains that justice must be seen to be done. In *R v Karg* 1961 (1) SA 231 (AD) at 236 the court had the following to say:

"It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for

[3] *S v Zinn* 1969 (2) SA 537 (A @ 540 G.).
[4] See: *S v Matyityi* 2011(1) SACR 40 (SCA) @ para 11 and *S v Malgas* 2001(1) SA 469 (SCA).

serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment."

124. Terblanche writes in his book, *A Guide to Sentencing in South Africa*:

"(1) The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The sentence should not be too light or too severe.

(2) An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors surrounding the person of the offender; in other words, the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender. These two factor, the crime and the offender, are the first two elements of the triad of Zinn.

(3) An appropriate sentence should also have regard to or serve the interests of society, the third element of the Zinn triad. The interests of society can refer to the protection society needs, or the order or peace it may need, or the deterrence of would-be criminals, but it does not mean that public opinion be satisfied.

(4) In the interests of society the purposes of sentencing are deterrence, prevention and rehabilitation, and also retribution.

(5) Deterrence has been said to be the most important of the purposes of punishment, although this has been shown to be an oversimplification. Deterrence has two components, namely deterring the offender from re-offending and deterring other would-be offenders.

(6) Rehabilitation should be pursued as a purpose of punishment only if the sentence actually has the potential to achieve it. In the case of very serious crime, where long terms of imprisonment are appropriate, it is not an important consideration.

(7) Prevention as a separate purpose of punishment is rarely discussed any longer.

(8) Retribution, as an expression of society's outrage at the crime, has been held not to be as important as it was in the past but may nevertheless be of great importance, depending on the facts of the case. Thus, if the crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence. Retribution can also be related to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime.

(9) Mercy is contained within a balanced and humane approach to consideration of the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. There is no room for a vindictive and vengeful attitude from the sentencing officer."[5]

125. It is apposite the remarks made in the final paragraph of *S v Matyityi* 2011 (1) SACR 40 (SCA) at paragraph 24 where Ponan JA aptly said:

"In this case the respondent and his cohorts conducted themselves with a flagrant disregard for the sanctity of human life or individual physical integrity. All three of them acted in a manner that is unacceptable in any civilised society, particularly one that ought to be committed to the protection of the rights of all persons including women." …

126. In respect of counts 1 and 4, the resultant sentence due to the use of a firearm in the commission of the robbery and also involving the taking of a motor vehicle[6]. The Accused has previous convictions rendering him to be a third or subsequent offender, which Section 51 (2) (a) (iii) read with Part II of Schedule 2 of the CLAA prescribes a minimum sentence of 25 years. The Accused did not present any substantial and compelling circumstances warranting the imposition of a lesser sentence. Therefore, the Accused is sentenced to 25 years' imprisonment.

[5] SS Terblanche, *A Guide to Sentencing in South Africa* (LexisNexis, 3Ed. 2016), at 151-2.
[6] Schedule 2, Part II (a) and (b) of the CLAA.

127. For counts 2 and 3, the Accused is guilty of kidnapping in respect of both Zoleka and Kholosa. The provisions of Section 51 (2) (c), read with Part II of Schedule 2 of the CLAA, kick in. In the premise, I sentence the Accused to 8 years for each count.

128. The Accused is also found guilty of counts 5 and 6 relating to the murder of both Zoleka and Kholosa. The deceased were killed after they were robbed and kidnapped. The provisions of Sections 51 (1) read with Part I of Schedule 2 of the CLAA are invoked. In this regard, I impose two life sentences in respect of both counts.

129. All of the above sentences are to run concurrently.

B. METU
ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

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