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

CASE NO.: CC31/2022

Heard: 17, 18 & 19 October 2022

Delivered: 20 October 2022

In the matter between:

THE STATE

Appellant

and

MANDILAKHE MATEBESE

Accused 1

PHILASANDE TUSANI

Accused 2

JUDGMENT

MOLONY AJ:

Introduction

1. The two accused in this matter both face the following charges:

1.1 One count of robbery with aggravating circumstances – as defined in section 1 (1)(b)(i) and (ii) of the Criminal Procedure Act ('the CPA').¹

¹ 'aggravating circumstances', in relation to—

1.2 One count of murder.

2. It is alleged that on or about 6 January 2021, and at or near Renus farm, in the district of East London, the accused unlawfully and with the intent to rob, took by force from the possession of SIYAKHOLWA NDAMASE (hereafter referred to as ‘the deceased’), a laptop and a backpack bag, his property or property in his lawful possession, aggravating circumstances being present in that the accused inflicted grievous bodily harm on the deceased, and/or wielded a dangerous weapon being a knife, before, during or after the commission of the robbery. Due to the aforementioned circumstances, and on the date and place referred to in count 1, the accused unlawfully and intentionally killed the deceased.

3. The applicable minimum sentences, should the accused be found guilty of the above-mentioned offences, are 15 years and life imprisonment respectively.

4. It is alleged that the accused acted at all times in the furtherance of a common purpose or conspiracy to commit robbery with aggravating circumstances and to kill the deceased.

5. At the start of proceedings, the State requested an amendment to the first charge, as the reference to wielding a dangerous weapon was omitted from the charge (although the relevant section of the CPA was referred to). There was no objection from the defence and the amendment was duly effected.

6. The State also requested that the name of the place where the offence was committed be changed from ‘Reeston Farm’ to ‘Renus Farm’. There was no objection and the amendment was duly effected.

(b) robbery, or attempted robbery, means—

- (i) the wielding of a fire-arm or any other dangerous weapon;
- (ii) the infliction of grievous bodily harm; or...

by the offender or an accomplice on the occasion when the offence is committed, whether before or during or after the commission of the offence’

7. Mr Geldenhuys (who appeared for both accused) then placed on record accused no. 2's name (Philasande Tusani). It appears that he goes by both Ayanda Vato Lindani as well as Philasande Tusani, with the latter name being the one reflected on his identity document.

8. Both accused pleaded not guilty to each of the charges.

9. Written plea explanations were read into the record on behalf of both accused (and duly confirmed by both accused). Accused 1's plea explanation was marked exhibit 'A', whilst accused 2's plea explanation was marked exhibit 'B'.

10. The plea explanations revealed, in essence, the versions of the accused to be the following:

10.1 On the day in question accused 1 and 2 were walking at or near Renus Farm. A young boy reported to them that the deceased was nearby and was fighting with 4 men.

10.2 The names provided by the young boy were: Siya, Terra, Rose and Sixolile. The boy showed them the direction in which the fight was taking place.

10.3 The two accused went in that direction because they wanted to approach the deceased about the deceased stealing accused 1's brother's shoes (the boy confirmed the shoes being worn by the deceased fitted the description of the stolen shoes) from accused 1's house, and accused 2's laptop from accused 2's house.

10.4 When the two accused reached the deceased, his attackers were no longer there. They saw that the deceased was injured and covered in blood. Accused 2, according to his plea explanation, spoke to the deceased and told him that this would not have happened if he had not stolen things, meaning he was notorious for stealing and that he was wanted in that area.

The deceased gave the laptop back to accused 2. Accused 1 and 2 then left in the direction of accused 1's house.

10.5 As they were approaching accused 1's house, the brother of the deceased arrived and asked what had happened. Accused 2 explained to him what had occurred, and pointed to in the direction of where the deceased was to be found. The brother then went in that direction.

10.6 Accused 1 and 2 went to accused 1's house and checked the laptop, which was damaged.

10.7 Thereafter friends of the deceased (a group known as 'Full Force Gangsters' – 'FFG') and members of the community arrived at accused 1's house, and took both accused to a field. Ultimately the police were called and they took the accused with them.

10.8 The State witnesses, in the view of the accused, had been influenced by another State witness, Mr Xolani Mpupha, a member of the local community, who did not have a good relationship with accused 2.

10.9 Both accused denied any wrongdoing.

11. Written formal admissions on behalf of both accused (in terms of section 220 of the CPA) were also read into the record and duly confirmed by both accused. Accused 1's formal admissions were marked exhibit 'C' and accused 2's formal admissions were marked exhibit 'D'.

12. Pursuant to the formal admissions, a postmortem report in regard to the deceased, as well as a photograph album of the scene, were handed in by agreement, and marked exhibits 'E' and 'F' respectively.

13. It was admitted by both accused that:

13.1 On or about 6 January 2021 and at or near Renus Farm, in the district of East London, a person or persons stabbed the deceased several times with a knife, causing his death.

13.2 The injuries sustained by the deceased during the incident are correctly indicated in the post-mortem report, compiled by a Dr Ongama Ntloko on 10 January 2021.

13.3 The deceased sustained no further injuries from the time of his death until Dr Ntloko performed the post-mortem examination on the body of the deceased on 10 January 2021.

13.4 The deceased, at all relevant times, was correctly identified as Siyakholwa Ndamase, a 28-year-old man.

13.5 The photographs of the scene where the deceased was assaulted, of the surrounding area and of the deceased, as well as the key to those photographs, were correct.

14. The State led the evidence of three witnesses, those being Liyema D[...], Xolani Mpupha and Aphiwe Bombotho.

State's Case

15. Mr D[...] was the first witness to testify. He is 17 years old and 16 years of age at the time of the incident. He was self-evidently capable of appreciating the import of, and the taking of the oath, which was duly administered.

16. He testified that on the day in question at about 12h00, he was cutting grass inside the yard of a particular house (found at point 'A' in photograph 1 of exhibit 'F').

17. He saw four men walking together in the road in front of the house. The four men were conversing, although he could not hear what they were talking about.

18. One of the men tripped one of the other men (who, it transpired, was the deceased), who then fell down. Point B on photograph 1, it is not in dispute, is where the deceased was on the ground.

19. After the deceased was tripped, one of the men produced a knife from a backpack (which was in the possession of the deceased) and began stabbing the deceased.

20. He identified the man who caused the deceased to fall as accused 1.

21. The man who took the knife from the backpack and began stabbing the deceased he identified as accused 2.

22. At the time he did not know their names but knew them by sight and had seen them, mostly during weekends, over several months in the past. He had seen them at both Renus farm and Thembaletu.

23. Accused 2 stabbed the deceased on the front and back of the deceased's upper body.

24. Accused 2 then handed the knife to accused 1, who stabbed the deceased on the back, and on the back of one of his legs (shown in photograph 25 of exhibit 'F').

25. The deceased's backpack was removed from the deceased and handed to a fourth man (whom Mr D[...] did not know) by accused 2.

26. The fourth man ran away. The fourth man ran away after accused 1 had stabbed the deceased.

27. Mr D[...] made passing mention of a laptop in his evidence in chief, but was specifically also asked, thereafter, about whether or not he saw what was in the backpack, and if he knew anything of a laptop in the backpack. He clarified that he did not see what was in the backpack, and when referred to the accused's

referenced to a laptop in their plea explanation, said he had no knowledge about a laptop.

28. Mr D[...] testified that accused 1 and 2, after stabbing the deceased, also ran away, but in a different direction to the fourth man.

29. The deceased got up and wandered off between shacks (see photograph 2 of exhibit 'F'). The photographs in exhibit 'F' demonstrate the path followed by the deceased after he was stabbed.

30. The deceased ultimately fell in the midst of various houses/shacks, and it seems that this was where he passed away (see point 'E' on photograph 16).

31. Mr D[...] informed Mr Mpupha of what had occurred, as Mr Mpupha was a member of the local community policing forum/neighbourhood watch. He did not tell Mr Mpupha who was involved, as he did not know their names at the time.

32. The incident occurred approximately 10 meters away from where Mr D[...] was cutting grass, and in broad daylight.

33. Whilst there was a wire fence between where Mr D[...] was standing and where the incident occurred, the wire did not obstruct his view – this much is self-evident from photograph 1 as well.

34. Mr D[...] testified that the incident occurred over a brief period of time. He could not estimate how long it took, but denied that it was only a matter of seconds. He saw the faces of both accused during that time.

35. He confirmed that the deceased was notorious in the area for being a thief. He denied being influenced by Mr Mpupha to implicate the two accused when this was put to him.

36. Mr Mpupha confirmed in his evidence that Mr D[...] had reported what had occurred to him, somewhere between 12h00 and 13h00pm on the day in question.

37. Mr D[...] took him to where the incident took place. Mr Mpupha then followed the blood trail to where the deceased had finally fallen down (point 'E' in photograph 16). He covered the deceased with a blanket as small children were gathering to see what had happened.

38. Mr D[...] told Mr Mpupha that it was two gentlemen from Thembaletu who did the stabbing. Mr D[...] did not know their names.

39. Mr Mpupha contacted the station commander and asked for a van and an ambulance to be sent. The ambulance arrived first. They inspected the body of the deceased and found 8 or 9 wounds on the deceased's body. The forensics team came and took photographs, and then the body was taken. Those present held a prayer for the deceased's soul to go with his body in peace.

40. Later the same day, accused 1 and 2 were arrested by members of the community. Mr Mpupha went to where they were being held in the veld. There were many community members there, most of whom were unknown to Mr Mpupha.

41. When he arrived the two accused were sitting on the ground with a panga next to them. Some community members had sticks. Mr Mpupha was told that the police had been called.

42. He also took out his phone and called the station commander, who confirmed that the police had been called. Whilst Mr Mpupha was talking to the community members, a police van appeared. He did not know, prior to the two accused being pointed out to him by community members as being involved in the stabbing of the deceased, that these two accused had been involved in any way.

43. Mr Mpupha had not known the deceased.

44. Mr Mpupha confirmed under cross-examination that he knows accused 2's mother. He knew accused 1 and 2 by sight, but did not know either of them personally.

45. It was put to Mr Mpupha that he had issue with accused 2 due to a disagreement with one of Mr Mpupha's sons (the son was not identified). Mr Mpupha denied any knowledge of this, and denied influencing Mr D[....], when this was put to him.

46. Mr Bombotho, who is the brother of the deceased, testified that on the day in question a friend of his had notified him of his brother being stabbed at Renus farm.

47. On his way out, he came across accused 1 and 2. Accused 1 is his neighbour. Mr Bombotho enquired as to what was going on. He did this because the deceased was in their company the previous day.

48. Accused 1 and 2 were friends with the deceased, and accused 2 was Mr Bombotho's friend.

49. Accused 1 was not Mr Bombotho's friend, but he knew him by sight.

50. Accused 1 was already in the house when he enquired. Accused 2 was standing at the gate, but did not respond.

51. Mr Bombotho then went to Renus Farm, where he met with Mr Mpupha. Mr Mpupha showed him where the deceased was lying.

52. Mr Bombotho testified that he and the deceased also had two sisters. Their parents are both alive. All of them are unemployed save for their father, and the deceased would sometimes assist financially when he had odd jobs. He described the pain that he and the rest of his family experienced after learning of the deceased's death.

53. Mr Bombotho confirmed that the deceased did not own a laptop.

54. Under cross-examination he confirmed having heard rumours that the deceased was notorious in the community for being a thief.

55. It was put to Mr Bombotho that the deceased had stolen a laptop from accused 2 the previous evening, as well as a jacket, and a pair of accused 1's brother's shoes.

56. Mr Bombotho said that he did not have any knowledge of this. He denied being told by accused 2 (when he encountered them at accused 1's house on the day in question) about what had happened, and he denied that accused 2 showed him which direction to go in order to find the deceased.

Accused 1

57. Accused 1 was the only witness to testify in his defence.

58. He is 34 years old this year, completed his grade 12 year and was studying a course in Business Management, but had to drop out in 2013.

59. Before his arrest he lived in Thembaletu. He knew the deceased.

60. On the evening prior to the incident, he saw the deceased, but nothing occurred.

61. The following morning, as he was coming back from the shop, he encountered accused 2, who asked whether or not the deceased had come past accused 1's home. Accused 1 told him that the deceased had come to accused 1's home that morning, and accused 1 had left him there when he (accused 1) went to the shop.

62. Accused 2 informed accused 1 that the deceased had, the previous evening, left with accused 2's laptop.

63. The two accused proceeded to accused 1's home. On their arrival they saw that the deceased was no longer there. Upon inspection accused 1 noted that a pair of takkies, belonging to accused 1's brother, were missing.

64. Accused 1 said that he and the deceased sometimes borrowed clothes from each other, and so he suspected that the deceased thought that the takkies belonged to accused 1. Accused 1 told accused 2 that he would rather not assume that the deceased took the takkies, and would rather accompany accused 2 to find the deceased.

65. On their way to find the deceased, they came across a young boy, close to Renus Farm. The young boy (whose name he did not know) told accused 1 and 2 that there were four men fighting with the deceased.

66. The young boy mentioned names (that being Siya, Terra, Rose and Sixolile). These people were unknown to accused 1.

67. Accused 1 and 2 then proceeded to the place where they were told the deceased would be. It is common cause that this was point 'B' on photograph 1 (which is the same place where Mr D[...] said he saw the deceased fall to the ground and be stabbed by accused 1 and 2).

68. On their arrival they found the deceased. He was sitting down on the ground and bleeding profusely. There were young children in close proximity to the deceased who were observing.

69. According to accused 1, accused 2 then told the deceased to look at what he (the deceased) had done and where he was. If the deceased had not taken their things, this would not have happened, as the deceased was not even wanted in that area.

70. The deceased then handed over the backpack to accused 2. The laptop was inside the backpack.

71. Under cross-examination it emerged that the deceased had also given accused 2's jacket, in a separate bag, back to accused 2. Accused 1 saw that the

deceased was wearing accused 1's brother's takkies, but they had blood on them and so accused 1 left them.

72. There were other people (including adults) in the vicinity of where the deceased was stabbed (the implication being that they would have seen what occurred).

73. Accused 1 did not know the people who resided around that vicinity, and so could not name any names.

74. He said he wanted to call two sisters who were near a tavern at Renus Farm, as witnesses. He was not sure about their address but did know where they resided. If they were called as witnesses he did not know what they would say, but they were in the vicinity at the time when accused 1 and 2 saw the deceased, and accused 2 told them he had lost his laptop.

75. Accused 1 and 2 thought about who they would inform about the incident. The deceased was not a person who was wanted in the area - the community had attacked the deceased on previous occasions.

76. Accused 1 then decided to go back home, as he had left his home unlocked. Accused 2 also said he should go home, as allegations were being made at home that accused 2 had sold the laptop.

77. On their way they encountered Mr Bombotho. Accused 1 saw Mr Bombotho at a distance, as he was entering his (accused 1's) home. He then heard accused 2 informing Mr Bombotho that the deceased was attacked at Renus Farm.

78. Accused 2 tried to tell Mr Bombotho the names of the four attackers (which had been conveyed to accused 1 and 2 by the young boy) but Mr Bombotho rushed off.

79. Since there was no electricity in the vicinity where accused 2 resided, accused 2 wanted to check if the laptop was working. He plugged it in at accused 1's home, and found that it was broken.

80. Accused 1 testified that after a short period a group known to him as the 'Full Force Gangsters' (who are apparently friends of the deceased), arrived and told them that the community members were looking for them. The friends of the deceased were armed. They left accused 1's home with the Full Force Gangsters and went to a place in the veld, where they encountered a group of community members.

81. Under cross-examination he stated that the two sisters had tried to inform the community members who were holding accused 1 and 2 in the veld, that they (the two sisters) had seen the accused arriving and obtaining the bag from the deceased.

82. They were not sure what was in the bag but apparently knew the accused did not stab the deceased.

83. They tried to tell the community members, but were chased away by the gang members who were friends of the deceased. He estimated the two sister's vantage point when seeing him and accused 2 collecting the laptop to have been about 50 meters from the place of the incident.

84. Ultimately the police were called and both accused taken into custody.

85. Accused 1 explained that his view was that Mr D[...] had implicated accused 1 and 2 in these offences because Mr Mpupha had a problem with accused 2.

86. According to accused 1, there was a quarrel between accused 2 and one of Mr Mpupha's sons about a woman. As a result, Mr Mpupha had been making up stories about accused 2 since then. Mr Mpupha also convinced certain young boys to lie and say that accused 2 had been selling drugs.

87. Accused 1 denied assaulting the deceased in any way, and denied stealing anything from the deceased.

88. He confirmed under cross-examination that he and the deceased had been friends. He confirmed that the deceased had lived at the same home as the deceased's brother (which was in close proximity to where accused 1 lived).

89. He and accused 2 did not have any major problems with the deceased.

90. Accused 1 was asked why he and accused 2 went looking for the deceased (on 6 January 2021), instead of asking the deceased's brother (Mr Bombotho) next door where the deceased was. Accused 1 responded that Mr Bombotho had, in similar instances in the past, told them he had nothing to do with his brother's mischievous ways.

91. During cross-examination accused 1 stated that the young boy approached accused 1 and 2 and made a report to them about what had happened to the deceased. The young boy was asked to give them a description of the deceased, from which they were able to surmise that the deceased was the person they were looking for. Accused 1 thought the young boy chose to report to accused 1 and 2 because the young boy knew that accused 1 and accused 2 live in Thembaletu, which is also where the deceased resided. The young boy apparently knew this because he had seen the deceased together with the two accused in the past. Accused 1 did not know where the young boy lived.

92. Accused 1 testified that the deceased had stabbed and killed another man in the area in the past, and the deceased himself had been attacked 3 times at Renu Farm.

93. In cross-examination he was referred to Mr Mpupha's evidence that they said a prayer for the deceased after his body was removed – the implication being that this was incompatible with a community which hated the deceased.

94. Accused 1 said he did not know why Mr Mpupha did that. He then said that it was for the sake of the deceased's father, who is a friend of Mr Mpupha.

95. He confirmed that the deceased had already been stabbed when he and accused 2 arrived at the scene of the incident. They did not take note of exactly where the deceased was stabbed. The deceased, according to accused 1, gave the laptop to accused 2 without being asked.

96. Under cross-examination he conceded that he could not dispute that Mr D[...] was in the vicinity and had observed what was happening. It was put to him that Mr D[...] could not have known about where on his body the deceased was stabbed if Mr D[...] had not seen the stabbing itself. Accused 1 attributed this knowledge to the influence of Mr Mpupha. His view was that it was possible that Mr D[...] could have seen the deceased's attackers, but only saw accused 1 and 2 when they took the laptop.

97. Accused 1 confirmed that he had seen Mr D[...] in passing before, and that he had never had a squabble with Mr D[...] or Mr Mpupha.

98. He thought that he was being falsely accused along with accused 2 because they knew he was close to accused 2. He stated that when accused 2 had previously been falsely accused in regard to other matters, two of accused 2's friends had also been falsely accused, and had been beaten up by the community.

99. He was asked why Mr Mpupha would not have told Mr D[...] the names of accused 1 and 2, if he wanted Mr D[...] to falsely implicate them. Accused 1 responded that it might be that he saw the men who attacked the deceased and then saw accused 1 and 2 taking the laptop, and then changed the story.

100. He confirmed that accused 2 was upset about the missing laptop, especially as accused 2 was being blamed at home in this regard, and that he (accused 1) was upset that his brother's shoes were missing. He agreed that the nature of the stab wounds meant that whoever stabbed the deceased was clearly quite angry with the deceased.

101. It was put to him that he did not inform the police of his exculpatory version of events when he was interviewed by the police. According to accused 1 the police knew of the fact that four men had stabbed the deceased, but because they could not be identified by the accused, the two accused had to be arrested instead. The police were not willing to listen to anything the accused had to say on the matter.

Accused 2

102. Accused 2 was the only witness to testify on his own behalf.

103. He confirmed that prior to his arrest he resided in Thembaletu. He is 23 years old this year and he dropped out of school in grade 10 without completing his grade 10 year.

104. Accused 2 testified that he had been in the deceased's company on the evening of 5 January 2021. Thereafter he had gone back to where he was staying. Later that evening the deceased arrived and, upon the door being opened, brandished a knife and demanded that accused 2 hand over his jacket and laptop. The laptop in question in fact belonged to accused 2's brother.

105. Accused 2 went looking for the deceased the following morning, ostensibly to obtain an explanation in regard to why the deceased had robbed him of the laptop and jacket. He came across accused 1 and was informed that accused 1 had left the deceased at accused 1's home. Both accused went to accused 1's home, but the deceased was no longer there when they arrived. Accused 1 discovered that takkies as well as boxer shorts were missing from his home. Both accused then went looking for the deceased.

106. Whilst doing so they came across a young boy. Accused 2 asked the boy if he knew the deceased, to which the boy responded in the negative.

107. Accused 2 then described the deceased and the clothing he was wearing, whereafter the boy said he had seen him fighting with 4 men at Renu Farm.

Accused 2 did not know what he said to accused 1 thereafter as accused 2 rushed off in the direction indicated by the boy. Accused 2 therefore did not hear the four first names referred to by accused 1 in his evidence.

108. Accused 1 and 2 ultimately found the deceased sitting on the grass next to a yard. Accused 2 told the deceased that if he had not taken those items this would not have happened to him. By 'those items' he was referring to the laptop, jacket, takkies and boxer shorts. The deceased did not say anything, but handed accused 2 the backpack with the laptop and jacket. Accused 2 observed that the deceased's t-shirt was bloodstained, and he was bleeding very much.

109. Accused 2 took the laptop and jacket and he and accused 1 returned to their locality. They did not look for help for the deceased because it would be pointless in that area, as the deceased was not wanted there. He referred to the deceased having stabbed another man to death in the past in that area. The intention was to find help in the area where they (accused 1 and 2) lived.

110. Accused 2 also wanted to check, at accused 1's home, if the laptop was working. They were about to enter accused 1's home when they came across Mr Bombotho. Accused 1 proceeded inside, whilst accused 2 told Mr Bombotho what had happened to the deceased and where this had occurred. Mr Bombotho then boarded a bakkie, which was being driven by someone else, and they rushed to Renus Farm.

111. A short while after reaching accused 1's home, members of the Full Force Gang arrived, and accused 1 and 2 were taken to the veld. The police were ultimately called.

112. Mr Mpupha was present in the veld and was asked by community members regarding his knowledge of the incident. Mr Mpupha said he was not aware of it.

113. Accused 2 said he had a clear recollection of the incident, and denied that Mr D[...] was at the scene at the relevant time (at point A on photograph 1). He said that Mr D[...] was lying in his evidence.

114. He blamed this on Mr Mpupha's influence, and also alleged that the police who were investigating the matter were involved in the conspiracy to falsely accuse him and accused 1.

115. Accused 2 testified that he and Mr Mpupha did not have a good relationship, as he had an altercation with Mr Mpupha's son (Siphiwe) in regard to a woman they both had a relationship with. Mr Mpupha, apparently aggrieved by this altercation with his son, later accused accused 2 of selling drugs, and roped in local boys to falsely allege that he was selling drugs.

116. Under cross-examination he was asked how it came about that community members came to take accused 1 and 2 from accused 1's home. He responded that Mr Bombotho knew that they had spent the previous evening with the deceased. He surmised that Mr Bombotho, despite being told by accused 2 that the deceased had robbed accused 2 the previous night, and being aware that accused 2 did not harm the deceased, informed the deceased's friends that accused 2 had told him where to find the deceased, which led to the community arriving at accused 1's home.

117. Despite alleging that Mr Bombotho was lying in his evidence, accused 2 described Mr Bombotho as being a good friend of his (that being accused 2).

118. During cross-examination he was asked why he was only referring to the deceased robbing him now, when his plea explanation, and the version put on his behalf, had referred to the deceased as having stolen the laptop. Accused 2 stated that he had relayed this information to the investigating officer and his legal representative.

119. Accused 2 said he had not seen the two sisters at the scene, but had seen them later speaking to community members in the veld when the two accused were brought there by the community.

120. After accused 2 closed his case, Mr Geldenhuys placed on record that the investigating officer in this matter had attempted, on 18 October 2022, at the request of and using information provided by the accused, to trace the two sisters referred to by accused 1 and 2, but to no avail. Mr Obermeyer confirmed in this regard.

Analysis

121. The chief post-mortem findings on the deceased's body (contained in exhibit 'E') were the following:

121.1 8 incisions on the back and left thigh (7 of them being on the back and one on the left thigh).

121.2 A collapsed left lung.

121.3 Haemothorax on the left side of the chest.

122. The cause of death is recorded as: 'stab back'.

123. It is trite that the State bears the onus of proving the guilt of the accused beyond a reasonable doubt, and that if the accused's' versions are reasonably possibly true, even if those versions are improbable (unless they are so improbable that they cannot be reasonably possibly true), then they are entitled to their acquittal.²

² *Sithole v S* (868/2011) [2012] ZASCA 85 (31 May 2012) it was held:

"[8] The State bears the onus of establishing the guilt of an accused beyond reasonable doubt and he is entitled to be acquitted if there is a reasonable doubt that he might be innocent. The onus has to be discharged upon a consideration of all the evidence. A court does not look at the evidence implicating the accused in isolation to determine whether there is proof beyond reasonable doubt nor does it look at the exculpatory evidence in isolation to determine whether it is reasonably possible that it might be true. The correct approach is set out in the following passage from Mosephi and others v R LAC (1980 – 1984) 57 at 59 F-H:

'The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful guide to a proper understanding and evaluation of it.

124. Mr D[...] was the only eye-witness who was called to testify. He is thus a single witness in this regard and his evidence must be treated with the requisite caution. Further caution is attached to the fact that he is a child, and that his evidence involves identification of the perpetrators.

125. In this instance the matter of *S v Carolus* 2008 (2) SACR 207 (SCA) is instructive, stating the following at paragraphs 15 - 17:

[15] Section 208 of the Criminal Procedure Act 51 of 1977 provides that an accused may be convicted of any offence on the single evidence of any competent witness. There is no formula to apply when it comes to the consideration of the credibility of a single witness. The trial court should weigh the evidence of the single witness and consider its merits and demerits and, having done so, should decide whether it is satisfied that the truth has been told despite the shortcomings or defects or contradictions in the evidence.

[16] A is also a child. In Director of Public Prosecutions v S, the court came to the conclusion that:

It does not follow that a court should not apply the cautionary rules at all or seek corroboration of a complainant's evidence. In certain cases

But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. If that is not done, one may fail to see the wood for the trees'.

In weighing the evidence of a single State witness a court is required to consider its merits and demerits, decide whether it is trustworthy and whether, despite any shortcomings in the evidence, it is satisfied that the truth had been told. It must state its reasons for preferring the evidence of the State witness to that of the accused so that they can be considered in the light of the record. In applying the onus the court must also, where the accused's version is said to be improbable, only convict where it can pertinently find that the accused's version is so improbable that it cannot be reasonably possibly true."

caution, in the form of corroboration, may not be necessary. In others a court may be unable to rely solely upon the evidence of a single witness. This is so whether the witness is an adult or a child.

[17] It will be recalled that identity is the primary issue in this case.³ Our courts have repeatedly stated that evidence of identification must be approached by the courts with caution. In *S v Mthetwa*, the court said:

Because of the fallibility of human observation, evidence of identification is approached by the Courts with some caution. It is not enough for the identifying witness to be honest: the reliability of his observation must also be tested.'

126. Mr Geldenhuys conceded that the allegation that Mr D[...] would lie was perhaps somewhat speculative, and did not take this argument any further.

127. He submitted that Mr D[...] was a single witness who had seen a gruesome stabbing and was shocked. He had seen this from a yard through a fence. It was reasonably possible that he was mistaken in alleging that it was the two accused who had stabbed the deceased. His reliability was therefore in question (there was reasonable doubt in this regard), and his evidence should not be accepted above that of the two accused.

128. In reply, Mr Obermeyer pointed to the fact that Mr D[...] had:

128.1 Confirmed that the incident did not take mere seconds.

128.2 He was close to where the incident occurred.

128.3 He saw the faces of the two accused.

128.4 The fence (as demonstrated in photograph 1) does not obstruct one's view at all.

³ That being the Carolus matter.

129. To the above can be added the fact that this incident occurred in broad daylight at approximately midday.

130. In the alternative, Mr Geldenhuys submitted that the robbery charge should fall away, as the two accused were looking for property stolen by the deceased. It was pointed out that Mr Bombotho had confirmed that the deceased did not have a laptop.

131. In reply, Mr Obermeyer submitted that there was no evidence adduced from the State's side in regard to what was in the bag, with Mr D[...] confirming that he knew nothing of the laptop or what was in the bag.

132. In my view the State witnesses were all good witnesses who were consistent in their evidence and who were not discredited under cross examination.

133. Mr D[...]’s evidence is (with due regard to the relevant cautionary rules), in my view, reliable for the following reasons:

133.1 It is common cause that the deceased was stabbed at the exact place as described by Mr D[....].

133.2 The places where the deceased was stabbed on his body, as recounted by Mr D[....], are compatible with the findings in the post-mortem report.

133.3 Mr D[...] knew both accused by sight, and observed the incident from a short distance away, under circumstances where his view was clear and unobstructed.

133.4 Mr D[...]’s reporting of the incident to Mr Mpupha is confirmed by Mr Mpupha.

133.5 Mr D[....] was unlikely to have had knowledge of the deceased's backpack being taken from the deceased, had he not witnessed the stabbing.

133.6 Mr D[....] honestly conceded that the deceased had a reputation in the area for being a thief.

134. Mr D[....]'s evidence was accordingly consistent with the probabilities, particularly given the facts which were common cause. The fact that he is child, who is currently on the cusp of adulthood, does not, on its own, detract from his reliability as a witness.

135. Whilst it remains unclear how the community came to know the identities of the two accused as being the alleged perpetrators of the robbery and murder of the deceased, this does not take the matter any further as it is common cause that both accused were at the scene of this incident on the day in question, at least one of them spoke to the deceased, and the deceased's backpack was taken.

136. Mr D[....]'s evidence relating to how both accused stabbed the deceased (essentially taking turns), whilst a fourth person made off with the deceased's backpack, the backpack having been given to this fourth person by accused 2, demonstrates that the accused were acting in concert and with a common purpose in regard to both the robbery and the murder.

137. In addition, and whether or not a laptop was in fact contained in the deceased's backpack, it is not in dispute that the backpack itself, and any remaining contents therein, belonged to the deceased. On the State's version of events, the same would be true of the knife which was taken from the backpack.

138. The two accused were, in my view, poor witnesses, whose evidence contained numerous inconsistencies and improbabilities. A few examples are the following:

138.1 Accused 2, in his evidence in chief, for the first time disclosed that the deceased had robbed him when taking the laptop and the jacket. This robbery was not mentioned by accused 1 in his evidence, nor was it referred to in the plea explanation of accused 2, nor was it put to any of the State witnesses during cross-examination.

138.2 The theft of the jacket itself was not mentioned in the plea explanations, whilst the pair of boxer shorts allegedly taken from accused 1's home only emerged when accused 2 testified.

138.3 It emerged for the first time during accused 2's evidence in chief that accused 2 had not been informed of the first names of the alleged perpetrators of the stabbing, yet the plea explanation for accused 2 confirms they were both told the names by the young boy.

138.4 No full names or further details are available in regard to the young boy, the four alleged perpetrators who stabbed the deceased, or the two sisters who potentially witnessed what occurred.

138.5 The deceased was a friend of the two accused, to whom, based on their evidence, they did not bear much ill will, despite him stealing from them. Accused 2 opted, after being robbed by the deceased at knife-point, to try and fix things with the deceased rather than approaching the police.

138.6 The accused then, upon seeing the deceased covered in blood and sitting on the ground, chose to focus on their allegedly stolen property, viewing it as pointless to seek assistance as the deceased was not well-liked in the area. Both accused instead decided to return to accused 1's home first instead of going elsewhere to seek assistance.

138.7 In addition to the above, both accused insisted they were being implicated as part of a conspiracy, the original catalyst for which was a disagreement relating to a girlfriend.

138.8 The above conspiracy allegedly involved Mr Mpupha, as a community forum member, being content to allow the real perpetrators of the violent attack suffered by the deceased to go unpunished, in favour of falsely implicating accused 2 due to a disagreement about a girlfriend between accused 2 and one of Mr Mpupha's sons at some point in the past. Mr Mpupha was apparently content to falsely implicate accused 1 merely because he was a friend of accused 2.

138.9 Despite Mr Mpupha's allegedly devious intentions, he did not accuse the two accused of any wrongdoing when they were being held by members of the community in the veld on the day in question.

138.10 Mr D[...] was influenced by Mr Mpupha to lie in this regard, and to maintain the lie when he testified in court. This despite the fact that Mr D[...] was clear that whilst he recognized the accused by sight at the time of the incident, he did not know their names, under circumstances where Mr Mpupha could easily have provided them to Mr D[...].

138.11 The police (and especially the investigating officer) were, inexplicably also part of this conspiracy to falsely implicate the two accused.

138.12 The accused alleged that Mr Bombotho, without apparent reason, was lying about speaking to accused 2 outside accused 1's house on the day in question.

139. There is no evidence before this court to elevate the accused's allegations in regard to a conspiracy above mere speculation, and such allegations are furthermore inherently improbable, when juxtaposed with the facts which are common cause.

140. Having carefully considered the evidence as a whole, it is clear that the versions of both accused fall to be rejected as not reasonably possibly true, and that the State has proved its case, in regard to both charges, beyond a reasonable doubt.

141. I accordingly find both accused guilty as charged.

N MOLONY

JUDGE OF THE HIGH COURT (ACTING)

For the State : Mr. Obermeyer

For the Accused : Mr. Geldenhuys