**IN THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG DIVISION, PRETORIA**

CASE NO: A80/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO
(3) REVISED

2/5/2017 .....
DATE SIGNATURE

5/5/2017

In the matter between:

| | |
|---|---|
| **Molontoa Kgomotso** | **1st Appellant** |
| **Johannah Khoza** | **2nd Appellant** |
| **Mamolefe Legodi** | **3rd Appelant** |
| **and** | |
| **The State** | **Respondent** |

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**JUDGMENT**

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NOBANDA AJ:

INTRODUCTION:

[1] The Appellants were charged in the Regional Court for the Regional Division of Gauteng held at Pretoria for murder and kidnapping. The Appellants pleaded not guilty to both charges and reserved their plea explanation. The State called three witnesses who testified on behalf of the State. It appears from the record that the State intended to call two further witnesses and requested a postponement for that purpose. The court refused on the basis that the case was previously postponed for those witnesses but the witnesses were still unavailable on the date the matter was postponed to. As a result, the State closed its case.

[2] The Appellants applied for a discharge in terms of Section 174 of the Criminal Procedure Act 56 of 1977 ("the Act"). The application was refused on the basis that there was *prima facie* evidence on which the Appellants might be found guilty at the end of the proceedings. The Appellants closed their case without giving evidence or calling any witnesses.

[3] On 3 September 2012 the Appellants were found guilty on both charges and sentenced to 8 years direct imprisonment on both counts. Both counts were taken together for the purpose of sentence. The Appellants were further declared unfit to possess firearms in terms of Section 103 of Act 60 of 2000. The Magistrate was assisted by 2 assessors during the trial. All the Appellants were legally represented during the trial.

[4] The Appellants applied for leave to appeal against both the conviction and sentence. On 27 May 2013, Appellants 2 and 3 were granted leave to appeal against both conviction and sentence. Their bail was extended and increased from R1000 to R3000 pending the appeal. A similar order was granted for Appellant 1 on 11 June 2013. All the Appellants are out on bail. The appeal is however proceeding against Appellants 1 and 3 only as Appellant 2 passed away during May 2016.

[5] During September 2014, Appellants 2 and 3 raised a *"point in limine"* in their heads of argument that the record of the trial proceedings was incomplete in that there was important evidence missing relating to one of the State witnesses. It is not clear why the Appellants referred to the issue as a *"point in limine"*. Regardless, nothing turns on this as the missing evidence was subsequently transcribed and the record supplemented during October 2014. It appears the matter was set-down for 25 August 2016 for argument. On 25 August 2016, the matter was postponed *sine die* for Appellant 3 to file heads of argument on or before 30 September 2016.

[6] The matter was heard on 14 November 2016.

GROUNDS OF APPEAL

[7] There is no notice setting out the grounds of appeal found in the court file. The grounds of appeal can be deduced from argument on the record for application for leave to appeal and from the heads of argument filed by the Appellants. From the application for leave to appeal on behalf of Appellants 2 and 3, Mr Somo, their legal representative argued as follows:

"*Mr Somo: It is our believe that a different court may come to a different conclusion, in regarding (sic) the conviction of the accused on the counts that they have convicted on (sic)...the court did not with respect take into consideration the following aspects that there was no evidence before this court in the count of murder that such [indistinct]. The accused were the real perpetrators.*

*There is no evidence before this court that informs the court that they indeed had a hand in the assault that led to the death of the accused . The only evidence the court has is, that accused 2 and 3 were the last people seen with the*

*deceased and eventually when the deceased was found was also found in the presence of them (sic), although it is very clear and very evident that there was a mass of people that were involved in the killing of in the assault that lead to the death of the deceased (sic)....*

*It is our submission Your Worship, that since there is no evidence to the defect (sic) at (sic) a different court may come to a different conclusion against, that which the court has come up (sic) to and the evidence before this court in regard to the kidnapping count Your Worship, suggest that from the police station as the accused left with the deceased it was by agreement they at all times that is what even like the police cop believe (sic) or to release the deceased to go peacefully with them as they had an agreement and the deceased consented to the moving."*[1](emphasis provided).

[8] With regard to Appellant 1, Mr Somo argued that there was little or no evidence that suggested that the Appellant was the perpetrator of the murder of the deceased; that the evidence that is before the court only relates or ends at the time when Appellant 1 was seen with the deceased leaving the police station; that nothing suggests that Appellant 1 was even party to the killers or the people who assaulted the deceased that led to the deceased's death; further that there was nothing before the court that suggested that Appellant 1 was even present when the deceased was found by the paramedics. Mr Somo submitted that the court misdirected itself in concluding that there was sufficient evidence leading to the conclusion that the fact that Appellant 1 was the person '*last seen*' with the deceased and therefore that he was the person who had committed the act that led to the deceased's death.

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[1] Record p 194 line 22-p 195 line 1 – 9 and 14 – 21.

[9] With regard to the kidnapping charge, Mr Somo argued that the deceased consented to leave the police station with the Appellants; that when they left, it was by agreement with the deceased and there was no conflict or rather that they were sent away by the police officers in the charge office to go and sort out their differences. Further, that there was 'no intention' or sign of violence or resistance from the deceased.[2]

[10] Accordingly, Mr Somo submitted that the State had failed to prove its case beyond a reasonable doubt against Appellant 1.

[11] It was further contended on behalf of the Appellants that the fact that they did not testify in their defence did not alleviate the State's onus to prove its case against the Appellants beyond a reasonable doubt.

[12] In addition, Appellant 3 raised *a point in limine* in her supplementary heads of argument. Appellant 3 contended that the Magistrate committed an irregularity in that she did not administer the oath to any of the three State witnesses who gave evidence in court in compliance with the provisions of Section 162 of the Act.

[13] Accordingly, it was submitted that the evidence of all the State witnesses whereupon the conviction was based is inadmissable. As such, that there is *"no evidence"* before this court whereupon this appeal can be adjudicated to determine whether or not the Appellants committed any of the offences they have been convicted of.

[14] The State called 3 witnesses, to *wit,* Ms Montheo Mureal Sealetsa, Mrs Gloria Tshoba and Inspector Mosia Mabuye. All the Appellants closed their case at the end of the State's case and elected to remain silent without presenting any evidence before court. The Appellants' version was however put to the witnesses during cross-examination.

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[2] Record p 205 line 20 – p 206 lines 1-20

[15] Prior to dealing with the witnesses' evidence, I shall first deal with the *point in limine* raised by Appellant 3 as this will determine how the matter proceeds, if at all.

APPLICABLE LEGAL PRINCIPLES

*Point in Limine*

[16] Appellant 3 contends that the Magistrate failed to administer the oath to all the three witnesses who testified in the trial as required by Section 162 of the Act. As such, that in line with the unreported Full Court judgment by the North West High Court Division per Hendricks J in ***Pilane v The State***[3], such 'evidence' lacks the status and character of evidence and is therefore inadmissible. Accordingly, it was submitted, in line with the *Pilane* finding, that there is no evidence before this court whereupon this appeal can be adjudicated to determine whether or not the Appellants committed the offence they have been convicted of.[4] *Pilane (supra)* was subsequently confirmed by the Supreme Court of Appeal in ***Machaba & Another v The State***.[5]

[17] Subsequently, a similar issue in ***The State v Maloma***[6] was referred to the Full Court of this division on a special review by the regional court Magistrate of Lydenburg, in terms of Section 304 (4) of the Act.

[18] After considering *Pilane* and the Supreme Court of Appeal cases relied upon in *Pilane*, the Court agreed with the finding that the provisions of Section 162 of the Act are peremptory but disagreed with the conclusion that if the oath was not administered by the presiding officer but interpreter, such evidence was inadmissible and irregular thereby

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[3] CA 10/2014 delivered on 5 March 2015.
[4] At [9] after the court referred to, discussed and agreed with the SCA's judgments in S v Raghubar 2013 (1) SACR 398 (SCA) and Matshivha v S [2016] JOL 33572 (SCA) (decided on 23 September 2013), held that it was bound by those decisions based on the principle of *stare decisis.*
[5] (20401/2014) [2015] ZASCA 60 (8 April 2015).
[6] CA A376/2015 delivered on 27 May 2015 per Bam J (Mlambo JP and Potterill J concurring).

vitiating the entire proceedings. To that end, this Court *per Bam J (Mlambo JP and Potterrill J concurring)* stated thus:

> *"What, however, the North West Court, with respect, did not consider, are the provisions of section 165. This may be due to the fact that counsel appearing for the appellant and the State, for an unknown and inexplicable reason, failed or neglected to draw the Court's attention to that section, and for that matter, the country wide long standing of the application thereof in all our criminal courts.... Subsequently, in the matter of Machaba and Another v The State (20401/2014) [2015] ZASCA 60 (8 April 2015) the Supreme Court of Appeal, in paragraphs [8] and [9] of the judgment, with reference to Pilane, confirmed that it is peremptory in terms of section 162 that either the presiding judge, or the registrar in the case of a superior court should administer the oath to witnesses. The question whether it was justified in law that the interpreter is empowered to administer the oath, was not addressed and the Court was clearly not called upon to consider Section 165. The Court merely referred to the provisions of section 162. Accordingly the decision in Machaba, with respect, did not solve the problem. It follows, with respect, that the North West Division's conclusion, whilst the Court did not consider Section 165, cannot be followed."*[7] **(emphasis provided).**

[19] The Full Court then concluded that an oath administrated by an interpreter was consistent with the provisions of Section 162 read with Section 165 of the Act. Accordingly, that an oath administered as such is not irregular.[8]

[20] In *casu,* the following appears from the record:

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[7] paras 7-13
[8] para 16

"COURT: Madam your full names please?
EVIDENCE FOR THE STATE
MONTHEO MUREAL SEALETSA (d.s.s) (through interpreter)
...
COURT:...Has she been sworn in Mr Interpreter?...
INTERPRETER: Sworn in...[9]
...
GLORIA TSHOBA: (d.s.s) (through interpreter)[10]
...
SEKGWARE MOSIA MABUYE: (d.s.s)
INTERPRETER: Sworn in."[11]

Section 165 of the Act provides:

> *"Where the person concerned is to give his evidence through an interpreter or an intermediary appointed under section 170A (1), the oath, affirmation or admonition under section 162, 163 or 164 shall be administered by the presiding judge or judicial officer or registrar of the court, as the case may be, through the interpreter or intermediary or by the interpreter or intermediary in the presence or under the eyes of the presiding judge or judicial officer, as the case may be.* (emphasis provided)

[21] As evinced by the record above, the oath of all the three State witnesses was administered by the interpreter *'in the presence or under the eyes'* of the presiding Magistrate. All three witnesses gave evidence through the interpreter. Accordingly, the oath was administered in compliance with the provisions of Section 162 read with Section 165 of the Act. As such, the evidence of all three State witnesses is admissible.

[22] Now to deal with the witnesses' evidence.

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[9] Record p17 lines 5 - 13
[10] Record p62 line 1
[11] Record p84 lines 10 - 11

Ms MONTHEO MUREAL SEALETSA (1st State Witness)

[23] Ms Sealetsa testified that the deceased was her boyfriend and that on the day of the incident, the deceased left home around 8h00 in the morning. Whilst the deceased was away, two men arrived, one of whom she identified as Appellant 1. The two men spoke to the deceased's mother within her earshot, alleging that the deceased has stolen their vehicle. Then Appellant 1 requested the deceased's mother to give him the deceased's cellphone numbers which she did.

[24] Then at approximately 12h30 one of those people phoned the deceased's cell phone which the deceased had left at home. She answered the phone and informed the person that the deceased was not home. She then immediately called one of the deceased's friends and asked him where the deceased was. The friend advised her that they were together at a complex in Silverton. She then went to the complex where they were. When she got there, she found the deceased and informed him that there were men looking for him alleging that he had stolen their car. The deceased said that he knew nothing of the car. She then advised the deceased that they should go to the police station.

[25] When they got to the police station, they informed the police officer in the charge office that the deceased is accused of having stolen a motor vehicle. The police officer informed them that there was such a case reported. Whilst talking to that police officer, the person called the deceased's cellphone again and the deceased informed him that he was at the police station and that they would find him there.

[26] Whilst there, six people entered the charge office, four men in the company of two women. Appellants 1, 2 and 3 formed part of that group of six. The group, including the Appellants, started assaulting the deceased inside the charge office, accusing him of stealing their

vehicle. They used their open hands and fists to assault the deceased on his face and body. The police officers then chased them out of the charge office and told them to go outside and resolve their problem. The group dragged the deceased outside whilst assaulting him in the process. Appellant 3 hit the deceased once on the back with her hand. She kept on saying that the deceased should show them their vehicle whilst the other three, which included Appellants 1 and 2, were dragging him outside. She tried to assist the deceased and Appellant 2 slapped her.

[27] When they got outside the charge office, Appellants 1, 2 and 3 continued assaulting the deceased with clenched fists over his body. Appellants 1 and 2 dragged the deceased towards the car they came with and forced the deceased into that car. At that time, Appellant 3 was already sitting in the car. The deceased was placed at the backseat and all six, including the Appellants, drove away with the deceased to an unknown location.

[28] She then went to the deceased's home and reported the incident to the deceased's mother. She and the deceased's mother then went back to the police station and a police vehicle was organised for them to look for the deceased. The deceased was eventually found at approximately 22h00 in hospital, unconscious and severely injured. The deceased passed away at approximately 01h00 the following morning. Ms Sealetsa testified that she did not know any of the Appellants prior to that day.

MRS GLORIA TSHOBA (2nd State witness)

[29] Mrs Tshoba testified that the deceased was her son. He was 35 years of age at that time. On the day of the incident, 2 September 2006 at approximately 8h08 in the morning, she was approached by two unknown young men whilst sweeping outside her home. She identified one of the young men as Appellant 1 and the other one called himself

Peace. They told her that the deceased had stolen their car. She informed them that the deceased was not home and advised them to report the matter to the police but they refused, alleging that the police do not do their work.

[30] She also suggested that they call the deceased so that they can talk about this issue at home, but they didn't. Then they left. As they left, one of them said that they were going to arrange people to kill the deceased.

[31] When the deceased arrived home, she advised him to go and report the matter to the police station. The deceased then left with Ms Sealetsa, the first State witness for the police station. Then later at around 12h30 four men came to her home, again looking for the deceased. It was the first two men who came earlier accompanied by two other men. She told them that the deceased has left for the police station. They then asked for the deceased's cellphone numbers which she gave to them thinking that they were reasonable people and were going to sit down and talk about that issue. They then called the deceased who told them that he was at the police station and if they wanted to see him they should come to the police station. They then left.

[32] Later on Ms Sealetsa came home and reported that the men in a red VW Golf had come into the police station and dragged the deceased from behind the counter at the charge office after the police officer told them to go outside and continue with their argument outside. Ms Sealetsa reported that they had forced the deceased into the red VW Golf and taken him to an unknown location.

[33] She then went to the police station with the first State witness and the first State witness pointed out the police officer who had chased them out of the charge office, one Mr Ralothaga. She then confronted Ralothaga, asking him why he allowed those people to drag the

deceased out of the charge office. Ralothaga's response was that they were making a noise and he thought they knew each other. She then requested him to accompany them to Maseko where she had heard that they had taken the deceased and that they were fighting. Ralothaga told her that he cannot accompany them as there was no escort and no police vehicle to transport them. They were told to sit outside and wait.

[34] After some time, whilst waiting, she decided to call her younger brother Phillip who then came to the police station. Then another police officer arrived and said that he will escort them and they left for Maseko. Her brother followed them in his vehicle. When they arrived at Maseko they were advised that nothing was happening there. Whilst driving around, the driver of the police vehicle received a message on the radio that there was an emergency and he took them back home and left. Later on, her brother Phillip phoned her and informed her that they had found the deceased at a particular place and he was badly injured and they were waiting for an ambulance to take him to hospital. He said he will come fetch her so they could go to hospital together.

[35] Her brother came and they went to hospital. When they arrived, they found the deceased unconscious and swollen on his head, face and shoulders. They sat in hospital and at around 01h00 the following morning, they were advised that the deceased had passed away.

INSPECTOR MOSIA MABUYE (3rd State witness)

[36] Inspector Mabuye testified that he was on duty the day of the incident and had attended to a complaint that they had received about a mob justice incident at Vista Campus in Mamelodi. He went there with his colleague, Inspector Mathe. When they arrived, they found a group of people who pointed them to a room and said that that is where they

should go check. They went to that room and found the door closed. They knocked and Appellant 3 opened the door for them. They were advised that the room belonged to Appellant 2.

[37] Inside the room, they found a gentleman lying on the floor on his back, half naked from the top. The gentleman appeared assaulted. The room was ransacked and there was water lying around the floor. The gentleman was not bleeding but had a swollen face and his whole body appeared swollen. It also appeared as if water was poured over his head. He then asked the two ladies, Appellants 2 and 3, who had assaulted the gentleman. Appellant 3 said that it was two of their gentlemen friends who had accused the victim of stealing their car. He asked them where they were and Appellant 3 said that they had left to look for their car at SNS.

[38] Inspector Mabuye testified that because the victim was just lying on the ground and not speaking, he realised that he was still alive but unconscious. He then requested Inspector Mathe to call an ambulance which he did. Whilst waiting for the ambulance, a gentleman came and said that he was looking for his nephew who is injured. The ambulance came and they took the victim to hospital. Inspector Mabuye further testified that the deceased did not sustain any further injuries from the time the ambulance came to fetch him until he arrived in hospital.

[39] Although the Appellants did not testify in their defence, the Appellants' version was put to the State witnesses under cross examination. From that version, the following became common cause:

39.1 Appellant 1 visited the deceased's residence in the morning of the incident to confront the deceased about his stolen vehicle;

39.2 Appellant 1 received the deceased's cellphone number from the deceased's mother;

39.3 the Appellants met the deceased and the first State witness at the police station in Mamelodi later that day;

39.4 the Appellants interacted with the deceased inside the charge office and were instructed by a police officer there to go outside, which they did, after the deceased confirmed the whereabouts of the stolen motor vehicle;

39.5 Appellant 1 and one Given went back to the deceased's home with two other men in a red VW Golf later that day;

39.6 the Appellants left the police station with the deceased for the deceased to show them where the stolen vehicle was;

39.7 the deceased was found lying on the floor in a room in the presence of Appellants 2 and 3;

39.8 the deceased was Thembi Nkosi Velaphi Tshoba;

39.9 the deceased died as a result of a blunt "*head injury*" as recorded by the Pathologist.

[40] Although the Appellants denied assaulting the deceased, the following facts were not placed in dispute:

40.1 the police searched for the deceased after Ms Sealetsa and the deceased's mother Mrs Tshoba reported him being taken against his will;

40.2 Inspector Mabuye received a report of mob justice at Vista Campus which he attended to with his colleague Inspector Mathe;

40.3 Inspectors Mabuye and Mathe were pointed to a room by a group of people who advised them that the room belonged to Appellant 2 and they should go and check in that room;

40.4 Appellant 3 opened the door for them;

40.5 they found the deceased badly assaulted and lying on the floor in that room half naked from the top;

40.6 Appellant 3 told them that the deceased was assaulted by their friends who had accused him of stealing their car and they had left to look for their car at SNS;

40.7 the deceased was still alive but could not speak and swollen on his face and his whole body when found;

40.8 the room where the deceased was found was ransacked and there was water on the floor;

40.9 Inspector Mathe called an ambulance which came and took the deceased to hospital;

40.10 the deceased did not sustain any further injuries from the time the ambulance picked him up from the room to hospital;

40.11 the deceased died later in hospital due to the injuries he sustained on that day.

[41] The Magistrate sitting with two assessors analysed the evidence as a whole and found that, although the first State witness was a single

witness, and that caution as contemplated in Section 208 of the Act should be applied, her evidence was satisfactory in all material respects. The Magistrate found the first State witness' evidence to be credible and reliable as a whole, notwithstanding the contradictions in her evidence, which the court found not to be material. The court found the first State witness to be an honest witness who did not have any motive to implicate any of the Appellants.

[42] In addition, the court found that her evidence was corroborated by the second State witness, Mrs Tshoba that Appallent 1 was amongst the two men who came earlier looking for the deceased and among the four who came later looking for the deceased. As such, the court found that her version was credible and probable.

[43] The Magistrate also found the second State witness' evidence credible and reliable. With regard to the third State witness, the court held that his evidence was undisputed that he found the deceased seriously injured but still alive in a room that belonged to Appellant 2, in the presence of Appellants 2 and 3.

[44] The trial court rejected the Appellants' version as put to the witnesses under cross examination that the Appellants did not assault the deceased and dragged him forcefully outside the police station and drove away with him without his consent. Then the court stated that since there was a *prima facie* case against the Appellants and the Appellants chose, which was their constitutional right, not to give evidence in their defence, the court only had the State's version on which to determine their guilt or innocence. The court found that since the State's evidence was uncontroverted, the *prima facie* case against the Appellants became conclusive because there was nothing to compare it with. The court then found that the evidence established beyond a reasonable doubt that the Appellants took part in the offences they were charged with. The court found the Appellants guilty

on the basis of common purpose for the murder and kidnapping of the deceased.

APPELLANTS' GROUNDS OF CONTENTION

[45] The Appellants contend that the Magistrate misdirected herself in finding that since the State's case was uncontroverted, the State has proved the Appellants' guilt beyond a reasonable doubt, more particularly since there was no evidence before court to support the charges proffered against the Appellants.

[46] It was contended on behalf of the Appellants that the first State witness contradicted herself on who assaulted and dragged the deceased out of the charge office. It was further contended that there was evidence that the deceased was assaulted by a mob and there was no evidence when the deceased was found that any of the Appellants were part of the mob that assaulted the deceased that led to his death.

[47] It was further submitted on behalf of Appellant 1 that he was also not present in the room where the deceased was found by the two police officers, injured and unconscious. With regard to Appellant 3, it was contended that there was no evidence that she was involved in the assault of the deceased other than that she was found in the same room with the deceased.

ANALYSIS OF THE EVIDENCE

[48] The correct approach to the evaluation of evidence in a criminal trial was enunciated by the Supreme Court of Appeal in **S v Chabalala** as follows:

> "*...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 about the accused's guilt. The results may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call material witness concerning an identity parade) was decisive but that can only be an ex-post facto determination and a trial court (and counsel) should avoid the temptation to latch on to one (apparently) obvious aspects without assessing it in the context of the full picture presented in evidence...*

*This salutary approach was also adopted in S v Trainor 2003 (1) SACR 35 (SCA) para 9."*[12]

[49] The Supreme Court of Appeal in ***S v Phallo and Others***[13] enunciated the correct approach regarding proof as follows:

*".... Where does one draw a line between proof beyond reasonable doubt and proof on a balance of probabilities? In our law, the classic decision is that of Malan JA in R v Mlambo 1957 (4) SA 727 (A). The learned Judge deals, at 737 F - H, with an argument (popular at the Bar) that proof beyond reasonable doubt requires the prosecution to eliminate every hypothesis which is inconsistence with the accused's guilt or which, as it is also expressed, is consistent with his innocence. Malan JA rejected this approach, preferring to adhere to the approach which 'at one time found almost universal favour and which has served the purpose so successfully for generations' (at 738A). This approach was then formulated by the learned Judge as follows (at 738A-C):*

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[12] 2003 (1) SACR 134 (SCA) at [15]
[13] S v Phallo & Others 1999 (2) SACR 558 (SCA) at 738 A - C.

*'In my opinion, there is no obligation upon the Crown to close every avenue of escape which may be said to be open to an accused. It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.*

*An accused's claim to the benefit of a doubt when it may be said to exist must not be derived from speculation but must rest upon a reasonable and solid foundation created either by positive evidence or gathered from reasonable inferences which are not in conflict with, or outweighed by, the proved facts of the case'.*

*(See also S v Sauls and Others 1981 (3) SA 172 (A) at 182G – H; S v Rama 1966 (2) SA 395 (A) at 401; S v Ntsele 1998 (2) SACR 178 (SCA) at 182b-h.)*[14]

[50] The Court proceeded to state that the approach of our law as represented in *R v Mlambo (supra)* corresponds with that of the English Courts as set out in *Miller v Minister of Pensions per Denning J* that proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. Otherwise, the law would fail to protect the community if it admitted *"fanciful possibilities"* to deflect the cause of justice. As such, it is said that if the evidence is so strong against the accused as to leave only a remote possibility in his favour which can be dismissed with the sentence of *"of course it is possible, but not in the least probable"*, then the case is proved beyond reasonable doubt.[15]

[51] The evidence of the first State witness Ms Sealetsa was that she observed the Appellants at the police station assaulting the deceased

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[14] at [10]
[15] at [11]

with open hands and fists. She also testified that she also observed at least Appellants 1 and 2 together with other members of the group dragging the deceased into a red VW Golf and leaving with the deceased. Although it was not clear from the witness' evidence of the sequence of who assaulted the deceased where and who was involved in the dragging of the deceased and at what stage, the witness was adamant even during cross-examination that the Appellants at one stage or the other were involved in both the assault and the dragging of the deceased outside the charge office. The witness however did testify that at the time of dragging the deceased into the car, Appellant 3 was already sitting at the back seat of the car. That was the last time the first witness saw the deceased until she saw him again later in hospital injured and unconscious, whereafter the deceased died in the early hours of the morning as a result of the injuries sustained on that day.

[52] The evidence of the second witness, the deceased's mother, although not having witnessed the assault and the kidnapping itself, corroborates the evidence of the first witness that Appellant 1, in the company of another young man, came to her home early that morning looking for the deceased alleging that the deceased has stolen their car. This witness testified that when they left, they, or at least one of them, had threatened that they were going to find people to kill the deceased. Later during that day, around 12h30, Appellant 1 and that same gentleman came to her home again, accompanied by two other men still looking for the deceased, whereafter she gave them his cellphone numbers which they used to call the deceased in her presence. Thereafter they left for the police station.

[53] Appellant 1's version also corroborates the first witness' evidence that they did go to the police station in a red VW Golf and found the deceased there and left with the deceased. The Appellants' version put to the witnesses under cross-examination was that the deceased was

not kidnapped from the police station but had voluntarily left with them to show them where the car was.

[54] The deceased's mother further corroborates the first witness' evidence that they later found the deceased in hospital, unconscious and badly injured, and that the deceased later died in the early hours of the morning in hospital as a result of the injuries sustained on that day.

[55] Inspector Mabuye's evidence was that he found the deceased still alive in Appellant 2's room after being directed there by a group of people he found standing outside at Vista Campus. He testified that, after they had knocked on the door, Appellant 3 opened the door for them and they found the deceased lying on the floor, half naked from the top and swollen all over the body and the head. The deceased appeared to be unconscious. It was further the third State witness' evidence that Appellant 3 informed him that the deceased was assaulted by their friends who had left to look for their car. He testified that inside the room where he found the deceased, the room was ransacked and there was water on the floor as if someone had poured water over the deceased. He then requested his colleague to call an ambulance which came and took the deceased to hospital.

[56] This witness also corroborated the deceased mother's evidence that a gentleman came in whilst they were in that room waiting for an ambulance who informed him that he was looking for his nephew and he had heard that he was in that room. Save to state that it was put to this witness that the deceased was assaulted by a mob, his evidence was not disputed by any of the Appellants. Under cross-examination, it was sought to infer that the group that this witness found standing outside could have been the mob that had assaulted the deceased. The witness disagreed and went as far as stating that that group did not interfere with them in any way and were just sitting dormant there.

[57] In my view, each State witness was to a large extent a single witness with regard to the evidence that they tendered in court. Each gave evidence of what unfolded on that day, giving a separate account of what each witnessed. What is however interesting is the evidence tendered by each witness is a piece of a puzzle that, when viewed together, gives a complete picture of what transpired on that fateful day when the deceased died. Ms Sealetsa's evidence is the only evidence that gives an account of the assault and kidnapping of the deceased by the Appellants. As such, she is a single witness in that regard.

[58] In terms of Section 208 of the Act, an accused may be convicted of any offence on the evidence of any single competent witness. In ***S v Teixeira***[16] the Appellate Division observed that in evaluating the evidence of a single witness, a final evaluation can rarely, if ever, be made without considering whether such evidence is consistent with the probabilities. Later, the same court amplified upon this principle in ***S v Sauls*** and stated thus:

> "*There is no rule of thumb test or formula to apply when it comes to a consideration of the credibility of the single witness...the trial Judge 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 short-comings or defects or contradictions in his testimony, he is satisfied that the truth has been told. The cautionary rule... may be a guide to a right decision but it does not mean that 'the appeal must succeed if any criticism, however slender, of the witness' evidence were well founded...it has been said more than once that the exercise of caution must not be allowed to displace the exercise of common sense*"[17].(emphasis provided).

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[16] 1980 (3) SA 755 (A) at 761
[17] S v Sauls 1981 (3) SA 172(A)

[59] In the premises, viewing the evidence of the three State witnesses as a whole and not in isolation as the Appellants sought to do, and the facts that were common cause and undisputed, the Magistrate was correct in refusing to grant the Appellants a discharge in terms of Section 174 of the Act at the close of the State's case and ruling that there is a *prima facie* case against the Appellants which the Appellants had to answer.

[60] The Appellants chose to exercise their constitutional rights not to testify. However, it is said that where there is *prima facie* proof of the accused's guilt, as it was *in casu,* the election of the accused not to testify, although not presupposing that an adverse inference can be drawn against the accused *per se*, entails certain consequences for that accused. One of those consequences is that the *prima facie* evidence left uncontroverted, might be found to be sufficient proof of the accused's guilt.[18]

[61] The Constitutional Court in *S v Boesak*[19] per Langa DP stated as follows in that regard:

> "*The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence." (emphasis provided)*

[62] It is common cause that there is no direct evidence *per se* that links the Appellants to the death of the deceased save for the assault of the

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[18] S v Brown en ander [1996] All SA 625 (NC)
[19] 2001 (1) SACR 1 (CC); 2001 (1) SA 912 (CC) par [24]

deceased at the police station on that day. As such, the State's case of the Appellants' involvement in the deceased's death rests on circumstantial evidence. The Supreme Court of Appeal in ***S v Cwele***[20] per Mpati P, stated as follows with regard to the assessment of circumstantial evidence:

> *"In S v Reddy & Others 1996 (2) SACR 1 (A), this court said the following regarding the assessment of circumstantial evidence:*
>
> *'In assessing circumstantial evidence one needs to be careful not to approach such evidence upon a piecemeal basis and to subject each individual piece of evidence to a consideration of whether it excludes the reasonable possibility that the explanation given by the accused is true. The evidence needs to be considered in its totality. It is only then that one can apply the oft-quoted dictum in R v Blom 1939 AD 188 at 202 – 3, where reference is made to two cardinal rules of logic which cannot be ignored. These are, first, that the inference sought to be drawn must be consistent with all the proved facts and, secondly, the proved facts should be such 'that they exclude every reasonable inference from them save the one sought to be drawn.'* (emphasis provided).
>
> *The state must therefore satisfy the court, 'not that each separate fact is inconsistent with the innocence of the [appellants], but that the evidence as a whole is beyond reasonable doubt inconsistent with such innocence".*[21]

[63] Prior to the deceased's death, Appellant 1 and his companion had threatened to find people to kill the deceased. Later that same day, Appellant 1, in the company of the same companion and of two other men, again went to look for the deceased at his home. After

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[20] S v Cwele and Another 2013 (1) SACR 478 (SCA)
[21] at [19]

discovering that the deceased was at the police station they immediately followed him there in the company of Appellants 2 and 3. They accosted the deceased there and dragged him to the car they were in, with the sole purpose of ensuring that the deceased was going to show them where he took their car.

[64] The evidence of the first State witness is that they started assaulting the deceased from inside the charge office all the way out, while dragging him to the car that was transporting them and whilst Appellant 3 was shouting that the deceased tell them where he took the car. They forced the deceased into the car and left with him. The next time the deceased was seen he was found lying half naked, badly assaulted and unconscious in Appellant 2's room in the presence of Appellants 2 and 3.

[65] Appellant 1 failed, after admitting that he together with other Appellants left the police station with the deceased, to explain where they took the deceased and where they left him thereafter, if at all. Neither did Appellant 3 explain why she was found in the same room where the deceased was found lying on the floor badly injured and unconscious.[22]

[66] In addition, there was no evidence tendered that sought to break the chain from the time when the deceased was accosted, assaulted and dragged into the Appellants' car and driven off from the police station, and the time the deceased was found hours later, badly injured and unconscious in Appellant 2's room in the presence of both Appellant 2 and 3.

[67] In the premises, the only reasonable inference that could be drawn in the circumstances is that the people who assaulted and dragged the deceased into the car and left with him from the police station are the

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[22] See, S v Boesak (supra)

same people that further assaulted the deceased, which assault eventually led to his death. To suggest that the deceased could have been assaulted by the group or 'mob' that the third State witness found standing outside within the proximity of the room where the deceased was found, is not only improbable but devoid of truth, as there was no evidence that sought to link the deceased with that group. In any event, the undisputed evidence of Inspector Mabuye that Appellant 3 informed him that the deceased was assaulted by their friends was never challenged.

[68] It was argued on behalf of Appellant 1 that there was no evidence that he was present when the deceased was found. As such, that there is no evidence that Appellant 1 was involved in the assault of the deceased. This argument is without merit as the absence of Appellant 1 at that stage is explained by Appellant 3 to the third State witness that he and the other friends of the Appellants have left to search for the car in SNS after assaulting the deceased.

[69] In the light of the above, in my opinion, the only inference that can be drawn from these facts is that, after the Appellants assaulted the deceased at the charge office and dragged him from the police station into the car, they took him to Appellant 2's room where they continued assaulting him to confess where he had taken Appellant 1's car. From the second State witness evidence, Appellant 1 in the company of another gentleman had threatened to find people to kill the deceased. Later that same day, Appellant 1 in the company of the same gentleman, now accompanied by two other men, again came to her home looking for the deceased, whereafter they went to the police station and, according to the first State witness started assaulting the deceased, dragging him into their car and leaving with him to an unknown location. The next time the deceased was seen he was badly injured and unconscious, whereafter the deceased died in hospital the following morning not having regained consciousness.

[70] In the premises, the only reasonable inference that could be drawn from these facts is that, at the least, Appellant 1 and his co-perpetrators made good on their threats by beating the deceased until he died later as a result of the assault.

[71] It was argued on behalf of Appellant 3 that even if it was found that she hit the deceased with an open hand on his back at the police station, there was no other evidence that she was involved further in the assault of the deceased that led to his death. It was further argued that there was no evidence that Appellant 3 was present at the deceased's home when Appellant 1 and the other gentleman allegedly threatened to find people to kill the deceased.

[72] Accordingly, it was submitted that the Magistrate misdirected herself when she found Appellant 3 guilty of murder on the basis of having formed a common purpose with the other Appellants. It was submitted that, at the least, Appellant 3 should have been convicted of common assault and given a non custodial sentence.

[73] To counteract Appellant 3's contention, the State submitted that it was not relying on a common purpose on the basis that there was a prior agreement to commit the crime.

[74] The State argued that not only did Appellant 3 assault the deceased at the police station, which it submitted was sufficient for the purpose of forming a common purpose, but Appellant 3 was also found in the same room that the deceased was found, badly injured and unconscious. Accordingly, that Appellant 3 associated herself with the actions of the other Appellants by not calling an ambulance or the police to assist the deceased. It was further argued by the State that the condition of that room was in such a state such as to infer that that was where the deceased was assaulted and Appellant 3 was present during that time. The State further contended that the only reason that

could be inferred for Appellant3's presence when the deceased was found was to keep the deceased there until the car was found.

[75] Accordingly, the State submitted that the only inference that can be drawn from the above is that Appellant 3 had common purpose with other Appellants who assaulted the deceased which assault led to his death.

[76] The Supreme Court of Appeals in ***Scott & others v S***[23], considered the circumstances where there was no proof of prior agreement to commit the offence and held that the co-accused can be convicted on the basis of common purpose if:

> *"(a) they were present where the violence was committed;*
>
> *(b) they were aware of the assault on the [victim] and the deceased;*
>
> *(c) they intended to make common cause with the perpetrator(s) of the assault;*
>
> *(d) they manifested their sharing of a common purpose with the perpetrator(s) of the assault by themselves performing some act of association with the conduct of the perpetrator(s); and*
>
> *(e) they had the requisite mens rea concerning the unlawful outcome at the time the offence was committed, ie [they] intended the criminal result or foresaw the possibility of the criminal result ensuing and nevertheless actively associated themselves recklessly as to whether the result was to ensue (see S v Safatsa & Others 1998 (1) SA 868*

[23] [2011] JOL 27685 (SCA)

*(A); S v Mgedezi & Others 1989 (1) SA 687 (A) and S v Thebus & Another 2003 (2) SACR 319 (CC) at paragraph [49] ).*"[24]

[77] I agree with the State's submission in this regard. Not only did Appellant 3 assault the deceased at the police station, but Appellant 3 was also present where the deceased was found, badly injured and unconscious, a few hours after he was accosted and assaulted at the police station and driven off in the same car Appellant 3 was riding in. The only inference that could be drawn from these facts is that Appellant 3 was at all times present when the deceased was further assaulted in the room in which he was found, which room was observed to be ransacked by Inspector Mabuye.

[78] In addition, keeping the deceased there in the condition he was in, without getting him medical assistance evinces Appellant 3 actively associating herself with the common purpose of the other Appellants and assailants. As such, even if Appellant 3 was not party to the prior agreement to kill the deceased, as argued by her counsel, Appellant 3, by her conduct, must have, at the least, foreseen the possibility of the deceased dying and nevertheless associated herself recklessly as to whether the criminal result would ensue and it did. Alternatively, Appellant 3 *"acted wrongfully, in the criminal sense"*, by not taking steps, such as calling an ambulance, to prevent the imminent death of the deceased. By so doing, Appellant 3 was reckless as to whether the deceased would die.[25] Accordingly, Appellant 3 made common purpose with the other Appellants and assailants, at the least on the basis of *dolus eventualis.*[26]

[79] In the light thereof, the trial court was correct in finding that on the uncontroverted evidence presented by the State, and there being no

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[24] at [23]
[25] See, Musingadi and others v S [2004] 4 All SA 274 (SCA) at [42]; 2005 (1) SACR 395 (SCA)
[26] Ibid

other evidence to compare it with, the State had proved its case against the Appellants beyond reasonable doubt, at least insofar as the charge of murder is concerned.

[80] I however disagree with the *court a quo's* finding of a guilty verdict against Appellant 3 with regard to the charge of kidnapping. There was no evidence that Appellant 3 was involved in the dragging of the deceased into the car from the police station. On the contrary, it was the first State witness' testimony that when the deceased was dragged into the car by the other Appellants, Appellant 3 was already sitting in the car.

[81] It is said that in the absence of a demonstrable and material misdirection by the trial court, the appeal court's powers to interfere with the findings of fact of the trial court are limited. Consequently, that the trial court's findings of fact are presumed to be correct and unless the recorded evidence shows them to be clearly wrong, such findings cannot be interfered with.[27]

[82] As set out above, the evidence tendered by the first State witness is contrary to the *court a quo's* finding in this regard. Accordingly, the trial court misdirected itself in this regard, by concluding that the State has proved beyond reasonable doubt the guilt of Appellant 3 with regard to the kidnapping charge.

[83] Save as aforesaid, I find the Magistrate's findings and reasons for her judgment cogent in concluding that the State proved beyond a reasonable doubt that the Appellants are guilty of the first charge of murder on the basis of common purpose and Appellant 1 on the kidnapping charge.

I now turn to deal with sentencing.

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[27]S v Monyane & Others 2008 (1) SACR 543 (SCA); S v Hadebe & Others 1997 (2) SACR 641 (SCA).

[84] It is trite that the imposition of a sentence is pre-eminently within the discretion of the trial court. It is a long established principle of our law that the appeal court should desist from altering the sentence imposed by the trial court except in circumstances where the sentence imposed is either totally out of proportion to the gravity or magnitude of the offence, or the sentence evokes a feeling of shock or outrage or the sentence is grossly excessive or insufficient or there was an improper exercise of discretion by the trial court or the interest of justice requires it.[28]

[85] The trial court did not even impose the prescribed minimum sentence after convicting the Appellants of murder. Instead, the court found that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence. After considering both the mitigating and aggravating circumstances of the case, the court imposed a sentence of 8 years direct imprisonment for both offences.

[86] I therefore find no reason whatsoever to interfere with the sentence imposed by the trial court save insofar as it relates to Appellant 3's conviction on the kidnapping charge.

[87] In the premises, I propose that the following order be made:

1. the Appellants' appeal against the murder conviction is dismissed;

2. Appellant 1's appeal against the conviction on the charge of kidnapping is dismissed;

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[28]S v Anderson 1964 (3) SA 494 (AD) at 495. A number of cases from the Supreme Court of Appeal have since expanded on this principle: Sv Malgas 2001 (2) SA 1222 (SCA); Sv Blignaut 2008 (1) SACR 78 (SCA); Sv Johaar & Another 2010 (1) SACR 23 (SCA); S v Truyens 2012 (1) SACR 79 (SCA).

3. Appellant 1's appeal against sentence is dismissed;

4. Appellant 3's appeal against her conviction on the charge of kidnapping is upheld and the conviction is set aside;

5. Appellant 3's appeal against sentence for murder is dismissed;

6. Appellant 3's sentence against the kidnapping charge is upheld and the sentence is set aside and the trial court's sentence is varied as follows:

6.1 accused 3 is sentenced to 6 years direct imprisonment.

**NOBANDA AJ**
**ACTING JUDGE OF THE HIGH COURT**

**I AGREE AND IT IS SO ORDERED**

**J W LOUW J**
**JUDGE OF THE HIGH COURT**