

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable

Case no: A53/2024

In the matter between

THABANG MOLLELE

FIRST APPELLANT

KAMOHELO ALPHONS KHIBA

SECOND APPELLANT

THAMSANQA GODFREY NDZUME

THIRD APPELLANT

and

THE STATE

RESPONDENT

Neutral citation: *Thabang Mollele, Kamohelo Alphons Khiba and Thamsanqa Godfrey Ndzume v The State*

Coram: Van Rhyn J et Nemavhidi AJ

Heard: 11 November 2024

Delivered: 27 March 2025

Summary: Appeal and criminal law – housebreaking with intent to rob and robbery with aggravating circumstances – two counts of attempted murder. Identities of the Appellants placed in dispute during the trial. Appellants identities proved beyond reasonable doubt as they attended school with the victims' children and used to visit

the complainants' premises to buy commodities. Mr Mokhele Michael Ntsheno, (Mr Ntsheno), his wife Mrs Rebecca Ntsheno (Mrs Ntsheno) and their daughter, Sebelelo Ntsheno (MsNtsheno), and three minor children were present in their home located at Botshabelo during the evening of 31 July 2014 when the three appellants broke into and entered their home.

The State alleged that the offences were committed by the three appellants and presented the testimony of eight witnesses in support of its case.

The appellants pleaded not guilty to all three charges. No plea explanations were tendered in terms of the provisions of s115 of Act 51 of 1977.

- The appellants were represented during the trial.
- After the close of the State's case the 1st appellant terminated his legal representative's mandate and elected to conduct his own defence.
- Minimum sentences were explained prior to the commencement of the trial.

ORDER

The appeal against conviction is dismissed.

JUDGMENT

Nemavhidi AJ (Van Rhyn J concurring)

[1] The appellants were convicted in the regional court, Botshabelo, on 29 June 2016 and sentenced on 16 August 2016 as follows:

- (1) Robbery with aggravating circumstances: 12 years imprisonment.

- (2) Attempted murder: 6 years imprisonment
- (3) Robbery with aggravating circumstances: 12 years imprisonment

The appellants were effectively sentenced to a cumulative period of 18 years' imprisonment. Leave to appeal the conviction was granted by the Court a quo.

Background:

[2] On 31 July 2014 the Ntsheno family were in their house between 20h30 and 21h00. The state alleged that the Ntsheno family consisting of his wife and four children. On that night Mr Ntsheno, also known as 'Tall', was at his tavern which is at his home place of abode while his wife and their children were in the house. He told his patrons that he was tired and that they should leave. Among them was Fusi, his assistant, and Lerato. He proceeded to the house after telling Fusi to close the gate on his way out. He entered the house and warmed his food in the kitchen while his wife and children were in the bedroom preparing to bathe.

[3] Suddenly the kitchen door opened. Fusi stomped in as if he was being pushed. Three other men, whose faces were covered, entered the house brandishing firearms. One hit him with a firearm on his cheek while another pointed a firearm at his stomach. They demanded his firearm and the keys to his safe. He informed them that he owned neither after which they forced him to walk to his bedroom; he was walking backwards, facing his attackers. Meanwhile, Lerato entered the house through the kitchen door.

[4] They were made to sit in the bedroom, whereafter the three men suddenly went outside the house. When they left the bedroom to go outside, his wife attempted to close the kitchen burglar door. At that stage he heard gunshots; his wife was shot before she could close the burglar door.

[5] The three assailants re-entered the house but their faces were no longer covered. He could see them clearly as the electric lights in the house were on. The first appellant shot him in the lower part of his stomach, then proceeded to enter his bedroom where he searched and came back carrying a bag which contained money. Thereafter, the first appellant shot him again, in his hand. Sebolelo(Ms Ntsheno), his daughter, then threw a Puma bag which contained money to the first appellant and begged him not to shoot her father again. All three assailants then left. The police were summoned and took the injured victims to the hospital, where Mr Ntsheno spent a week recovering.

Evidence for the state

[6] Mr Ntsheno testified that when the three assailants entered the house they called him by his popular nickname, 'Tall'. During the robbery, he was forced to his bedroom, and made to sit down with the other members of his household, he noticed that one of the attacker's face-covering, comprising of a hat and a scarf, had moved downwards which allowed him to recognize the attacker as Thami, the third appellant.

[7] The first appellant shot him twice while the third appellant pushed him with a firearm. Ms Ntsheno pleaded with them not to shoot her father again, as he was attempting to balance himself while holding onto the headboard to avoid falling. Ms Ntsheno then took out a bag which was inside the Puma bag and threw it to the first appellant. This bag contained her mother's stokvel money. Thereafter, all three assailants left and her mother managed to enter the bedroom bleeding, as she had been shot.

[8] Mr Ntsheno knew the second appellant, as both lived in section E. He identified him as 'Pana'(second respondent)". He also knew the third appellant as 'Thami', as he was a regular customer at his shop. It was also known to Mr Ntsheno that third appellant's parents were related to a woman who used to work for him. The third appellant was the one who called him 'Tall' and demanded the firearm and safe keys, and it was the second appellant that hit him on his cheek with the firearm.

[9] He identified the first appellant at an identity parade held at Grootvlei Prison on the 19 November 2014. However, the second and third appellants refused to partake in the parade because they were well known to the victims .

[10] Ms Ntsheno testified that on 31 July 2014, at about 20h30, she was in the bedroom at her house with her mother, two siblings and her own child, who she was about to bath. She heard a noise coming from the kitchen and went to investigate. She noticed that her father was being accosted by three men holding firearms. She heard them shout that they wanted money and a firearm from her father.

[11] She and her mother tried to escape, and it was at this instance that her mother tried to close the burglar door before being shot. In this regard, she testified that the shooter was the first appellant. Thereafter, she was forced back into the house and all three assailants forced them into her bedroom.

[12] The first appellant then shot her father after continuously demanding more money and a firearm. When Mr Ntsheno did not comply with the request, he shot him again.

Fearing that her father might die, she gave the attackers about R16 000.00 stokvel money, which her mother kept.

[13] Third appellants scarf, which had covered his mouth, fell while he grabbed her phone with which she intended to call the police. However, the attackers' attention was focused on the money which was when Ms Ntsheno managed to identify the second appellant.

[14] She stated that she did not know the first appellant at the time he shot her mother. He had not covered his face when he shot her and she could clearly see him, as the lights were on. Furthermore, she said she knew the second appellant, as she used to see him in the street drinking liquor. She knew third appellant, as he used to drink at her family's tavern. Ms Ntsheno also identified the appellant at the identity parade. Lastly, on the night of the incident, she did not tell the police that she saw the second appellant's face because she was afraid to mention their names, as her parents were still in hospital.

[15] Mrs Rebecca Ntsheno (Mrs Ntsheno) testified that she was in the room with her daughter (Ms Ntsheno). They were preparing to bath their three minor children when they heard noise coming from the kitchen. She sent Ms Ntsheno to check and when she returned she reported that three men were pointing her father with firearms. She went to the dining room where she met the assailants who pointed firearms at her resulting in her retreating to the room in which she was. The assailants pushed Mr Ntsheno into the room in which they were.

When the noise subsided she went through the kitchen to close the burglar door which is on the stoep. As she was about to close it one of the assailants shot her on the stomach.

She fell on her back. She managed to see the man who shot her as he was no longer covering his face. As she was screaming, second appellant kicked her on her buttocks and third appellant slapped her. They were wearing blue or black big lumber jackets. While lying on the floor she heard two gunshots. At that stage, she could not rise.

When the assailants left the third appellant picked her up and took her to the bedroom.

She spent a week in the hospital. She went to Grootvlei Prison on the 19th November 2014 with Mr Ntsheno and Ms Ntsheno to take part in the identification parade where she pointed the first appellant as the person who shot her.

[16] Selena Nyapotse (Ms Nyapotse) testified that on 31 July 2014, she was at her home with two children which is located in the same street as the complainants' residence. On that night, the third appellant arrived at her home with his two friends. He was her boyfriend at the time. Ms Nyapotse also identified the third appellant's friends as the first and second appellants. The first appellant asked her if it would be easy to enter Mr Ntsheno's place. She replied that it will not be easy. The three then left but came back a few minutes later carrying three bags— a Nike one, a Puma one, and another one without a name.

[17] They left these bags at her house and then left. She noticed that the police were at Mr Ntsheno's place. She checked the contents of the bags and saw that one contained firearms and another one had SASSA cards and identity documents of people who borrow money from Mr Ntsheno and the last bag had money in it. This made sense as she also used to borrow money from Mr Ntsheno. She explained that she used to live with him in the same street.

[18] She stated that third appellant used to sleep with her at his place and at times he would sleep at her place. She denied that on that night he was watching TV at his place with the first and second appellants because he did not have a TV at his home. Furthermore, she testified that her boyfriend had been stabbed a month prior incident. He had recovered by the time of the incident. She denied that she had become separated from the third appellant in December 2013 as he frequently visited her until he disappeared in October 2014. Lastly, she testified that she was taken to the police station where she was threatened with arrest at the time she made her statement.

Defence case

[19] The first appellant told the court that he knew Mr Ntsheno because he used to buy goods from his shop. On the 31st of July 2014, he was at home with his wife, his brother, child, and his mother. He testified that Ms Nyapotse was his girlfriend and that he knew all the complainants. He denied any participation in the incident in question.

[20] The second appellant testified that on the 31st of July 2014, he slept at the third appellant's place, where the latter was recuperating from an attack in which he was stabbed 13 times. He stayed with him for three weeks. At about 9h00, he heard about the robbery at Mr Ntsheno's place from his girlfriend, as she lived next door. He denied that he was at Ms Nyapotse's place on 31 July 2013. He knew the Ntsheno family because he

attended school with Mr. Ntsheno's son and used to drink at Mr Ntsheno's tavern.

[21] The third appellant stated in his evidence that on 31 July 2013 he was with his girlfriend Mzwake and the second appellant at his home. He also confirmed that he was attacked and recovering from stab wounds at the time. When this incident happened, he was sleeping at his home.

With this evidence the defence case was closed.

[22] The court called two witnesses, to wit Mzwake Nkosi ("Ms Nkosi") and Lerata Noise Makalanyane ("Mr Makalanyane"). Ms Nkosi told the court that she met the third appellant, in June 2013 and became his girlfriend. The affair ended because he phoned her from prison and insulted her. Furthermore, on 31 July 2013, she was at the third appellant's residence when he arrived between 21h00 and 22h00, followed shortly by second appellant. When they began their relationship, third appellant had fully recuperated from the attack upon him.

[23] She disputed that third appellant and second appellant were watching TV because third appellant did not have his own TV where he stayed. She also denied that she ever spoke to Mr Ntsheno before she testified. She stated that on the night in question she scolded him for coming home so late. She also testified that she was unsure as to whether he woke up at night and went somewhere, as she was asleep. According to Ms Nkosi, he had a tendency to leave his home without telling her where he would be going.

[24] The second witness, Mr Makalanyane, told the Court that he ordinarily consumes liquor at Mr Ntsheno's tavern and that he knows everyone in the Ntsheno family. He also knows the first appellant and the third appellant. It was the first appellant who pointed a gun at his forehead when they were at Mr Ntsheno's house. However, the third appellant was also carrying a firearm.

[25] Their interaction began when he met the two in the street carrying bags. He noticed that the Ntsheno family home's gate was still open as he was making his way there, because he wanted to buy cigarettes from Mr Ntsheno through the security door. The first appellant assaulted him and pointed a firearm at him; he dragged him inside the house where he demanded money from Mr Ntsheno. Thereafter, the appellants moved out of the house momentarily and when they came back, the first appellant shot Mrs Ntsheno when she tried to close the security door. They also shot Mr Ntsheno in his daughter's bedroom. The daughter, Ms Ntsheno, threw a bag of money at them to avoid her father from being

the witnesses testify in his presence in court. As the saying goes, he was steeped in the atmosphere of the trial. Absent any positive finding that he was wrong, this court is not at liberty to interfere with his findings.⁷

[33] The trial court in this matter demonstrated a fair-minded and balanced approach to the evidence. I agree with the findings of the trial court.

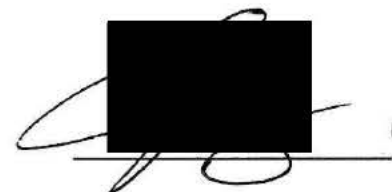
In the circumstances, I propose the following order:

The appeal against conviction in this matter is dismissed.



NEMAVHIDI, AJ

I concur. It is so ordered.



VAN RHYN, J

Appearances

For the Appellant:

V Adams

Instructed by:

Legal Aid, Bloemfontein

For the Respondent:

Adv Liebenberg

Instructed by:

DPP, Free State, Bloemfontein

⁷ Ibid para 30.