THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case No: 390/18

In the matter between:

NJABULO MKHIZE	**FIRST APPELLANT**
MBONGENI INNOCENT DLAMINI	**SECOND APPELLANT**
JABULANI ERICK ZULU	**THIRD APPELLANT**
MUZI PETROS MBUYAZA	**FOURTH APPELLANT**
PSYCHOLOGY THUTHUKANI GUMEDE	**FIFTH APPELLANT**

and

THE STATE	**RESPONDENT**

Neutral Citation: *Mkhize v S* (390/18) [2019] ZASCA 56 (1 April 2019)

Coram: Majiedt, Swain and Mathopo JJA

Heard: 25 March 2019

Delivered: 1 April 2019

Summary: Criminal law – deceased assaulted whilst being interrogated by policemen – police officers present in the room – not disputed – appellants not testifying – failure to put version to state witnesses – prima facie case of State strengthened – duty of cross examiner – explained – duty in law of police officers present and who witnessed but did not participate in the assault to put a stop to it – common purpose established – Sentence – correctional supervision inappropriate – high court altered the sentence – no misdirection – sentence of 7 years of which 2 years suspended for 5 years – confirmed on appeal.

ORDER

On appeal from: The KwaZulu-Natal High Court, Pietermaritzburg (Lopes and Olsen JJ concurring sitting as court of appeal):
The appeal is dismissed.

JUDGMENT

Mathopo JA (Majiedt and Swain JJA concurring):

[1] This appeal arises from a tragic incident which occurred on 10 July 2009 at the offices of the detective branch at Esikhawini, when Bongani Cebekhulu (the deceased) who was suspected of being in involved in car hijackings and armed robberies in the area of Jozini and Esikhawini, died whilst being interrogated by the five appellants. The appellants were at that time members of the Special Task Team established to deal with a spate of armed robberies and car hijackings in the area of Jozini and Esikhawini.

[2] As a result of the death of the deceased, the appellants were charged with murder in the Esikhawini Regional Court. After a long trial they were convicted of culpable homicide. The regional magistrate reasoned that, because the appellants were present at the offices during the interrogation, they acted in common purpose and that a reasonable person would have taken steps to guard against the possibility of death and the appellants failed to take such steps. She sentenced the appellants to three years correctional supervision in terms of s 271(1)(*h*) of the Criminal Procedure Act 51 of 1977. In addition, they were sentenced to five years' imprisonment which was wholly suspended for a period of four years on condition that they were not convicted of any offence involving violence, committed during the period of suspension.

[3] The appellants then appealed to the KwaZulu-Natal High Court, Pietermaritzburg, against their convictions only. The high court, after reading the record, formed the prima facie view that the sentence imposed by the trial court was too lenient. Notice was then given to the appellants of a possible increase of the sentence. The high court confirmed the convictions and set aside the sentences imposed by the regional magistrate and replaced it with sentences of seven years' imprisonment of which two years was suspended for five years. The effective sentences imposed was thus five years' direct imprisonment. This appeal is before us with the special leave of this court.

[4] The brief background facts are as follows. The State's case was that the deceased met his death at the hands of one or more of the appellants, whilst in the company of one or more of the appellants. The evidence led in support of the State case was that the appellants acted in common purpose. The State's version was that after the deceased was arrested by Constable Nkwanyana in the area of Jozini on 8 July 2009 on suspicions that he was involved in car hijackings committed in the district of Esikhawini, he was temporarily detained at Jozini Police Station. Later the same day he was conveyed by Constable Nyawo to the police cells in Ubombo where he was handed over to Constable Tembe, free of any injuries. On 9 July 2009 he was handed over to Constable Mbuyaza, the fourth appellant, free of any injuries.

[5] The same day the first appellant, Warrant Officer Mkhize, handed over the deceased to Constable Dlamini of SAPS Esikhawini where he was detained in the police cells. On 10 July 2009 the first appellant booked the deceased out for questioning and took him to the detective offices. The officer on duty was Lieutenant T G Mkumane. The deceased was free of any injuries at that time. It is common cause that a short while later Captain Mncwango reported to Captain Hadebe that the deceased had died in the detective offices. Captain Hadebe and Captain Mncwango then reported this to the station commander, Lieutenant Colonel Mazibuko. The three of them went to the detective offices where the deceased had died. Captain Hadebe testified on behalf of the State that 'We went inside office number 15. We found the members who are here (referring to the appellants). They reported to us what

had happened. The person in charge of those members was Warrant Officer Mkhize (the first appellant)'. Upon enquiry as to what happened Mkhize explained that he was busy with the deceased when Constable Dlamini, the second appellant enquired from the deceased if he was aware that his friend with whom he had been committing crimes in Jozini, had died. According to Mkhize when the deceased heard this, he fell off the chair and died. . Hadebe was then asked, 'Now you said something about in office 15 you found members. Which members you found there?' To which he replied that it was the five appellants that he found there. He was then asked 'And when accused 1 reported to you what had happened where was the other four?' and replied as follows 'When we entered as we were three, three of us were as officers, they moved aside and stood in the passage which looks like a corridor.'

[6] Two forensic pathologists testified during the trial. Dr Kalapdeo, who performed the post mortem, found that there was bruising on the sides of the head, bruising on the bilateral cheek areas which means on the face area, bruising on the side of the neck, laceration to the chin, bruising over the chest centrally and a neck fracture. He further stated that the thoracic cage also had some positive findings which he described as bruising subcutaneously over the pectoral muscles which are the big muscles in the chest area and the left sub costal area, the area just below the heart. On examination of the spinal column it showed a fractured neck. Dr Kalapdeo concluded that the cause of death was 'blunt force trauma to the neck'. He was of the view that blunt force trauma could have arisen as a result of pressure on the neck by open hands or possibly a fist to the neck or a plank or worst still somebody falling over the neck through an object. He opined that the trauma must have been quite severe to have caused a fracture of the trachea and hyoid and the neck, with the result that respiration was compromised. According to him, with such injuries, the deceased would have died immediately or at least within three to five minutes. During his cross-examination it was suggested that the deceased could have sustained injuries whilst at Jozini or Ubombo Police Station on 8 and 9 July. He disputed this proposition and contended that if such injuries had been inflicted on the deceased whilst at the said police

station he could not have lived until 10 July 2009. He also disputed the hypothesis that the above injuries could have occurred as a result of the deceased falling off the chair.

[7] Dr Naidoo, a senior specialist forensic pathologist, received the docket for his review and opinion. He supported Dr Kalapdeo's findings and confirmed that the force required to cause the injuries described in the post mortem report cannot be accounted for, from falling from a chair as implausibly suggested by counsel for the appellant. Like his colleague Dr Kalapdeo he opined that a day or two survival period is not compatible with the nature of the injuries sustained by the deceased. All these experts disputed proposition that the cause of death were injuries sustained while the deceased was incarcerated at the police cells in Jozini and Ubombo. The appellants declined to testify.

[8] What transpired at the offices of the detective branch lies at the heart of this appeal. As there was no direct evidence implicating the appellants to the crime, the trial court relied on circumstantial evidence to convict the appellants. It has been said:

'Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. [In some cases], as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence. Circumstantial identification by a fingerprint will, for instance, tend to be more reliable than the direct evidence of a witness who identifies the accused as the person he or she saw. But obviously there are cases in which the inferences will be less compelling and direct evidence more trustworthy. It is therefore impossible to lay down any general rule in this regard. All one can do is to keep in mind the different sources of potential error that are presented by the two forms of evidence and attempt, as far as this is possible, to evaluate and guard against the dangers they raise.'[1]

[9] In convicting the appellants, the trial court accepted the State's version and found that the appellants' guilt was proved beyond reasonable doubt. The

[1] See Zeffert et al *The South African Law of Evidence* 2 ed at 100.

court reasoned that the appellants acted in common purpose because they were present at the offices and took part in the interrogation of the deceased or were part of a team that was interrogating the deceased.

[10] In dismissing the appeal, the high court concluded that when Captain Hadebe went inside the detective offices, all the five appellants were present and 'they reported to us what had happened'. It concluded that it was not disputed that the appellants did not hear what was said by the first appellant and if that was their defence, it would have been put to Captain Hadebe. It held that the evidence that all of the appellants were inside the room and collectively gave an explanation to Captain Hadebe as to what had happened, was never challenged or disputed.

[11] The high court reasoned further that the appellants' silence was maintained out of the misguided belief that the failure to identify the correct perpetrator would exonerate him and, ultimately, all of them. To allow them to do so would be to grant a licence to police officers to assault accused persons at will. As long as there was more than one of them present when a suspect was assaulted they would be safe in the knowledge that if the suspect was killed and they stuck together in their version that the suspect have died for some other reason than being assaulted, they would escape conviction.

[12] Relying on the judgment of this court in *S v Govender* 2004 (2) SACR 381 (SCA), the high court held that there was a duty in law on those policemen who were present and who witnessed, but did not participate in the attack on the deceased, to put a stop to it.

[13] Before us it was contended that, absent any direct evidence linking the appellants to the death of the deceased, the trial court and the court a quo erred in drawing the inference of common purpose. It was further submitted that, because there was no evidence that the appellants could have had an opportunity to prevent the assault, their conduct could not be said to have caused or contributed to the death of the deceased. The submission made in

this regard is that the State failed to establish that the other appellants, save for the first appellant, were in the room and aware of the assault.

[14] As to the failure to dispute or put certain assertions to Captain Hadebe, it was argued that because no witness testified as to who was present or who assaulted the deceased, putting a version to Captain Hadebe in cross-examination would have been an exercise in futility. Counsel for the appellants submitted that it was not the duty of the appellants to testify to supplement a deficient State case. In support of his argument counsel for the appellants relied on *S v Scott-Crossley* 2008 (1) SACR 223 (SCA). Reliance on this case is misplaced. In *Scott-Crossley*, this court cited a passage in *Phipson, Evidence* (7ed at 460) to the effect that, as a rule, a party should put to witnesses in turn 'so much of his own case as concerns that particular witness (*S v Scott-Crossley*, supra para 26). In this instance no version was put to any of the State witnesses. It was particularly important to put a version to at least Captain Hadebe, given the nature of his evidence. I will later in the judgment deal with the failure of the cross-examiner to put a version to a witness.

[15] The evidence of Captain Hadebe was clear and straightforward. but the appellants submitted that he initially made a general statement, but immediately afterwards clarified it by saying that the first appellant made the report as to what happened and that the other appellants were in the passage when he made the report. I disagree with this submission because the nub of his evidence is that when the first appellant reported to them what had happened, all the appellants were present in the room'. This important piece of evidence squarely placed the appellants at the scene. During cross-examination it was not put to the Captain Hadebe that anyone of the appellants were not present during the interrogation. It was also not put during the trial that the appellants were not present in the room. Cross-examination of Captain Hadebe was focussed on the injuries sustained by the deceased and the cause of death. At no stage was it ever put to Captain Hadebe that the other appellants would disprove his evidence about what Mkhize told him in their presence. It is the duty of the cross-examiner to put

all contested points to the witnesses in cross-examination. A cross-examiner who fails to do so runs the risk of having his witness criticised of recent fabrication when that witness later testifies. Leaving contradictions, improbabilities or lies undisputed is dangerous. Failure to do so would in appropriate cases lead to an adverse inference being drawn from the failure to cross-examine on the contested issues.

[16] In *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) para 61 it was stated:

'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This rule was enunciated by the House of Lords in *Browne v Dunn* and has been adopted and consistently followed by our courts.'

[17] It was further held para 63:

'The precise nature of the imputation should be made clear to the witness so that it can be met and destroyed, particularly where the imputation relies upon inferences to be drawn from other evidence in the proceedings. It should be made clear not only that the evidence is to be challenged but also how it is to be challenged. This is so because the witness must be given an opportunity to deny the challenge, to call corroborative evidence, to qualify the evidence given by the witness or others and to explain contradictions on which reliance is to be placed. (At para 63) *and to explain contradictions on which reliance is to be placed*.' (Emphasis added.)

In the present matter the appellants did not do so. Instead they sought refuge in their silence and declined to join issue with the state witnesses. The argument of the appellants loses sight of the fact that cross-examination cannot be used to prove anything, it can only establish inconsistencies or weaknesses in the case, but it cannot establish evidence. Assertions or

questions put by counsel during cross-examination remains so and is not evidence.

[18] It is untenable for counsel for the appellants to now suggest that Captain Hadebe made a general statement which he immediately clarified that the first appellant made a report to them as to what had happened when the other appellants were in the passage and presumably not within earshot. Even if it may be accepted on behalf of the appellants that Hadebe may have contradicted himself, a view which I do not share, once a view was formed that what Hadebe said was a contradiction, it was incumbent upon the cross-examiner to afford the witness Hadebe an opportunity to clarify the alleged perceived contradiction instead of leaving it hanging in the air.

[19] It is not open to the appellants to rely on the perceived contradiction without first putting it to Hadebe. In my view the precise nature of the imputation that the appellants (save for the first appellant) denied explaining to Hadebe what had happened should have been made clearer to him so that he could deal with it. The cross-examination of Hadebe was cursory and unhelpful. He did not state that the explanation given to him by the appellants when they were in the room differed from the explanation given by the first appellant. His clear statement that all of the appellants explained what had happened was not contested in cross-examination and the trial court was accordingly entitled to accept it.

[20] A prima facie case was presented against the appellants which, in the absence of any contradictory evidence, became conclusive. It is trite that an accused's failure to testify can be used as a factor against him only when at the end of the case for the State, the State has prima facie discharged the onus that rests on it. It cannot be used to supply a deficiency in the State case, that is to say where there is no evidence on which a reasonable man could convict.[2] In the present case in the absence of any contradictory evidence, the State was entitled to assume that the undisputed evidence was

[2] Ibid.

correct. This evidence prima facie established that all of the appellants were present in the room when the deceased was assaulted and died. It lay exclusively within the power of the appellants to show what the true facts were and their failure to do so, entitles the court to infer that the truth would not have supported their case. The failure of the appellants to testify and rebut the state case strengthened the prima facie case to one beyond reasonable doubt. I say this because it was within their powers to adduce evidence as to the true state of affairs by disputing what Hadebe said about them. They did not do so. Their failure to testify, was in the circumstances of this case, rightly used as a factor against them (s*ee S v Boesak* 2001 (1) SA 912 (CC) at para 24). At the very least, the prosecution proved suspicious circumstances, namely the presence of all of the appellants in the room with the body of the deceased shortly after his death, which the appellants if innocent, could reasonably be expected to answer or explain.

[21] When the totality of the evidence is properly analysed, the suggestion that the deceased sustained injuries shortly after his arrest and detention at Jozini and Ubombo police cells is implausible. Equally improbable is the assertion made during cross-examination that the injuries, which ultimately led to his death, could have been caused when he fell off the chair. The medical evidence conclusively establishes that this was a false explanation. This hypothesis was rightly rejected by both courts as lacking any substance. The only reasonable inference to draw is that the deceased was assaulted by the appellants whilst being interrogated at their offices. If they were not complicit, one would have expected them to deny their involvement at that time or clarified their position by way of viva voce evidence at the trial. Instead, all the appellants adopted an attitude of shielding one another or the real perpetrator at the expense of their constitutional duties as police officers.

[22] In my view it is inconceivable that any of them could have been unaware what happened to the deceased. There was a duty on the police officers who did not participate in the interrogation and who may have witnessed the attack to put a stop to it and tell Captain Hadebe what had happened. If they did not participate in the assault they omitted to prevent the

assault and consequent death in the circumstances where there was a duty on them to do so. What the appellants lost sight of is that as police officers and by virtue of their offices they owe society the duty to report a crime if it is committed in their presence. Their silence made it impossible on the evidence to identify the actual perpetrator/s of the death of the deceased.

[23] The next enquiry is to determine whether the State succeeded in proving that the appellants acted in common purpose. Having concluded that all of the appellants were present in the room when the deceased was assaulted and died, the issue that arises is that it is not possible on the evidence to identify a principal perpetrator of the death of the deceased, nor does the evidence exclude anyone of the appellants as the principal perpetrator. Accordingly, the only basis upon which the appellants may be convicted either of murder or culpable homicide is if a common purpose is proved between them, leaving aside the possibility of a conviction for being an accessory after the fact to either of these offences. If all of the requirements for a common purpose are established namely presence at the scene, awareness of the assault on the victim by somebody else, an intention to make common cause with the person or persons committing assault and the performance of some act of association, each perpetrators culpability (intention or negligence) has to be determined independently in order to convict him of either murder or culpable homicide, as the case may be. Consequently, although the evidence establishes that the appellants had a common purpose to commit the crime of assault and that in the course of executing this common purpose the deceased was killed, and the one perpetrators act of causing the death can be attributed to the other members of the common purpose, the intention or negligence of the one perpetrator cannot be attributed to the others. Counsel for the appellants submitted that both courts erred in applying the doctrine of common purpose to convict the appellants of culpable homicide. First, it was contended on behalf of the appellants that the State failed to prove common purpose because there was no evidence that any of the appellants were present or aware of the assault on the deceased, other than the first appellant who admitted to Captain Hadebe that he was present. Second, no evidence was led that the

appellants would have had either the time or the opportunity to prevent the assault or even try to prevent it and thus the alleged omission to do so cannot be said to be negligent or that it caused or contributed to the death of the deceased. It was also contended that the high court wrongly relied on the dicta in *S v Govender*.

[24] The fallacy in these submissions is that there is nothing on the record to suggest that the legal representatives who represented the appellants at the trial, raised the defence that the appellants were not present when the deceased was assaulted, or that they disassociated themselves from the conduct of others and disavowed what Mkhize told Hadebe in their presence. The medical evidence is of vital importance in determining the requisite intention or negligence in respect of the death of the deceased on the part of each of the appellants. In my view the impression created by the conduct of the appellants' legal representatives at the trial that all of them were present in the room during the assault, is strengthened by their failure to testify. The medical evidence indicates that all of the injuries sustained by the deceased could not be explained by a single occurrence. The medical evidence establishes that the deceased was subjected to a severe assault and the cause of death was a blunt trauma to the neck of the deceased of sufficient strength to fracture the spinal column. To convict the appellants of murder on the basis of a common purpose it would have to be proved that each of them subjectively foresaw the possibility of the death of the deceased and reconciled themselves to this possibility. The evidence does not establish this. However, to convict the appellants of culpable homicide on the basis of a common purpose, it would only have to be proved that a reasonable person in the position of any of the appellants, witnessing such an assault upon the deceased, would have foreseen the possibility of death resulting and have taken steps to guard against such an occurrence, by intervening and stopping the assault. The injuries indicate that a reasonable person in the position of the appellants witnessing such an assault upon the deceased, would have foreseen the possibility of death resulting and have taken steps to guard against such an occurrence. In my view the appellants omitted to prevent the assault and consequent death in circumstances where there was a duty on

them to do so. When regard is had to the severity of the injuries and assault, negligence of each appellant is established.

[25] I am thus satisfied that on the undisputed evidence the requirements of common purpose was satisfied because all the appellants were present inside the room when the deceased was assaulted and died. All the appellants were aware of the assault on the deceased and intended to make common cause with the conduct of the perpetrators. It follows that the guilt of the appellants was proved beyond reasonable doubt. The appeal against convictions must fail.

[26] As to sentence it is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate. Counsel for the appellants argued that the high court misdirected itself in a number of instances. First it ignored the fact that the appellants were first offenders. Second that they have all served a major part of their correctional supervision sentence. Third that the families of the deceased supported the sentences imposed by the trial court. This argument has no merit. In my view when the aggravating circumstances of this case are taken into account, their personal circumstances pale into insignificance. No remorse was shown by the appellants and this is evidenced by their complicit silence in explaining how the deceased lost his life. The post mortem report indicate that the deceased must have sustained a severe and prolonged form of assault. The sentences imposed by the trial court were in my view very light. The high court rightly concluded that the sentences do not accord with the principles of natural justice and proper punishment.

[27] What should be borne in mind is that as police officers the appellants have a duty to protect the public. The deceased deserved to be treated with dignity. He had the right not to be assaulted and unlawfully subjected to interrogation which ultimately led to his death. After comparing the facts of this case with that of *Govender*, the high court correctly formed the view that an appropriate sentence for each of the appellants would be seven years

imprisonment, of which two years was suspended for a period of five years because the appellants had undergone some level of correctional supervision. Consequently the sentence was reduced to five years imprisonment. Given the seriousness of the offence it was necessary to send out a clear message that society cannot tolerate lawlessness and violence on the part of the police officers. Absent any misdirection there is no basis for interfering with the sentence. The appeal in respect of sentence must also fail.

[28] In the result the appeal is dismissed.

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R S Mathopo
Judge of Appeal

APPEARANCES:

For appellant:	J H du Plessis Instructed by: Van der Westhuizen & Marshall Attorneys, Empangeni Honey Attorneys, Bloemfontein
For respondent:	N B Sewparsad Instructed by: The Director of Public Prosecutions, Pietermaritzburg The Supreme Court of Appeal of South Africa