



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Not Reportable

CASE NO: SS 62/2012

In the matter between:

THE STATE

and

MZWANELE MVABAZA

1st Accused

PULE HENDRICKS

2nd Accused

MZIYANDA MQUMBISA

3rd Accused

SIBONGILE PINKANA JAMES

4th Accused

Court: NYMAN AJ
HOFMAN-DE KOCK (Assessor)
SIYO (Assessor)

Heard: 8 April 2013 – 6 May 2013

Delivered: 14 May 2013

CONVICTION JUDGMENT

NYMAN AJ

[1] The four accused, Mzwanele Mvabaza, Pule Hendricks, Mziyanda Mqumbisa and Sibongile (Pinkana) James were charged with 1 count of kidnapping and 1 count of murder of Thabo Mzileni. The provisions of section 51 of Act No 105 of 1997 are applicable to count 2, in that it is alleged that the killing of the deceased was committed by a group of persons in the execution of a common purpose. Accused 5, Bongile Gongxeka, had passed away before the commencement of the trial and the charges were withdrawn against him (referred to hereinafter as accused 5). The four accused, who were legally represented, pleaded not guilty to both charges.

[2] In the particulars regarding the charge of kidnapping the State alleges that the accused had “*wrongfully and intentionally deprived Thabo Mzileni of his freedom of movement by tying his legs with a rope and keeping him against his will*”. In the particulars regarding the charge of murder, the State alleges that the accused had “*wrongfully and intentionally killed Thabo Mzileni, a male person, by hitting him with blunt objects*”.

[3] The accused made the following formal admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977, as amended:

[3.1] That Dr K C Quarrie conducted the post-mortem examination on Mr Mzileni on 26 March 2012.

[3.2] That the body of the deceased suffered no further injuries from the time of the alleged offence up to the time that the post-mortem examination was conducted.

[3.3] That the photo album together with the key to it, depicts a correct view of the scene as well as the surrounding areas where the deceased was allegedly killed.

[4] The factual background to the charges is as follows: In the early hours of Saturday morning on 24 March 2012, three young men robbed Bulelwa Cynthia Nontangana of her money, handbag and cellular phone on her way to work. Ms Nontangana ran home whilst crying, and reported the robbery to her mother and accused 1, who is her father.

[5] Siyanda Maseku, who had been sitting and drinking with accused 2, 3 and 5, witnessed the robbery. The four of them chased the robbers and caught one of them, being the deceased. They dragged the deceased by his belt and took him to accused 1's house situated in Section D, Khayelitsha. At the time of their arrival at accused 1's house, other members of the community had joined them. The group asked Ms Nontangana whether it was the deceased who had robbed her and she responded by saying that she did not know whether she would be able to identify the robbers on account of her having been so shocked. She used her mother's cellular phone and called her workplace and the police.

[6] The deceased was covered in blood and his feet were loosely tied with a rope. The deceased told the group that he could go and point out the things that were stolen. Accused 1, 2, 3, 5, Ms Nontangana, Wilile Nokilana (accused 1's neighbour) and other unidentified members of the group, travelled in two cars to Section B, Khayelitsha, to look for the stolen goods. The group placed the deceased in the boot

of one of the two cars, one of which was owned by accused 1. This search turned out to be fruitless and the cars returned to Section D. The deceased was dropped off at the street corner, close to accused 1's house. While the deceased was walking, unnamed members of the group assaulted him with sticks.

[7] Constable Gomba arrived at the crime scene shortly thereafter, and he found the deceased dead at the corner near to where he was dropped off, with a car tyre on his body and the lid of a concrete drain cover on his chest. According to the post-mortem report, the death was caused by multiple injuries due to the assault. These injuries comprised of multiple abrasions, contusions and lacerations to the head, chest and limbs, including a skull fracture.

Summary of oral evidence

[8] Princess Ntombomhlaba Mvabaza, the first state witness, is the wife of accused 1. She testified that when the group returned from Section B, her husband had told the group not to assault the deceased. At that stage accused 4, who is her next-door neighbour, came out of his house and went straight to the deceased and assaulted him. Accused 1 intervened and stopped accused 4 from assaulting the deceased and in this process, accused 1 suffered a cut to his hand from an object that accused 4 was holding in his hand. Accused 1 then returned home because his hand was bleeding.

[9] While they were inside the house attending to her husband's wound, she heard people outside exclaiming, "*wow, he has finished him off*". She looked through the burglar bars to the outside and saw accused 4 carrying something that looked like a

drain cover and using it to hit the deceased. The deceased was lying on the ground. On her way to work, she saw the deceased still lying on the ground.

[10] Under cross examination she stated that the police were telephoned twice. On the group's arrival from Section B, the deceased managed to run away into her yard, which is an open yard. She however denied that the deceased was assaulted in her yard.

[11] Siyanda Maseku testified that after he had dropped off the deceased at the house of accused 1, he passed the crime scene again and he noticed that the person that they had caught was being assaulted. He also noticed that accused 1 was assaulting the deceased with an iron rod on his chest more than once. The deceased was crying and apologising. He was lying on his back and he was injured. His legs and arms were not tied and he did not see any of the rope. He saw a lot of people around the deceased's head. While he was walking past, he heard accused 4 asking the deceased whether he knew the location of the stolen items. The deceased replied that the items were with the other two. He saw accused 4 smacking the deceased once. At this time, accused 2 and accused 3 were at accused 5's house.

[12] Constable Gomba testified that he arrived at work at 5h45. At 5h47 he received a report of a crime. It was reported that a person was assaulted to death in Section D in Khayelitsha. He left immediately. When he arrived at the scene at about 5h50, he found about 30 to 40 people standing around. He asked the people what was happening and they replied that nothing was happening. He did not find anyone being assaulted and left.

[13] At 6h10 he received another call and he returned to the scene where he found the dead body of the deceased with a concrete drain cover on his chest and tyre on his body. He was badly beaten. There were people in the street whom he asked who had assaulted the deceased. He did not receive any response. He noticed that the deceased's legs were tied with a black and white rope. He called an ambulance. The deceased was certified dead on the spot. He called the photographer and a DNA expert because blood was spotted on the walls of the house belonging to accused 1.

[14] The forensic expert testified that the blood sample found on the sole of one of the suspect's shoe was a perfect match with the blood of the deceased. He did not physically examine the shoe but only tested the blood sample.

[15] Sergeant Abraham Tobias testified that he arrived at the crime scene at 7h15 on the morning of 14 March 2012 and the crime scene was cordoned off. He saw one van. At the crime scene he found what looked like the wooden leg of a chair. The photographer and finger print experts were called to the crime scene. He requested the photographer to take pictures of the crime scene. This concluded the evidence presented on behalf of the State.

[16] Accused 1 testified that he is 49 years old and had been living in his house for 25 years. On 24 March 2012 his wife woke him up at about 5h50 and told him that their daughter had just been robbed on her way to work. His daughter telephoned the police and her employer. He heard a noise coming from the outside and people saying, "*here is the thug, we caught him.*" He then went outside and found about 7 to 8 people. He recognised accused 2 and 3 as well as accused 5. He did not know the

names of the other people who were present. The group was standing on the open ground across the road from his house.

[17] The deceased was standing and had already been assaulted because he was bleeding from his face and head. The group was angry. The deceased was free to move but there was a rope around his legs. Accused 1 asked his daughter whether she knew the identity of the persons who had robbed her and she replied that she would not be able to identify the robbers. Later on there were about 20 to 30 people because his house is on a busy road and people joined the group as they were passing by.

[18] The deceased stated that he was with the people who had robbed his daughter and that he would be able to take them to the person who had robbed her. During this whole process, the group was assaulting the deceased with sticks and stones. He told the people to stop beating the deceased because he was able to take them to the stolen items.

[19] He then went into the house to fetch the keys of his car. It was now approaching 6h10 to 6h15. He then asked a friend named Litha, to help him because he did not have a driver's license. The deceased was brought towards the car by the people, when he tried to escape and jumped over the vibracrete wall into accused 1's premises. He was apprehended and loaded into the boot of the car. About 8 to 10 people also got into the car, hence accused 1 could not fit into his car. They did not find the goods at the house pointed out by the deceased and they returned to Section D.

[20] At Section D, the deceased was off-loaded on the street corner and accused 1 instructed his daughter to telephone the police again as well as asking his friend to fetch the police.

[21] The deceased was assaulted again by a group of about 30 people. Accused 1 intervened on the deceased behalf whilst saying that the police were on their way. He noticed that accused 4 was amongst the group of people with a sharp object. In his attempt to stop the assault, accused 4 pulled the object and it cut his fingers. On seeing the blood, he went home to receive attention from his wife.

[22] Inside the house, he and his wife went into the kitchen to get something to stop the blood. He then heard someone crying out from the outside, "*no Pinkana!*". His wife looked through the burglar gate. He saw accused 4 moving away from the deceased and he saw the drain cover on top of the deceased. He had not seen what accused 4 had done. His wife left for work at 7h30. The police arrived five minutes after his wife's departure.

[23] Under cross examination he stated that accused 2 had assaulted the deceased, but he could not give any particulars of the assault nor what he was used to allegedly assault the deceased.

[24] He stated that when accused 4 came out of his house, he asked accused 1 why the deceased was being assaulted and he gave an explanation to accused 4. Accused 4 assaulted the deceased, a struggle ensued and they both fell to the ground. He saw accused 4 holding a sharp object in his hand. After stopping the assault, accused 4

went back inside his house.

[25] He saw accused 3 assaulting the deceased with the buckle of his belt. He denied that he had assaulted the deceased. He stated that he did not take the deceased to the police station because the thought had not crossed his mind. In his defence he stated that he had arranged for the police to be called and he had sent his friend to the police station.

[26] Wilile Nokilana was called as a witness for accused 1. Mr Nokilana testified that on the Saturday morning accused 1's younger daughter called him, whereupon he went outside and he saw a group of people in the street. Accused 1 told him that they had found his daughter's robber who was going to show them the stolen goods. On account of accused 1's car being full, he transported accused 1 and daughter in his car, following accused 1's car to Section B. On account of no items having been found, they returned to Section D.

[27] Accused 1 asked him to go to the police station, whereupon he drove to the Gugulethu West Police Station which is about 2 kilometres away from Section D. At the police station he reported the incident to a female police officer.

[28] Accused 2 testified that he is 29 years old and lives in Section D. He testified that he contracted polio when he was a child and he walks with the aid of a crutch. He stated that on the Saturday morning he and his friends apprehended an alleged robber whom they took to accused 1's house. Accused 1 was angry. He came out of the house and punched the deceased with his fist more than once. The daughter assaulted

the deceased with a mop. The deceased ran into the house.

[29] Accused 1 said that they should go to Section B because the deceased knew the whereabouts of the stolen items. Accused 1 said that the rope should be taken out of his car to tie up the deceased, to prevent him from running away. The deceased's legs were tied and he was placed in the boot of the car. He and accused 3 got into the car together with the others. He saw accused 1 getting into his own car. On their return from Section B, he told accused 1 that he should call the police. He saw the driver of the one car returning with a *knobkierie* and assaulting the deceased. He then left thereafter.

[30] Under cross examination accused 2 conceded that when he brought the deceased to the house of accused 1, he slapped the deceased once with an open hand against his neck. This concluded the evidence presented on behalf of accused 2.

[31] Accused 3 testified that on Saturday morning, while he was drinking with accused 2 and his other friends they witnessed a robbery and caught the deceased. They took the deceased to the house of accused 1 and knocked on the door. Accused 1, his wife and daughter came out of the house and his daughter beat the deceased with a mop and his wife hit him with a broom. Accused 1 hit the deceased with his fist on his body, head and ribs. Thereafter accused 4 came out of his house and assaulted the deceased. They pulled one another and fell on the ground. The deceased ran into the house of accused 1. Accused 1 took him out of his house and assaulted him with a *kierie* on his head. The deceased fled into the middle of the road but he, accused 2 and accused 5, gave chase and caught the deceased.

[32] Accused 1 went to his garage and took a rope out of his car and told them to tie up the deceased. The deceased was put in the boot of the car and they went to Section B. On their return from Section B, the car was parked in front of accused 1's house and the deceased was taken out of the boot. Accused 1 who was angry, got into his house and returned with an iron rod and he proceeded to hit the deceased. The deceased, whose feet were tied, fell to the ground. He was bleeding from the blow. At that stage, there were about 20 people in the group. He and accused 2 left. He felt that he had participated in causing the death of the deceased because he had taken him to the place where he was killed but he did not have the intention to kill him. Accused 2 was present when they chased the deceased and also accompanied them to Section B. It was on their return from Section B that they left. Under cross examination he stated that when they left, he saw accused 1 assaulting the deceased with an iron bar on his head and the deceased falling down. This concluded the evidence presented on behalf of accused 3.

[33] Accused 4 testified that he is 24 years old and is the direct neighbour of accused 1. He testified that on Saturday morning before 6 am when he woke up, he saw people outside his house, close to his gate. He heard a noise coming from next door and saw people in accused 1's yard. He saw his co-accused and some of accused 1's friends. He saw accused 1 assaulting the deceased with something that looked like a stick, while his wife and daughter were assaulting the deceased with a broom and mop. There were more than 20 people present. He asked accused 1 what was happening and accused 1 told him that his child had been robbed. Accused 4 immediately went to the deceased and hit him with his fist. The deceased grabbed him

and both of them fell to the ground. Accused 1 stopped him, at which point he went inside his house. He went back to sleep and woke up before 10 am. He does not know what happened thereafter.

[34] Under cross examination he stated that he had come out of his house and witnessed the assault after the group's return from Section B, because he had seen the car parked outside and he had heard people talking about their visit to Section B. He stated that when he woke up, after his return to his house, he left his house and went to a friend's house. This concluded the evidence presented on behalf of accused 4.

Count 1 - Kidnapping

[35] Snyman defines kidnapping as, "*unlawfully and intentionally depriving a person of his or her freedom of movement*". The elements of the crime comprise of: "*(a) the deprivation of (b) a person's freedom of movement*" (See: CR Snyman, Criminal Law, 5th Ed, LexisNexis:Durban at 479).

[36] In our view, the state has proven beyond a reasonable doubt that accused 1, 2 and 3 are guilty of committing the offence of kidnapping. Accused 1 had testified that when the deceased arrived at his house, his feet were tied. Before their departure to Section B, the deceased had tried to escape, but the group had caught the deceased and had put him in the boot of the car. On their return to Section B, the deceased was again put in the boot of the car. Accused 2 and 3 had testified that, following the deceased's attempt to escape, it was accused 1 who had ordered that the deceased's feet be tied with the rope that he took from his car in the garage. While we should

adopt a cautious approach in respect of the evidence of accused 2 and 3 as co-accused, to our minds, their version is the most probable within the totality of the evidence. Accused 1's daughter had been robbed and he had a vested interest in ensuring that the stolen goods were returned. He was the leader of the group who ensured that the necessary transport was organised for the visit to Section B.

[37] We do not agree with the submission made by Mr Lourens, on behalf of accused 2, that the deceased went to Section B voluntarily because he wanted to show them the stolen goods. In terms of the proven facts, the deceased did attempt to escape before their departure to Section B. To our minds, the deceased merely stated that he would show them where the stolen goods were as an attempt to save his life. This is borne out by the fact that the stolen goods were not at the house located at Section B. Furthermore, the fact that the deceased's feet were tied and that he was put in the boot of the car to and on their return from Section B, are clear indications that he was deprived of his freedom of movement. We should therefore convict accused 1 of count 1.

[38] In terms of the testimony of accused 2 and 3, they apprehended the deceased, pursuant to the robbery and brought him to the house of accused 1. They also chased the deceased when he tried to escape at the house of accused 1, apprehended him and brought him back to accused 1. At this point his feet were tied. They also accompanied the group to Section B when deceased was placed in the boot of the car. All of these facts arise from accused 2 and 3's own testimony. We do not find merit in the submission made by Mr Lourens during closing argument that accused 2 had

made a citizen's arrest. If this was indeed the case, accused 2 would have taken the deceased to the police station. This defence does not account for the conduct of accused 2 and 3 subsequent to them bringing the deceased to the house of accused 1. For these reasons, we should convict accused 2 and 3 of count 1.

[39] There is no evidence supporting a conviction of kidnapping in respect of accused 4. It was his undisputed evidence that he had joined the crowd after the group's return from Section B. Mr Baliwe, the state prosecutor, correctly conceded that the state has failed to prove its case against accused 4. We should therefore find accused not guilty of count 1.

Count 2 – murder

[40] It is common cause that the death of the deceased occurred within the context of what is known as a "vigilante killing". His death was caused by certain members of the Khayelitsha community taking the law into their own hands and imposing the rule of the mob. The perpetrators killed the deceased without affording him the opportunity to state his case. By doing so, they undermined the rule of law and our criminal justice system. He suffered a prolonged death, having suffered multiple injuries to his head, chest and body. He was put into the boot of a car, while he was injured and bleeding. The lid of a drain cover and tyre were found on top of his body. In the context of violence committed by members of a community acting in collaboration with one another, it is understandably difficult to find eye witnesses to bring the perpetrators to book.

[41] The law in respect of common purpose is set out in *S v Mgedezi and Others* 1989 (1) SA 687 (A). In order to prove common purpose, the following requirements have to be met, namely; (1) the accused must be present where the violence was committed; (2) the accused must have been aware of the assault on the victim; (3) the accused must have intended to make common cause with those perpetrating the assault; (4) the accused must have manifested his or her sharing of the common purpose with the perpetrators of the assault by himself or herself performing some act of association with the conduct of the others; and (5) the accused must have had the required *mens rea*.

[42] In our view, the proven facts show that all four of the accused participated in the assault of the deceased. In the case of accused 2 and 4, they conceded that they had assaulted the deceased.

[43] Accused 1 steadfastly denied that he had assaulted the deceased. In our view, this denial is not believable. Accused 2, 3 and 4 testified that they had witnessed accused 1 assaulting the deceased. Mr Maseku corroborated their version when he stated that he had witnessed accused 1 hitting the deceased with an iron rod. Even though Mr Maseku's friendship with accused 2 and 3 carries the risk of him being biased, we found him to be a credible witness. His testimony withstood cross examination and his version is probable.

[44] In our view, accused 1 was not a credible witness. He was an evasive witness, refusing to answer questions where the answers were obvious. For example, his denial of any knowledge of the spate of vigilante killings in Khayelitsha, is improbable and

his explanation for such ignorance, is devoid of any truth. He refused to concede that he was angry when he encountered the deceased who had just robbed his daughter. Such a response is unnatural. It is improbable that a father, whose daughter was a victim of robbery, would not become angry when confronted by the alleged perpetrator shortly after the robbery had taken place. Within the context of a group where emotions run high, the likelihood of accused 1 remaining in an unemotional state, is slim.

[45] For the same reasons, we do not find believable the evidence of Mrs Mvabaza. To our mind, Mrs Mvabaza's primary motive for giving evidence was to exculpate her husband from any wrongdoing. Mrs Mvabaza also denied that she had assaulted the deceased with a mop or broom. Yet accused 2, 3 and 4 had testified that she and her daughter also participated in the assault with a mop and broom. These accused have no motive to implicate Mrs Mvabaza because she is not a co-accused. Although she gave incriminatory evidence in respect of accused 4, this was not the case in respect of accused 2 and 3.

[46] Therefore, in our view, the chronology of proven facts is as follows: the deceased was apprehended by accused 2 and 3. On their way to the house of accused 1, accused 2 slapped him. By the time he was brought to accused 1's house he was bleeding from his head and face. At the house of accused 1, the deceased was assaulted by accused 1, together with his wife and daughter and other unidentified members of the group. Accused 1 was taken to Section B. On their return from Section B, the deceased was assaulted by accused 1, accused 4 and other unidentified

members of the community. There is no reliable evidence that illuminates the end of the chronology, namely who was present at the time when the deceased was killed.

[47] According to the testimony of accused 1, corroborated by his wife's testimony, accused 1 was not present at the time when the deceased was killed. Accused 1 had left the group when he suffered an injury to his finger after he had attempted to stop the assault committed by accused 4. At the time when Mrs Mvabaza was inside the house with her husband, she allegedly heard the crowd saying that accused 4 had finished off the deceased. She also allegedly witnessed accused 4 hitting the deceased with a drain cover. The evidence of accused 1 and his wife does not place accused 1 at the scene of the crime during the final stage of the chronology; when the deceased was killed. Accused 1 had also dissociated himself from the murder when he had asked his friend to report the situation to the police after their return from Section B. Mr Nokilana corroborated this evidence when he testified that accused 1 had asked him to report the incident to the police, which he did. We found his testimony to this effect, credible. In my view, there is a possibility that accused 1's version is reasonably possibly true and that he did not have the required *mens rea* to associate himself with the murder of the deceased. It is improbable that he would have asked Mr Nokilana to call the police, if he had the intention to associate himself with the murder. For these reasons we should acquit accused 1 of murder on count 2.

[48] However, the proven facts do show that accused 1 is guilty of assault with intent to do grievous bodily harm. Accused 1 applied direct force to the body of the deceased when he hit the deceased with his fists upon the deceased's arrival at his

house and later on, with an iron rod. The severity of the application of force is exacerbated because it was imposed on a victim who was already suffering bleeding from his head and face. This action demonstrates an intent to commit grievous bodily harm. We should therefore find accused 1 guilty of assault with intent to commit grievous bodily harm.

[49] It was the testimony of accused 2 and 3 that they had left the crime scene immediately after their return from Section B and that they had returned to accused 5's house to continue drinking. Mr Maseku corroborated their version. Gladys Mqumbisa, accused 3's grandmother, had testified that accused 3 had told her that his heart was sore because it was through his fault that the deceased had been assaulted. The state did not lead any evidence that placed accused 2 and 3 at the scene of the crime at the time of death. We therefore accept their version that they left the scene of the crime before the murder, and by doing so, they disassociated themselves from the murder. We should therefore acquit accused 2 and 3 of murder on count 2.

[50] However, the proven facts show that accused 2 and 3 are guilty of assault with intent to do grievous bodily harm on the doctrine of common purpose. Accused 2 himself contributed to the assault when he stated under cross examination that he had slapped the deceased with his open hand against his neck. Accused 2 and 3 were present when the deceased suffered grievous bodily harm from the time when the deceased was brought to the house of accused 1 to the time of their departure. It was the proven evidence that the deceased was assaulted with sticks and stones and that he was bleeding. They associated themselves with the assaults when they apprehended

the deceased after he attempted to flee from the house of accused 1 and when they accompanied the group to and from Section B. We should therefore find accused 2 and 3 guilty of intent to commit grievous bodily harm on the doctrine of common purpose.

[51] The only evidence against accused 4 in respect of count 2 is the evidence of accused 1 and his wife. We do not find the evidence of Mrs Mvabaza credible in this respect. We have already stated that it seems to us that she gave incriminating evidence against accused 4 with the belief that such evidence would exculpate her husband. In our view, the version of accused 4 to the effect that he had left immediately after accused 1 had intervened and stopped him from assaulting the deceased any further, is reasonably possible true. Additionally, the state has failed to prove beyond a reasonable doubt that accused 4 was present at the time of the murder. While accused 4 may have lied concerning his whereabouts when he returned inside his house after his assault on the deceased, this does not constitute proof of culpability of murder. In our view, the *viva voce* evidence of accused 4, and as conceded by Ms de Jong on his behalf, makes him guilty of assault. For the reasons already mentioned, we should convict accused 4 of assault with intent to commit grievous bodily harm, on the doctrine of common purpose.

[52] For these reasons the findings of this court are as follows:

- [a] Accused 1, 2 and 3 are convicted of kidnapping.
- [b] Accused 4 is acquitted of kidnapping.

[c] Accused 1, 2, 3 and 4 are convicted of assault with intent to do grievous bodily harm.

RM NYMAN AJ

ACTING JUDGE OF THE HIGH COURT