

**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

Case No. CC05/2017

In the matter between:

THE STATE

And

MOELETSI LETSOHO

Accused

JUDGMENT

JOLWANA J

[1] The accused, Mr Moeletsi Letsoho was charged together with his son Kekeletso Letsoho and Nyameko Mbobo. They were all charged with conspiracy to commit and aid one another in the commission of the offence of robbery with aggravating circumstances in contravention of section 29 of Act 9 of 1983, robbery with aggravating circumstances in contravention of section 155 of Act 9 of 1983 read with section 51(2) of the Criminal Law Amendment Act 105 of 1997 and murder in

contravention of section 84 of Act 9 of 1983 read with section 51(1) of the Criminal Law Amendment Act 105 of 1997 (the Criminal Law Amendment Act)

[2] The state later withdrew the charges against Kekeletso Letsoho following his untimely death. The court was further advised that the state had withdrawn the charges against Nyameko Mbobo who had since become a state witness in terms of section 204 of the Criminal Procedure Act 51 of 1977 (the Act). This resulted in Mr Moeletsi Letsoho (the accused) being the only one facing the above mentioned charges.

[3] The accused, who was legally represented throughout the trial, pleaded not guilty to all the charges and reserved the basis of his defence to the charges. He was also warned about the implications of section 51(1) and (2) of the Criminal Law Amendment Act in the event of conviction.

[4] Nyameko Mbobo (Mbobo) who was a section 204 witness testified that he resides at Ramafole location in Mount Fletcher. He knows the accused from the Mount Fletcher Taxi Association from the time they were in the taxi industry as taxi owners. He also knows his house which is at Tsolobeng Administrative Area in Mount Fletcher.

[5] He testified that he owned a taxi which started giving him problems while he was still paying instalments for it to a financial institution. He decided to look for someone who would refund him the deposit he paid when he bought it and also take over the instalments. He told his colleagues in the taxi industry in Mount Fletcher about this decision. Because the accused was not present when he made this announcement he called him and also told him his decision concerning his vehicle. This was about June 2016.

[6] The accused told him that he knew of a person in Lesotho who might be interested in the vehicle. They then made arrangements to go to Lesotho. They proceeded to Letsoho but the said person was not really interested in the vehicle. He decided to return to South Africa leaving his vehicle in Lesotho with the accused. On his return to Lesotho he met with the accused who told him that his cousin John Letsoho (John) was interested in the vehicle. He and the accused went to see John who offered to buy the vehicle for R35 000.00 and an agreement was reached about the sale. He thereafter returned to South Africa leaving the accused in Lesotho.

[7] After some time the accused told him that he had since returned to South Africa and wanted him to accompany him to Lesotho for a reason that was not disclosed. He agreed to go with the accused to Lesotho as he was not doing with anything after he had sold his vehicle. The following day at about 5.00 in the morning the accused picked up him at a tarred road near his homestead where he had waited for him as previously arranged. The accused was driving a quantum taxi vehicle and he got into the vehicle and sat at the front passenger seat. Mbobo asked the accused as to whose vehicle that was and the accused said the vehicle belonged to Mandla whom he knew. He asked the accused where Mandla was and the accused said Mandla was in the vehicle.

[8] The accused then remarked that he should not ask too many questions and that they must leave. They left proceeding towards Mount Fletcher. Because it was still early in the morning and it was dark inside the vehicle, he could not see if Mandla was indeed inside the vehicle. As they were going he asked the accused how he got the vehicle from Mandla. The accused responded in Sesotho saying “ke-monwele or ke monwesetse” which means he drank him when loosely translated from Sesotho a language in which he is not proficient. As they proceeded in the direction of Mount

Fletcher, at some point they turned and proceeded towards the farms in Maclear and drove for a short distance into a certain junction on a gravel road where the vehicle stopped.

[9] The accused then said that they must take Mandla out of the vehicle. He then assisted the accused in offloading Mandla from the vehicle. As they took Mandla out of the vehicle he was wrapped in a blanket. They took him and put him in culvert. He seemed to be dead although he did not see his face. After putting Mandla in that culvert, they drove back joining the tarred road in the direction of Maclear.

[10] They arrived in town in Maclear and stopped at a fuel filling station where the accused refuelled the vehicle. He was sent by the accused to buy water after which they proceeded towards Ugie past Elliot towards Barkley East. On the way he was asked by the accused to wash the deceased's blood that was in the vehicle and he did so. They proceeded towards Sterkspruit and somewhere in that route, the road was closed by protesters which forced them to turn back and use a different route. They drove until they reached the border between South Africa and Lesotho. They drove into Lesotho until they reached John who gave them money, a sum of about R35 000.00 for the vehicle.

[11] Thereafter they both proceeded to Maseru where they slept for that night. The following day he hitch hiked to Rustenburg in Gauteng to look for a job leaving the accused in Maseru. Less than a week after his arrival in Rustenburg, his father called him saying that police were looking for him. He returned home in Mount Fletcher and his father accompanied him to Maclear Police Station where he was arrested and detained.

[12] Under cross examination Mbobo largely confirmed his section 204 statement as well as his evidence in chief in every material respect. It was put to him that he is the one who asked the accused to accompany him to Bloemfontein to buy some traditional Sesotho cultural clothing which he was going to sell. He disputed this insisting that he never planned to go to Bloemfontein. He also disputed that he had hired the vehicle which was ordinarily driven by the deceased for the Bloemfontein trip. He denied buying liquor which was then consumed by the since deceased Kekeletso Letsoho, the deceased and the accused and testified that he did not even drink liquor.

[13] It was also put to Mbobo that the deceased arrived at the house of the accused with the liquor and at some stage after drinking it with the accused and Kekeletso, the accused decided to go to his bedroom to sleep. When he went to sleep he left the deceased with Kekeletso watching TV. At about 2:00 in the early hours of the following morning the accused was woken up by his late son Kekeletso telling him that the deceased had fallen on the verandah and was bleeding from the nose. The accused woke up and tried to assist the deceased thinking that the nose bleeding would stop. He took the deceased to a bedroom which had been prepared for him. Both the deceased and Kekeletso were visibly drunk. Mbobo disputed all of this version of the accused indicating that he was not at the accused home and would not know what happened there.

[14] It was further put to him that at about 3:15 in the morning he called the accused asking where he was as they had agreed to leave at 3:00. The accused then told him that the deceased had fallen and was injured and he was preparing to take him to the doctor. Mbobo told the accused that he should not take the deceased for medical attention as he would do so himself. Mbobo later arrived at his homestead

in a sedan vehicle with two other men who were unknown to him. The accused then assisted Mbobo in taking the deceased from the room into the quantum vehicle of the deceased.

[15] The two unknown men left in the said sedan vehicle and Mbobo followed them in the quantum vehicle of the deceased leaving the accused at his homestead. At that time the deceased had no injuries except for bleeding from his nose and that was the last time that the accused saw the deceased. At about 10:00 that morning Mbobo arrived again at the homestead of the accused in that sedan vehicle. Mbobo told the accused to prepare for the Bloemfontein trip and further told him that the deceased had been admitted in hospital. Mbobo denied all of these events pointing out that he would not know what happened at the home of the accused as he was not there and disputed all of the things he was said to have done or said.

[16] It was further put to Mbobo that both he and the accused boarded the sedan vehicle which Mbobo then drove to Maclear where they found the deceased's quantum vehicle. Mbobo took the quantum vehicle and drove with him going to Bloemfontein with the accused. On the way Mbobo told him that they would start in Lesotho before they went to Bloemfontein as he needed to get his balance of the purchase price for his own taxi vehicle which he had sold in Lesotho. When they arrived in Lesotho Mbobo told him that he would be selling the quantum vehicle they were driving. At that time the accused did not know that the deceased had died. Mbobo denied all of this version of the accused.

[17] It was further put to Mbobo that indeed the accused knew some people in Lesotho and he did assist Mbobo in selling the vehicle and he paid the accused R1000.00 for his assistance, Mbobo also denied this. After the vehicle was sold they

spent the night at a certain B & B in Maseru. In the morning Mbobo disappeared leaving the accused in Maseru. Mbobo confirmed sleeping in Maseru but denied the rest of the accused's version. It was also put to Mbobo that the accused did not know the place at which the body of the deceased was found. Furthermore Mbobo was able to give the description that he gave about where the deceased's body was found because he, Mbobo was the person who dumped it there without the knowledge of the accused. Mbobo confirmed that indeed he knew where the body was found because he was with the accused when the body of the deceased was dumped there.

[18] Admissions in terms of section 220 of the Criminal Procedure Act were handed up by agreement between the parties. The said admissions signed by the accused and his legal representative read as follows:

"I, Moeletsi Tsoho hereby make the following admissions in terms of section 220 of the Criminal Procedure Act 51 of 1977.

THAT

1. The person referred to as the deceased in this document and in the case generally, is indeed the person mentioned in the indictment to wit, Mandlakapheli Sitshinga, an adult male person, and his body was at all times and occasions correctly identified as such;
2. The deceased person died on 14 June 2016 at or near Tsolobeng Administrative Area in the district of Mt Fletcher as a result of Head Injury, Intracranial Bleeding and Brain Tissue Injury.
3. The deceased's body did not sustain any injuries from the time it was removed from Coldstream farm in Maclear where the body of the deceased was found, until Dr LL Mjamba performed a medico-legal post mortem examination on the body on the 17 June 2016.
4. The post-mortem report marked DR 172/2016 completed by Dr LL Mjamba is true and correct in all its contents, including observations, findings and conclusion stated therein.

5. The post-mortem report will be admitted as exhibit "D".
6. The photo album depicting the scene of crime as well as the place where the deceased was found abandoned and keys thereto as compiled by W/O Nxesi and W/O Sidinile as well as their contents are admitted as true and correct.
7. These photo albums and keys thereto will be admitted as exhibits "E1" and "E2" respectively."

[19] Mr Mongezi Dingalibala (Dingalibala) testified that he is a taxi owner and he knew the deceased very well as the deceased was his driver in respect of his quantum taxi vehicle with registration letters and numbers FYN 987 EC. On the 9 June 2016 the deceased took the said quantum taxi vehicle for a special trip to Ugie which was scheduled for the 10 June 2016. He called the deceased at 08:00 in the morning on 10 June 2016 to check on how the trip was going. When he could not get through to the deceased, he waited hoping that the deceased would return his call but he did not. In the afternoon at about 15:00 he called the deceased again but still he could not get through.

[20] Dingalibala then decided to ask the deceased's brother to assist in getting through to the deceased may be through some other number. This also did not help. The following day he searched for the deceased also assisted by other taxi owners going as far as Matatiele, Kokstad and Mount Ayliff, all in vain. He also reported this situation to the police at Mount Fletcher Police Station. On Tuesday the following week he received a call from the rank manager at their taxi rank telling him that a dead person had been found at Maclear. He later received a call from Bulelani Sitshinga who is the brother of the deceased telling him that the body of the deceased had been found in Maclear.

[21] As he was busy with funeral arrangements he received a call from Maclear police station telling him that his vehicle had been found in Lesotho and he needed to go to Lesotho with an insurance official to confirm if indeed it was his vehicle. He and Mr Van Der Merwe from the insurance company went to Lesotho, where he found the vehicle and identified it positively as his vehicle. The insurance company settled his insurance claim. He confirmed that this is the same vehicle with registration numbers and letter FYN 987 EC which had been taken by the deceased on the 09 June 2016 for a special trip.

[22] Warrant officer Mongezi Nxesi testified that he is based at Maluti Criminal Record Centre and has been working for the SAPS for thirteen years, twelve years of which have been in the Criminal Record Centre environment attending crime scenes, taking photographs and collecting exhibits and doing other record centre duties. On 17 June 2016 he attended a crime scene in Tsolobeng in Mount Fletcher at a certain homestead. In one of the bedroom in that homestead he observed blood in different places and took photographs.

[23] In that bedroom he observed possible bloodstains on the wall, the headboard, the pillow. Possible blood was also found from the red blanket in between the mattress and the base of the bed which he described as a pool of blood. He turned the mattress upside down and found possible blood on the mattress. Using evidence collection kits he took samples of the possible blood and sealed them in the normal way. The swabs were sealed individually and placed inside a forensic bag and were eventually sent to their Port Elizabeth forensic science laboratory for DNA analysis.

[24] It is common cause that the homestead at which warrant officer Nxesi attended a crime scene and took samples of possible blood for DNA analysis is that of the

accused. The chain evidence was not disputed nor were the methods, handling and the sealing of the collection kits questioned. The DNA biology report confirmed that the possible blood from the wall inside the bedroom and the possible blood from a blanket under the mattress was the blood of the deceased Mandlakapheli Sitshinga.

[25] The next state witness was Maria Elizabeth Pretorius (Pretorius) an employee of Tracker Connect, a vehicle tracking company based in Johannesburg where she is employed as an investigator. She testified that her company assists the South African Police Service with investigations in respect of cases in which the vehicles are fitted with her company's tracking equipment. She gave evidence regarding the tracking report of the vehicle with registration letters and numbers FYN 987 EC which in their tracking system is registered as belonging to Dingalibala.

[26] She testified that on 9 June 2016 at 20:52 the ignition of the vehicle was switched off 1.5 kilometres North West from Braki and 3.2 kilometres North West of Mount Fletcher. It is common cause that the place at which the ignition was switched off is the homestead of the accused and the said vehicle did not leave that homestead until the 10 June 2016. The ignition was switched on for the first time on the 10 June 2016 at 03:31 in the morning at the same place where it had been switched off. This confirms that the vehicle spent the night at that place. It started moving at 04:31 from Tsoibeng on the R56 road until it stopped for about three to four minutes at 05:33 with the ignition still on, on the DR03209, 6,4km South from Ntatyani and 10,3km North East from Sonwabile. This, according to the evidence of the state, is where the body of the deceased was dumped in a culvert at Coldstream farm.

[27] From that point the vehicle started moving again until it stopped on the R56 road in Maclear at 05:49 at a filling station where it moved again at 05:58 having spent about 9 minutes there. Thereafter the vehicle moved, stopping and moving at different places until the ignition was switched off at Quthing in Lesotho at 15:08 after having crossed Tele Bridge Border post into Lesotho. She testified that their system is only able to track a vehicle into Lesotho up to a certain point after which the signal is lost.

[28] The last state witness who gave significant evidence is Dr Mjamba, the pathologist who examined the body of the deceased and prepared the post-mortem examination report. He testified that on 17 June 2016 he conducted an autopsy on the deceased. His chief post-mortem findings were that the deceased was assaulted and sustained multiple scalp lacerations, depressed skull fractures occiput and frontal bone, brain tissue injury and intracranial bleeding. The cause of death was head injury, intracranial bleeding and brain tissue injury.

[29] He testified that the bleeding from the nose and ears was because blood vessels were lacerated. He explained that when arteries are lacerated the person bleeds heavily and the blood spits because of the pressure from the heart and it sprays or spreads. Therefore the blood in that room, on the walls and in the blanket and mattress could not have come from nose bleeding or epistaxis. It was bleeding caused by the fractured skull. After Dr Mjamba's evidence the state closed its case.

[30] Mr Sakwe who appeared for the accused made an application for the accused to be discharged in terms of section 174 of the Criminal Procedure Act in respect of counts 1 and 2 being conspiracy and robbery with aggravating circumstances. In respect count 1, conspiracy he submitted that there was no evidence by the state

that the accused conspired with anybody to commit any offence. Furthermore, the evidence by Mbobo, the section 204 witness was clearly that of somebody who completely disassociated himself with any of the criminal activities with which the accused has been charged. There was also no evidence which would or could prove robbery as there was no evidence of robbery having been committed before the deceased was killed.

[31] Mr Pomolo counsel for the state opposed the application. With regard to the charge of conspiracy his submission was that the accused might have conspired with somebody in South Africa or Letsoho where the vehicle was eventually sold. With regard to robbery he submitted that the evidence of the state was that the deceased was at the accused's homestead where he suffered a fractured skull from an assault with an object. Thereafter the vehicle was driven by the accused to pick up Mbobo after which the deceased's body was dumped at Maclear and the vehicle travelled to Lesotho where it was sold. Therefore clearly the deceased was killed to rob him of his vehicle.

[32] I granted the section 174 application in respect of the count of conspiracy. I agree with Mr Sakwe that there was just no evidence of conspiracy given by any of the state witnesses. To say that the accused might have conspired with somebody in South African or Lesotho when there was no evidence of conspiracy at all is to enter into endless and dangerous speculation fraught with many possibilities. That in my view is totally impermissible in our law. The refusal of the application for the discharge of the accused would be on the basis that in his evidence, if the accused chooses to testify, might incriminate himself. However, when it comes to robbery, the evidence of the state is that after the deceased was killed his vehicle left the homestead of the accused, picked up Mbobo on the way to dump the body of the

deceased. It thereafter proceeded to the Lesotho where it was sold by the accused. I refused the section 174 application in respect of the robbery count because in my view there was evidence on which the accused could be convicted.

[33] The accused testified in his defence. He testified that he was asked by Mbobo to assist him in selling his vehicle as he could no longer afford to pay the instalments. He told Mbobo that he knew John, a relative of his who normally buys damaged vehicles, repairs them and thereafter sells them. He did not know if John would be interested in Mbobo's vehicle as it was not a damaged vehicle. He spoke to John who said that the vehicle should be brought to him in Lesotho so that he could see it. He thereafter gave Mbobo John's contact details to enable him to speak to John directly. Thereafter Mbobo arranged for the two of them to take his vehicle to John in Lesotho.

[34] On their arrival in Lesotho they met John who inspected the vehicle. John and Mbobo discussed the matter inside the vehicle while he was outside and agreed on the sale of Mbobo's vehicle. He could see from the outside, money being counted by the two men. Thereafter Mbobo told him that they should leave. They left and spent the night at a B & B in Lesotho where Mbobo gave him R1000.00 as a token of appreciation for his assistance. The following morning they both returned to their respective homes in South Africa.

[35] Some two to three weeks later he received a call from Mbobo asking him to accompany him to Bloemfontein where he wanted to buy Sesotho traditional attire because he wanted to open a business of selling the Sesotho traditional attire. Mbobo came to his homestead accompanied by his wife and children to beg him to accompany him to Bloemfontein as he had initially refused. He even requested him

to also accommodate the deceased for the night as he was also going to go with them to Bloemfontein. Eventually he reluctantly agreed. Mbobo and his family left saying he would phone him in the morning.

[36] The deceased whom he had been requested to accommodate also arrived that night with lots of alcohol which he said had been bought by Mbobo. He, the deceased and Kekeletso, his son consumed the alcohol. He drank only one glass after which he went to bed leaving the deceased and Kekeletso drinking. A room had been prepared for the deceased to sleep in.

[37] At about 1:00 in the morning Kekeletso woke him up telling him that the deceased had fallen on the edge of the verandah. He got up, went to the verandah and found the deceased having fallen on his forehead. He and Kekeletso lifted the deceased up causing him to sit up. He instructed Kekeletso to fetch a blanket to cover the deceased as it was cold. Kekeletso brought the blanket and he covered the deceased after which they took him into the bedroom that had been prepared for him. He could see that the deceased was heavily intoxicated and his knees could not carry him. They put him on the bed and he realized that the deceased was bleeding severely from the nose. The deceased was at that stage in severe pain.

[38] After the nose bleeding stopped he left that room to bath water for himself in preparation for the Bloemfontein trip. After taking the bath he asked Kekeletso to remain with the deceased while he left to make himself coffee. After drinking his coffee he returned to the bedroom in which the deceased was and found him still bleeding from the nose. At that stage Mbobo phoned him saying he was waiting for him and the deceased for the Bloemfontein trip. He then told Mbobo about the deceased's condition and that he intended to take him to hospital.

[39] Mbobo said he was coming and would himself take the deceased to hospital. Indeed Mbobo arrived in a white sedan with two other unknown men. He and Mbobo helped the deceased into the quantum taxi vehicle in which the deceased had arrived the night before and Mbobo took the deceased away saying he was taking him to hospital. The two unknown men also drove away in the sedan and he remained behind at his homestead. He testified that save for the nose bleeding the deceased had no visible injuries. Furthermore he did not see any blood splattered on the wall in that bedroom, in the bed or on the mattress. The only blood that was there would have been from the nose bleeding and it was not much.

[40] Mbobo returned to his homestead just after 08:00 that morning in the same white sedan saying they should leave for Bloemfontein and told him that the deceased had been admitted to hospital. The two of them travelled to Maclear where they found the quantum vehicle standing and they boarded it with Mbobo driving. They drove until at some point he realized that they were not on the way to Bloemfontein. When he asked Mbobo, the latter said he was owed a balance of the purchase price by John and they were going to Lesotho to get it. When they got to a certain garage in Lesotho Mbobo phoned John who arrived and took them to his brick making business and asked them to wait for him there and he left.

[41] John later returned with another man and took Mbobo aside, they talked after which John, Mbobo and the other man left him there. After the three men returned, Mbobo indicated to him that they should go back home. He asked Mbobo if he was leaving the vehicle there and he said he should not ask too many questions. The two of them left for Maseru leaving the quantum vehicle there and spent the night at a B & B in Maseru. Mbobo gave him R1000.00 thanking him for assisting in driving

to Lesotho. In the morning he thought Mbobo had gone to take a bath but later realized that he had left him there.

[42] He also woke up and left for Sterkspruit where he phoned his daughter Kedibone who was in Cape Town who told him that she had been admitted to hospital as she was pregnant. He then decided to go to Cape Town. On his arrival in Cape Town he phoned his son Kahelo who told him that his daughter had given birth. He then phoned his daughter who told him that his mother had called her saying that the police were looking for him back home. He returned home in Mount Fletcher where he asked his brother Mkgerebe Tsoho to accompany him to the police. Eventually they went to Maclear police station where he was arrested and detained.

[43] He denied taking the vehicle from the deceased and denied assaulting the deceased. He categorically denied robbing the deceased of the vehicle and killing the deceased describing Mbobo's evidence as lies. He testified that the quantum taxi vehicle which was in possession of the deceased was driven by Mbobo from his homestead when he left with the deceased who was alive saying he was taking him to hospital. He saw that vehicle again at a filling station in Maclear after he had been fetched by Mbobo from his homestead in a sedan vehicle. He described Mbobo's version of events as lies.

[44] Under cross examination he changed his initial evidence that the deceased had fallen on a verandah at his homestead where he found him after being woken up by his son Kekeletso. He pointed at a different place as being the place where he found the deceased having fallen there. When he found the deceased there he could not walk and was staggering but he did not notice any injuries save for the small amount

of blood where he had fallen. He disputed telling his legal representative that the deceased had sneezed causing the blood to be on the wall in that bedroom. He maintained that he did not see any blood on the wall in that bedroom. He could not explain the pool of blood that was found under the mattress in the red blanket. He, however conceded that it could not have come from nose bleeding.

[45] When it was pointed out to him that according to the tracker system and the evidence of Pretorius from the tracking company, at 08: 08 on the 10 June 2016 the vehicle had gone past Barkely East on the R58 about 10.5 kilometres from Harringmelspruit. Therefore Mbobo could not have been at his homestead at or after 08:00 if he was in that vehicle. At 09:57 the vehicle was at Somerset Street on the N6 in Aliwal North. Therefore between 08:00 and 10:00 Mbobo could not have been at his homestead at Tsolobeng to fetch him. He then changed his version and said that he was now admitting the allegations against him. He clarified that he was in fact admitting to the murder of the deceased Mandlakapheli Sitshinga.

[46] He testified that he had been instructed by Mbobo to kill the deceased. However, Mbobo was not present when he killed the deceased. He testified that he killed the deceased at his homestead by hitting him with a knob stick three times although it might have been more. He testified that he picked up Mbobo at Ramafole stop that morning and they drove towards Maclear and dumped the body of the deceased at a culvert. He confirmed that the blankets with which the deceased's body was wrapped as depicted in the photo album were his blankets.

[47] He testified that the deceased did come to his homestead that night to sleep there for a trip to Bloemfontein which they were going to take with Mbobo. His agreement with Mbobo was that he alone would kill the deceased, load him in the

quantum vehicle, pick up Mbobo and that the two of them would together go and dump the body. In loading the body of the deceased in the quantum vehicle he was assisted by his son Kekeletso although Kekeletso was not involved in planning the murder. He had to ask Kekeletso to assist him in loading the body of the deceased because he could not do it alone. He confirmed that he is related to John and that the vehicle was sold in Lesotho. However, it is Mbobo who got the money. He further said that all his evidence about his daughter Kedibone giving birth in Cape Town was a lie. He went to Cape Town to see his children not because Kedibone had given birth or was in hospital. He also testified that he had lied when he said that the deceased had fallen on the verandah outside the house and said the deceased did not die accidentally but was killed by him. After his evidence the defence case was closed.

[48] The accused's version as put to state witnesses and the version he placed before court when he gave his evidence in chief was admittedly and evidently a concoction of lies. Under cross examination he also confirmed that he had lied in several respects going as far as admitting the fact that he alone murdered the deceased. He could not explain the inconsistencies in his version and ultimately admitted to the murder of the deceased. Furthermore he found himself unable to explain his earlier version that he had been fetched by Mbobo from his homestead after 08:00 on the 10 June 2016. This was after he was confronted with the evidence of Mrs Pretorius from the tracker company that the vehicle was many kilometres away from Mount Fletcher in the Barkley East area. It was at this stage that he did not just contradict himself but he literally recanted his earlier version and admitted that he single handedly murdered the deceased saying this was part of his plan with Mbobo and that they together dumped the body of the deceased in a

culvert at Maclear. Thereafter they proceeded to Lesotho where the vehicle of the deceased was sold through his relative John Tsoho.

[49] There may therefore have been a planning or conspiracy to murder the deceased if his evidence is to be given any credence in this regard given that there were so many lies that it is difficult to tell where the lies end and the truth begins. I must mention that the naivete of Mbobo in the whole thing is bewildering if not bothersome. He had so many opportunities to extricate himself from the murder and robbery and report the matter to the police. He however, did not do so or even return home. He went to Gauteng to look for a job. However his naivete or even stupidity or cowardice does not make him a liar in so far as he gave evidence as a section 204 witness. His evidence that he became afraid of the accused might very well be true. At worst he was an accessory after the fact in these crimes. Therefore he is granted indemnity from prosecution in terms of section 204 of the Act.

[50] The fact that the accused, after having been discharged in respect of the count of conspiracy later admitted to this offence as well calls for further comment on section 174. This section reads:

“If at the close of the case for the prosecution at any trial, the court is of the opinion that there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge, it may return a verdict of not guilty.”

[51] This section was considered and explained authoritatively in *S v Lubaxa* 2001 (2) SA 703 (SCA) in which Nugent AJA, as he then was, said:

“[18] I have no doubt that an accused person (whether or not he is represented) is entitled to be discharged at the close of the case for the prosecution if there is no possibility of a conviction other than if he enters the witness-box and incriminates himself. The failure to discharge an accused in those

circumstances, if necessary *mero motu*, is, in my view, a breach of the rights that are guaranteed by the Constitution and will ordinarily vitiate a conviction based exclusively upon his self-incriminatory evidence.

[19] The right to be discharged at that stage of the trial does not necessarily arise, in my view, from considerations relating to the burden of proof (or its concomitant, the presumption of innocence) or the right of silence or the right not to testify, but arguably from a consideration that is of more general application. Clearly a person ought not to be prosecuted in the absence of a minimum of evidence upon which he might be convicted, merely in the expectation that at some stage he might incriminate himself. That is recognised by the common-law principle that there should be 'reasonable and probable' cause to believe that the accused is guilty of an offence before a prosecution is initiated (*Beckenstrater v Rottcher and Theunissen* 1955 (1) SA 129 (A) at 135C-E), and the constitutional protection afforded to dignity and personal freedom (s 10 and s 12) seems to reinforce it. It ought to follow that if a prosecution is not to be commenced without that minimum of evidence, so too should it cease when the evidence finally falls below that threshold. That will pre-eminently be so where the prosecution has exhausted the evidence and a conviction is no longer possible except by self-incrimination. A fair trial, in my view, would at that stage be stopped, for it threatens thereafter to infringe other constitutional rights protected by s 10 and 12."

[52] Therefore the fact that when he was confronted with the evidence of the state during cross examination the accused ended up admitting also in respect of the charge of conspiracy for which he was acquitted at the close of the state's case does not entitle the court to revisit its earlier decision to discharge him in our law. The decision to acquit him of conspiracy was correct at the time the state closed its case. Not discharging him at that stage when there was no evidence on which he could be convicted would have been on the hope that he might incriminate himself. This is clearly impermissible as it indirectly shifts the burden of proof to the accused who bears no such burden.

[53] This, in my view, is what in essence the Supreme Court of Appeal's decision in *Lubaxa* is all about. The public outcry for justice in serious and violent crime which is rampant and even uncontrollable in our country is clearly no basis to revisit our law in these situations. If it must be revisited, then only the legislature can do so and some might say the legislature should do so. However, it is not up to the courts to do so in as much as the courts agree with the public's view that crimes must be punished and criminals held to account for all their criminal activities.

[54] This reminds me of the views expressed in this Division on constitutionalism. In *S v Nombewu* 1996 (2) SACR 396 (E) the court said:

"The court should in fact endeavour to educate the public to accept that a fair trial means a constitutional trial and vice versa. Pronouncements on human rights by the Court and academics obviously add body to the jurisprudence which surrounds the Constitution. But abstract statements of law very often mean different things to different people and very little to the bereaved and the aggrieved who see factually guilty accused go free in consequence of some infringement of his constitutional rights by officials. It is therefore the duty of the courts in their everyday activity to carry the message to the public that the Constitution is not a set of high minded values designed to protect criminals from their just deserts: but is in fact a shield which protects all citizens from official abuse. They must understand that for the courts to tolerate invasion of the rights of even the most heinous criminal would diminish their constitutional rights. In other words, the Courts should not merely have regard to public opinion, but should mould people's thinking to accept constitutional norms using plain language understandable to the common man."

[55] This case is one of very rare instances in which, after having been discharged in terms of section 174, an accused person later admits to the crime. However, an acquittal in terms of section 174 is the end of the matter. Later admissions or even confessions do not and cannot result in the court changing and convicting the

accused based on his own clear admissions. The temptation to appease public outcry must be resisted at all costs as our law, at least as it currently stands, and does not allow for public sentiments in such situations to be taken into account.

[56] Therefore, in respect of counts 2 and 3, robbery with aggravating circumstances and murder, the state has proved its case beyond reasonable doubt. The accused is found guilty as charged in respect of these counts.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances

Counsel for the State: L POMOLO

Instructed by: NDPP

MTHATHA

Counsel for the Accused: M SAKHWE

Instructed by: LEGAL AID BOARD

MTHATHA

Matter heard on: 16 August 2019

Judgment handed down on: 19 September 2019