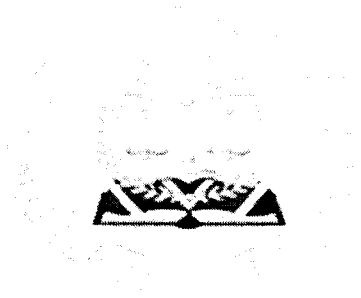


REPUBLIC OF SOUTH AFRICA

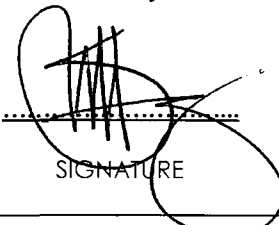


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO:A744/15

DATE: 30 MARCH 2017

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
<u>30/03/17</u>	
DATE	SIGNATURE

In the matter between:

EMMAH VUYELLA MAHLATI

FIRST APPELLANT

PETER MAHLANGU

SECOND APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

SIBUYI AJ (MOTHLE J CONCURRING):

INTRODUCTION

- [1] The first and second appellants, who were Thirty and Twenty-Eight years old, respectively, were convicted on charges of Housebreaking with the intent to rob ("Count 2") and Robbery with aggravating circumstances ("Count 3") in the Benoni Regional Court. The appellants were legally represented throughout the trial. The first appellant was sentenced to Six years imprisonment, with Two years thereof suspended for a period of Five years on Count 2 and Six years imprisonment on Count 3. The second appellant was sentenced to Six years imprisonment on Count 2, Eighteen years imprisonment on Count 3, with the Four years imprisonment on Count 2 ordered to run concurrently with the sentence imposed on Count 3. The effective terms of imprisonment are Ten and Twenty years, respectively. They were also declared unfit to possess a firearm in terms of Section 103 of the Firearms Control Act, 60 of 2000.
- [2] The first appellant applied for leave to appeal against her conviction only and the second appellant applied for leave to appeal against both the convictions and sentences. The appellants were granted leave to appeal by the trial court on 19 June 2015. The appellants now appeal against the convictions; and the convictions and sentences, respectively.

THE FACTUAL BACKGROUND

- [3] The relevant factual background to this appeal requires mentioning. The first appellant was employed by the complainant, Mr. Flick, as a domestic worker for approximately 12 months at the time the offences were committed. The complainant stayed on a plot with his 10-year-old son. The first appellant had no keys to the complainant's house. Should the need arise, the complainant would open the house doors for the first appellant to have access to the house. The complainant would usually leave the entrance door open for the first appellant to access the house and carry out her duties in the mornings. On the morning of 20 November 2010, the complainant woke up at approximately Six o'clock as usual. He went to unlock the security gate which isolate the bedrooms from the lounge area of the house. Just after unlocking the security gate he heard someone laughing inside the lounge area. He looked at the front door and realised that it was open. He then saw two strangers within the lounge area. The next moment he was struck with something on his head from behind a small wall that is built inside the lounge area. He fought his assailants. Whilst fighting, he became dizzy.
- [4] One of the assailants went down the passage straight to the complainant's bedroom. That assailant went straight to the cupboard in which the complainant had a safe. The complainant was then dragged down the passage to the main bedroom, where he witnessed the other assailant struggling to open the safe. The assailants threatened the complainant saying that if he did not assist them to open the safe, his son would be killed. One of the assailants had a rifle, which he pointed at the head of the complainant's son and threatened to blow out the boy's brains. The complainant then assisted in putting in the correct key numbers to the safe. The safe opened and the complainant removed

R6000.00 in cash from the safe and handed the money to one of the assailants. He was however pushed away from the safe and one of the assailant then removed a 9mm Parabellum pistol, with the serial number: 15771609, from the safe. The complainant and his son were tied up together and put in a cupboard. The assailants left the house. The complainant and the son untied themselves. The complainant discovered that his cellular phone was taken and the landline was pulled off the wall. He was taken to hospital for treatment and he spend three days in hospital. He sustained numerous injuries. The son suffered no physical injuries. The complainant and the son were traumatized by the events. They received counseling due to the trauma suffered. The son was seriously traumatized. About two and half years after the incident, the son did not want to walk from the lounge area to the bedroom alone. His good school performance went down by at least 50 percent. However, the marks have started improving. The firearm was recovered and returned to the complainant.

- [5] Captain Van den Berg visited the crime scene. He was the Crime Office Commander at Benoni Police Station. He was in the police force for 22 years and had been a captain for 5 years at the time. After inspecting the scene, he was of the view that the first appellant was responsible or involved in the robbery. He got his colleagues together and send them to fetch the first appellant from her home. The first appellant was fetched and taken into the police station. Upon her arrival at the police station, Captain van den Berg told the first appellant that she was considered a suspect in the robbery. He then notified her of her rights, specifically, her right to remain silent, the fact that she was entitled to have a lawyer present at that stage. Captain van den Berg explained to the first appellant why he considered her a suspect in the robbery.

The first appellant broke down and cried. She informed Captain van den Berg that she suspected that her boyfriend, by the name of Thato and one Peter were involved in the robbery. The first appellant further informed Captain van den Berg that Peter phoned her at approximately One o'clock during the morning of the robbery, informing her that they were already in the house and the burglar door leading to the bedroom was locked. Peter asked her where the burglar door key was. The first appellant did not tell Peter where the key was. The first appellant knew Peter from One Stop Shop. They would travel in the same taxi to and from work. Whilst in the taxi Peter asked her for information about the house where she worked. The first appellant gave Peter all information about the complainant's house and the contents thereof. The first appellant was then placed under arrest and detained.

- [6] Later, the first appellant was booked out from the cells. She voluntarily pointed out her boyfriend, Thato. The police arrested Thato. Thato agreed to assist the police and specifically that he would assist in pointing out Peter. Thato then telephoned Peter and arranged a meeting with him.. Peter came from some Fish and Chips shop in Daveyton. Thato pointed Peter out. Constable Shabalala arrested Peter and explained him his arrest constitutional rights. Peter took the police to Daveyton hostel and pointed out a room where among other things, the complainant's firearm was recovered. EXHIBIT C was handed in as a confession statement made by the second appellant. The trial court ruled that EXHIBIT C is inadmissible because despite the fact that the second appellant indicated that he required legal representation before making the confession statement, he was not afforded that opportunity.

- [7] At the close of the state case, all the accused, including the appellants made applications to be discharged in terms of section 174 of the Criminal Procedure Act, 51 of 1977 ('the CPA'). The trial court dismissed the section 174 applications on the basis that there was indeed a *prime facie* case, upon which a court acting cautiously, might be able to convict the accused. The accused chose not to testify but exercised their constitutional rights to remain silent.
- [8] In this appeal the appellants requested this court to condone the late filing of the appellants' Heads of Argument. The State does not oppose condonation. Having regard to the short period of delay and explanation therefor the late filing of the appellants' Heads Argument is hereby condoned.
- [9] The first question in this appeal is whether or not the State discharged the onus of proving the guilt of the appellants beyond reasonable doubt. It is a trite principle that in criminal proceedings the prosecution must prove its case beyond reasonable doubt and that a mere preponderance of probabilities is not enough. Equally trite is the observation that, in view of this standard of proof in a criminal case, a court does not have to be convinced that every detail of an accused's version is true. In this matter the appellants decided not to put forward their version but simply denied any involvement in the commission of the offenses. The trial court and this court are dependent on the evidence of the prosecution in deciding whether or not the state had proved its case against the appellants beyond reasonable doubt. In *S v Boesak*¹ the court held that "The fact that an accused person is under no obligation to testify does not mean that there are no consequences attaching to a decision to remain silent

¹ 2001(1) SACR 1 (CC)

during the trial. If there is evidence calling for an answer, and an accused person chooses to remain silent in the face of such evidence, a court may well be entitled to conclude that the evidence is sufficient in the absence of an explanation to prove the guilt of the accused. Whether such a conclusion is justified will depend on the weight of the evidence".

FIRST APPELLANT'S CASE

[10] Counsel for the appellants submitted that the trial court erred in finding that the first appellant is an accomplice to the offences because it was not proved on the evidence presented that she had the requisite intention of assisting in or furthering the commission of the offences. Further, it was argued on behalf of the first appellant that the trial court erred by not properly applying the test as laid down in *Rex v Blom* 1939 AD 188 when dealing with circumstantial evidence. The essence of the argument was that there was no direct evidence linking the first appellant to the commission of the offences and that circumstantially, from the proved facts, one cannot draw as the only reasonable inference, the inference that she had the necessary intention of assisting in or furthering the commission of the offences.

[11] The trial court considered and applied the *Blom* case. The trial court moved from the premises that the following proved facts came from the evidence: that the first appellant was not a perpetrator; she admitted providing information about the household and the contents of her employer's home to Peter; on 20

November 2015, the day of the incident, she received a telephone call at One o'clock in the morning from the same Peter informing her that they were already in the complainant's house and the burglar door leading to the bedroom was locked. Peter then asked her where the burglar door key was. The first appellant did not want to tell Peter where the key was at that stage as the complainant would know that she was involved; the perpetrators knew exactly what they were looking for as they went directly to the cupboard where the safe was and removed the contents thereof; the first appellant did not notify police that morning on learning that Peter and the other perpetrators were in the process of committing offences at the complainant's house; there were no signs of burglary; the first appellant voluntarily pointed out her boyfriend, Thato, Thato voluntarily pointed out Peter and Peter in turn voluntarily took the police to the hostel, where the firearm belonging to the complainant was found.

- [12] Relying on the above proved facts, the trial court concluded that the perpetrators had inside information provided by the first appellant. Hence, they knew where to go, and during the commission of the offences they called the first appellant on her phone and asked for the burglar door key. The first appellant did not alert police of the incident. The trial court concluded that the first appellant was not innocent as she claimed. Relying on the quotation from the publication, called Criminal Law, CR Snyman, the 4th edition, more specifically on page 269 of the said publication, the trial court concluded that "Looking at the evidence as a whole, the fingers point to one person only, ...[the first appellant]..." and that "...what she did ... pertaining to the events and the [offences], indeed makes her an accomplice".

[13] The trial court, except in respect of Nermalodi, was satisfied with the honesty and reliability of state witnesses. It is trite that a court of appeal will be hesitant to interfere with the factual findings and evaluations of the evidence by a trial court and will only interfere where the trial court materially misdirected itself insofar as its factual and credibility findings are concerned². In the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and will only be disregarded if the recorded evidence shows them to be clearly wrong³. Bearing in mind the advantage that a trial court has of seeing, hearing and appraising a witness, it is only in exceptional cases that this court will be entitled to interfere with a trial court's evaluation of oral testimony⁴. The trial court's factual findings and evaluation of evidence are dealt with herein below.

[14] I now turn to the trial court's evaluation of the testimony. The two cardinal rules of logic set out in *Rex v Blom*⁵ applies. The first question being, whether or not the inference sought to be drawn is consistent with the proved facts, and secondly, whether or not the proved facts are such that they exclude every reasonable inference save the one sought to be drawn.

[15] To convict the first appellant as accomplice on the facts of this matter one has to find that she directly or indirectly intentionally assisted in or furthered the commission of the offences. It is common cause that she was not directly involved in the commission of the offences as a perpetrator. Now, the next question is: Did she knowingly aided and or assisted in the commission of the

² See *Rev Dlumayo* 1948(2) SA 677 (A)

³ See *St Haded and Others* 1997(2) SACR 641 (SCA), at 645E-F

⁴ See *St Francis* 1991(1) SACR 198 (A), at 204E

⁵ 1939 AD 188, at 202-3

offences in question? If the answer is yes, then she was correctly convicted as an accomplice and a negative answer means the first appellant should have been acquitted. In order for the State to successfully meet its burden to find an accused guilty of accomplice liability, it must prove that the accomplice had the intent to help with the offence being committed. This means that the accomplice has to know that the principal is planning to commit an offence and that the accomplice intends to help the principal succeed in the commission of the offence.

[16] Generally and logically, the main perpetrator of a crime is referred to as a principal while the individuals assisting in the commission of the crime are referred to as accomplices. Even though the accomplice plays a supporting role in the crime and does not actually carry it out, he or she is just as culpable as the principal. For example, the principal may come into a bank and rob it at night, and an accomplice who works for the bank may leave the door unlocked or give the robber the security code to get into the bank. They are both guilty on the robbery count.

[17] In the present case, the conclusion that the first appellant knew that at least Peter, and her boyfriend, Thato, were planning to commit the robbery or house breaking is not supported by the proved facts. Such conclusion is based on a pure speculation. The first proved fact linking her to the robbers before the robbery is that she gave the house information to Peter. The second proved fact is that Peter called her whilst Peter was at the scene of robbery to ask for the burglar door key. Both these facts are alleged to have been volunteered by the first appellant and were not disputed during the cross-examination of state witnesses. However, the first appellant never admitted to Captain van den Berg

that she was involved in the planning of the robbery and or the housebreaking or that she knew that any of the perpetrators was planning to carry out the robbery and or the housebreaking. Nor did the State attempted to prove her involvement in the planning stages and her knowledge of the plans. Hence, it cannot be said that she knowingly aided or assisted in the commission of the offences. Therefore, the circumstances are such that one cannot safely conclude that the first appellant definitely knew that her boyfriend and Peter were planning to rob her employer and she intended to help them to accomplish their mission. In the circumstances, as correctly submitted by Counsel on behalf of the first appellant, the above drawn inferences, that the first appellant was involved in the planning of the robbery and or the housebreaking or that she knew of the plans to commit these offences are not consistent with the proved facts.

- [18]. Further, the proved facts are such that they do not exclude every reasonable inference save the drawn inferences. The perpetrators could have used her to get information about the house but kept their plan to themselves. There was no evidence of breaking into the house. Meaning that the perpetrators either had the key to the entrance door or the entrance door was left unlocked. So, if they planned the robbery with her, she could have alerted them that they would also need a key for the burglar door and or assisted them to get past the burglar door. There would have been no need for their call at 1 o'clock that morning. Someone, for example, the gardener could have assisted them to get access to the house. In the circumstances, the trial court materially misdirected itself insofar as its factual findings are concerned. The recorded evidence shows that the trial court's findings of fact are clearly wrong. Hence, such findings could safely be disregarded. Further, the trial court's evaluation of oral

evidence was also wrong. Especially, the drawing of inferences. This gives this court the power to interfere with a trial court's evaluation of oral testimony.

[19] Lastly, the fact that the first appellant become aware at about 1 o'clock that morning that Peter was at the crime scene does not make her an accomplice. This fact did not require that the first appellant take greater action to neutralize further commission of the offences by Peter and his co-perpetrators. Especially, having not initially provided critical assistance like leaving the door open for the perpetrators or giving them access keys, the first appellant was under no obligation to thwart the commission of the offences completely by calling the complainant or law enforcement to stop the perpetrators on their tracks. The first appellant did not in a way associate herself with the criminal conduct of the robbers and hence there was no need for her to take steps to show that she was effectively disassociating herself with their conduct. In *Rex v Van der Merwe* 1929 EDL 14, the court held that a person who knowing of the intended commission of a crime gives no warning to the authorities, or the intended victim, or a person who is present at the commission of a crime and takes no steps to prevent it, is not criminally punishable, unless his omission can be proved to have been designed with the object of assisting the perpetrator. Simple approval is not regarded as participation. There has to be an act or omission with the intent to associate.

20 No such act or intention to associate with the robbers on the part of the first appellant was proved. I am of the view that her omission (by not reporting the potential crime) was not designed with the subject of assisting the robbers. I am satisfied from all the circumstances of this matter that the first appellant's behavior had no effect of assisting the perpetrators. In my view, the first

appellant is not guilty of offences. On a proper consideration and analysis of the record of the proceedings the correctness of the trial court's factual findings and its evaluation of the evidence cannot be sustained. Therefore, this court is entitled to interfere and set aside the conviction of the first appellant.

[21] Therefore, the appeal against the conviction must succeed.

SECOND APPELLANT'S CASE

[22] Counsel for the appellants submitted that the trial court erred in using the statements made by the first appellant against the second appellant. In short, that the trial court erred in using the confession and or admission of one accused (first appellant) against his co-accused (second appellant). It was argued that such evidence is inadmissible against the second appellant. Secondly, that on the circumstantial evidence, the State did not prove that the second appellant was one of the robbers.

[23] In convicting the second appellant the trial court reasoned as follows⁶:

"In respect of accused 2, it was alleged or stated by Mr. Tshole at first that, it was not proved that the Peter that made the phone call on the night in question, is accused 2. Once again, the provisions as explained above with regards to the principles stated in the Blom matter, is applicable. Accused 1 gave information with regards to Mr. Fick and his household to a Peter. A Peter phones her at 1 o'clock in the morning, informing her that 'we are in the house'.

⁶ Record, at p230-1

She is arrested on the very day that the offense [was] committed. With her assistance and the assistance of Thato, Peter is arrested.

That Peter, that was arrested, is accused 2. That Peter takes the police to a firearm of the complainant is found. Now, could there be any other peter at play here, except accused 2? I do not think so. The court finds that Peter that was arrested, is the one that she referred to throughout the proceedings.

Furthermore, to that, the coincidence that this Peter is the one that points out the hostel where the firearm of the victim is found, is so great, that the court cannot find that it is a different Peter. The only reasonable inference that can be drawn from the proved facts in this instance, is that the Peter that was arrested, was indeed the Peter that robbed the compliance of his properties.

How else would that very Peter, point out a hostel where the complainant's firearm is found? Was that just pot luck? It cannot be. Therefore, I am satisfied that it was proved that it was the same Peter, accused 2 is the same Peter that featured throughout the proceedings. There is in fact no evidence to the contrary".

[24] Thought the above reasoning is correct in identifying the Peter that robbed the complainant as the second appellant, the same reasoning cannot be used to convict the second appellant. The trial court, in support of its conclusion that this Peter "is the one that the [first appellant] referred to throughout the proceedings", relies on the evidence of the first appellant. Such extra-curial statements of the first appellant, as correctly agued by appellants' Counsel, are

not admissible against the co-accused, the second appellant⁷. Section 219 of the CPA prohibits the confession of one accused being used against another accused. Without the evidence of the first appellant, there are no other proved facts, except the fact that the second appellant pointed out the firearm, and or that Thato pointed out the second appellant as one of the suspect, from which one can come to the conclusion that the State, proved beyond reasonable doubt, that the second appellant is the Peter that robbed the complainant. In this instance, the recorded evidence shows that the trial court's factual finding that the evidence placed the second appellant at the scene of crime is clearly wrong and can be safely disregarded by this court⁸. This is one of the exceptional circumstances where this court will be entitled to interfere with a trial court's evaluation of oral testimony.

[25] Having excluded all other evidence against the second appellant, one now needs to deal with the remaining evidence: the pointing out. To cut to the chase one has to consider whether or not the pointing out of the firearm by the second appellant constitutes admissible evidence against the appellant. The trial court did not consider and or decide this question. It evaluated the evidence on the assumption that the pointing out of the firearm by the second appellant constituted admissible evidence against the second appellant.

[26] For reasons stated herein below, I am of the view that the pointing out by the second appellant is not admissible evidence against the second appellant in the circumstances of this matter. Firstly, logically it does not make sense that the trial court ruled that the written confession by the second appellant was

⁷ See S v Litako and Others 2014(2) SACR 431 (SCA), at para 71

⁸ See St Haded and Others 1997(2) SACR 641 (SCA), at 645E-F

inadmissible for failing to comply with the constitutional prerequisites and on the contrary found that the pointing out⁹ by the same appellant was admissible against him. Logically, for the same reason: lack of constitutional prerequisites, the pointing out evidence should have been held to be inadmissible.

[27] Secondly, in the current constitutional era our courts have settled our law relating to pointing outs. Section 218(2) of the CPA provides that evidence may be admitted at criminal proceedings that anything was pointed out by an accused or any fact of thing discovered in consequence of information given by such accused person, notwithstanding that such pointing out or information forms part of a confession or statement which by law is not admissible in evidence against such accused person. However, in a landmark decision of *S v Sheehama* 1991 (2) SA 860 (A) the Appellate Division held that (a) a pointing out amounts to an extra-curial admission and must therefore comply with the admissibility requirements of admissions, and (b) evidence of a forced pointing out is inadmissible, unless it falls within the scope of the exception created in *R v Samhando* 1948 AD 608. Subsequently, in *S v January* 1994 (2) SACR 801 (A) the Appellate Division held that the exception created by *Samhando* was inconsistent with section 219A of the CPA, which requires that all admissions must be made voluntarily before evidence thereabout is admissible.

[28] In the Commentary, Criminal Procedure Act, Du Toit et al, at p24 – 66P, commented as follows: "...By overruling a number of cases... and by making it clear that pointings out or any other type of evidence referred to in s218 could

⁹ See Record, p230, lines 23-25

not enjoy any preferential treatment where, notionally, it amounted to an admission or a confession, and that the exclusionary principles set out in ss217 and 219A would apply in the normal way to all admissions and confessions, our court succeeded in removing the sting of the malign provision. The section has now, too, to be read subject to the Constitution, so that all the constitutional implications mentioned in the notes to ss217 and 219A become applicable to a pointing out that constitutes either a confession or an admission. It follows, for instance, that what was said here about the accused having to be informed of various rights-such as the right to silence, to be informed of the consequences of making an admission or confessions, and to legal assistance- apply, too, to pointings out".

- [29] In *Motsetse & Another v S* (unreported, ECM, Case No. 55/02, 19 March 2015, paragraph 42, the court stated the following: "As for the evidence of the pointing out made by the second appellant is concerned, it suffices to say that these ought not to have been admitted. It is clear from the evidence that the appellant was not given sufficient opportunity to secure the services of an attorney when he had clearly indicated that he wanted one before embarking on any procedures which may have been construed as having been self-incriminating. In my view this disregard of the second appellant's constitutional rights was sufficient for the trial court to have ruled the pointing out to the officer inadmissible". In the present case, the second appellant was also not given sufficient opportunity to secure the services of an attorney when he had clearly indicated that he wanted one. Nor was he warned of the consequences of making an admission or confession. The circumstances are such that the

admission of the pointing out evidence would not only render the trial unfair¹⁰ and in contravention of section 35 of the Constitution or but would involve the judicial process in moral defilement, compromise the integrity of the judicial process and dishonour the administration of justice¹¹.

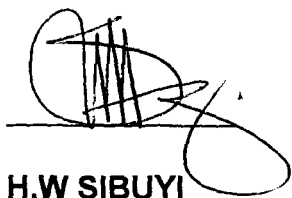
[30] Having found that the pointing out evidence is not admissible, it is not necessary, for the purposes of this judgment, to make a finding on whether or not the pointing out of the firearm by the second appellant constitute sufficient evidence to convict the second appellant on the counts. Now, what is left is the evidence by the police that the second appellant was pointed out by the first appellant's boyfriend as a suspect. Is this piece of evidence enough to sustain a conviction on any of the counts. The answer is no. That alone can never be enough to place the second appellant at the scene of the crime. It is clear from the trial court judgment that if the inadmissible evidence of the first appellant used against the second appellant and of the pointing out are excluded, the State failed to prove its case against the second appellant and he should have been acquitted. In the premises the conviction and sentence in respect of both counts cannot stand.

[31] In the premises, I make the following order:

- a. The first and second appellants' appeals against conviction succeed.
- b. The first and second appellants' convictions and sentences in respect of both counts are set aside.
- c. It is ordered that the first and second appellants be released from prison immediately.

¹⁰ See *S v Matlou & another* 2010 (2) SACR 342 (SCA), para 36

¹¹ See *S v Matlou*, *supra*, para 30

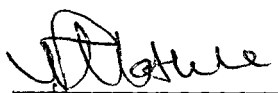


H.W SIBUYI

Acting Judge of the High Court

Gauteng Division Pretoria

I agree:



S.P MOTHLE

Judge of the High Court

Gauteng Division Pretoria

FOR THE APPELLANTS:

H Steinberg

Instructed by: Legal Aid South Africa
 Church Square
 Pretoria

FOR THE RESPONDENT:

B E Maoke

Instructed by: Directorate of Public Prosecution

Gauteng