

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: AA10/2023

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

In the matter between:

PHILIP MODIME

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MULLER J:

[1] The appeal against the convictions and sentences imposed on the appellant is with leave to appeal granted by the trial judge.¹ The appellant was convicted of murder (count 1); housebreaking with intent to commit robbery (count 2) and robbery with aggravating circumstances (count 3). He was sentenced to undergo 20 years imprisonment in respect of count 1; 8 years imprisonment in respect of count 2 and 15 years imprisonment in respect of count 3.²

[2] The appellant applied for condonation for the late filing of the notice of appeal which was only filed on 21 November 2023. There appeared to have been a circular which was issued that stated that the office of the chief justice is not responsible for the costs of the transcription of the record. It took a considerable time for Legal Aid South Africa to resolve the issue before the record could be transcribed. The application is not opposed by the prosecution and there are, in addition, reasonable prospects of success of the appeal. Condonation is therefore granted.

¹ Order dated 23 August 2022.

² The appellant was acquitted in respect of count 4 and 5. The evidence adduced in respect of those counts is omitted for purposes of this judgment.

[3] The prosecution relied mainly on the single evidence of an accomplice Thaluki Joel Mashaba³ who testified as a so-called section 204 of the Criminal Procedure Act,⁴ witness which provides that:

“(1) Whenever the prosecutor at criminal proceedings informs the court that any person called as a witness on behalf of the prosecution will be required by the prosecution to answer questions which may incriminate such witness with regard to an offence specified by the prosecutor—

(a) the court, if satisfied that such witness is otherwise a competent witness for the prosecution, shall inform such witness—

(i) that he is obliged to give evidence at the proceedings in question;

(ii) that questions may be put to him which may incriminate him with regard to the offence specified by the prosecutor;

(iii) that he will be obliged to answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the answer may incriminate him with regard to the offence so specified or with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified;

(iv) that if he answers frankly and honestly all questions put to him, he shall be discharged from prosecution with regard to the offence so specified and with regard to any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) such witness shall thereupon give evidence and answer any question put to him, whether by the prosecution, the accused or the court, notwithstanding that the reply thereto may incriminate him with regard to the offence so specified by the prosecutor or with regard to any offence in

³ Hereinafter called “the witness”.

⁴ Act 51 of 1977 (Hereinafter called “the CPA”).

respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified.

(2) If a witness referred to in subsection (1), in the opinion of the court, answers frankly and honestly all questions put to him—

(a) such witness shall, subject to the provisions of subsection (3), be discharged from prosecution for the offence so specified by the prosecutor and for any offence in respect of which a verdict of guilty would be competent upon a charge relating to the offence so specified; and

(b) the court shall cause such discharge to be entered on the record of the proceedings in question."

[3] The witness was warned by the learned judge when he commenced his evidence:

"Sir you have agreed to act as a Section 204 witness for the state. You are warned that you should tell the truth, and nothing but the truth and you should give your full cooperation. That was the basis of your agreement to act as a Section 204 witness. Should you at any stage not comply and cooperate the state may have you declared as a hostile witness or withdraw the agreement with you. Do you understand Sir?

MR MASHABA: The explanation is understood.

COURT: Thank you and you are also warned that you still have your constitutional rights. So you may elect to call on your constitutional rights. Do you understand Sir?

MR MASHABA: Yes. I understand."

[4] Both warnings given to the witness, in my view, were inadequate. It was held in *R v Qongwana*⁵ that although section 254 of Act 56 of 1955 (which was the predecessor of section 204) did not expressly require that a witness must in advance be informed of the substance of the section, that it was proper and indeed common practice to do so.⁶

Section 204 makes it peremptory for the witness to be informed of its substance. The wording of section 204(1)(a) that states "the court...*shall* inform such witness..." dictates that it is peremptory to inform the witness of the contents of subsection (1)(a)(i)-(iv).⁷ The purpose of the explanation is to afford the witness the opportunity to reflect upon the importance of giving truthful and satisfactory testimony which incriminates him/her in the commission of an offence or offences and what the possible consequences may be if he/she gives unsatisfactory evidence.⁸

[5] The warning given to the appellant *in casu* was no more than a regurgitation of the oath to tell the truth and nothing but the truth, without any reference to the four points mentioned by the subsection.

[6] In respect of the second warning given, it is also by no means clear what the constitutional rights were to which reference was made by the learned judge. Since the witness was not represented by a legal representative he could not have been aware of the specific rights which he may choose to invoke.

⁵ 1959 (2) SA 227 (A)

⁶ 230D.

⁷ My emphasis.

⁸ *S v Maunye and Others* 2002 (1) SACR 266 (T) 278-280.

[7] It is to be noted, however, that nothing turns on the failures alluded to above, as it emerged during the trial that the witness had testified in other trials concerning the same incident and that he had been discharged from prosecution at the conclusion of those trials.

[8] I now turn to the facts of this case. The appellant pleaded not guilty to all the counts and elected not to disclose his basic of defence in terms of section 115 in respect of counts 1, 2 and 3⁹. However, certain formal admissions recorded in writing were made in terms of section 220 of the CPA. The identity of the deceased as well the correctness of the findings as contained in the *post mortem* report that the deceased died as a result of "blunt force trauma to the head" were admitted. A photo album and key thereto compiled by constable Matlala was also admitted. The appellant also made further admissions in terms of section 220 that the safe as well as the Isuzu bakkie depicted in Exhibit H (photograph 3 and 4) are the property of the deceased which were taken on the day the offence was committed. It was also admitted that the photo album Exhibit C depicts the farm of the deceased known as Sumadi Farm.

[9] The first witness called by the state was constable Lesetja who testified that he attended a complaint at Sunwadi Farm. He was stopped on his way to the said farm by a lady who identified herself as the ex-wife of the deceased. She identified the deceased who was on the backseat of her vehicle and who had already passed away. He then proceeded to the farm where he found various other policemen in attendance at the farmhouse which was in disarray with doors having been broken.

⁹ In respect of counts 4 and 5 the appellant disclosed a defence. It is unnecessary to refer to the substance of the defence due to his acquittal on those counts.

[10] The witness testified next, after being warned in terms of section 204 of the CPA. He explained that he was with Phineas Molawane on 2 February 2017 who informed him that there is work to be done by him at a farm where there is a safe containing money. But first they had to meet two other gentlemen. They travelled with a motor vehicle to a spaza shop where they met two unknown persons who were introduced to him as Tshepo Rasodi and Phillip Modime (the appellant). They boarded the vehicle and discussed that there is a farm where there was money in a safe. The appellant informed him to wait for a boy named Thapelo who is the younger brother of Tshepo and who worked on the farm and who will accompany them to the farm on the following Sunday. Thapelo informed them that the farmer is an elderly man who stays alone and that he had observed when he helped the old man with chores in the house, that there was a lot of money in a safe.

[11] On Sunday they contacted each other between 17h00 and 18h00 and met at a tavern and proceeded from there in a vehicle to the farm where they stopped at the first gate. Tshepo and the appellant said they had medicine that make people sleep and wanted to perform a ritual. They all alighted from the vehicle. The witness was told to take the car back. The witness waited in the vehicle (a grey Mercedes Benz) that belonged to Phineas. The rest of them proceeded into the farm where Thapelo was going to point out the gate to the farm. After a little while Thapelo came and entered the vehicle. They then proceeded to the main road which is 100 -200 metres from the gate. They waited 30-40 minutes at the main road until Thapelo received a call on his cell phone. They then proceeded back to Marapong. Upon their arrival he parked at Thapelo's home whereafter he proceeded to his home to sleep. At about 2h00 he received a call from Phineas. After speaking to him he proceeded to Terblanche to fetch a grinder. He proceeded from Terblanche to Shongwane

1 using his own vehicle. Whilst waiting at Mogoto Tavern a white Isuzu bakkie arrived driven by Phineas which flashed lights at him. He followed the said vehicle to an RDP house. Present at the house was the appellant and Tshepo as well as two unknown men. A big grey safe was on the floor inside the house. The safe was cut open by the appellant using the grinder. Inside the safe were papers and a rifle together with ammunition. The appellant, Tshepo and the two unknown men loaded the safe on the white Isuzu bakkie. They left the house together. It was the last occasion that he saw the appellant. The witness and Phineas proceeded back to the home of the witness at Lephalale.

[12] During cross examination it was put to the witness that he testified in two related cases where Phineas and Thapelo were charged and convicted. It was also put to him that he testified in those trials that Phineas used the grinder to cut the lock of the safe to open it. The legal representative of the appellant put it to the witness that he told the police that "Phineas, Tshepo, Phillip (the appellant) and the other two unknown persons then took the grinder and cut the lock of the safe" The witness insisted that the appellant used the grinder to cut open the safe.

[13] It was put to the witness that the appellant was present in the Mercedes Benz from Marapong to the gate to the farm where they alighted. Thapelo pointed out the farmhouse after they walked for a distance towards the farmhouse where the deceased stayed. After Thapelo had pointed out the house of the deceased to the others he returned to where the witness was waiting in the motor vehicle. The appellant informed the other two (Phineas and Tshepo) that they needed to perform a ritual before they proceed to the house. Phineas said he was wasting time and that they are there to commit a robbery. Because they refused to

allow him to perform a ritual the appellant decided that he is not going to take part in the robbery. He then walked back where he left the witness with the vehicle but was unable to find the vehicle.

[14] The witness disagreed with him and stated that he and Thapelo waited at the tarred road which is about 100-200 metres from where he offloaded them at the gate earlier for about 30-40 minutes until they received a call and they then drove away. It was put to the witness that whilst the appellant was at the tarred road a white Isuzu bakkie stopped next to him which was driven by Phineas. In the bin of the bakkie was a safe. Phineas told him to get into the vehicle otherwise he would be killed by farmers if they find him on the road. Whilst talking to him, Phineas opened the drivers' side door and invited him into the vehicle. The inside light came on and he noticed blood on the trousers and shoes of Phineas. He decided to get into the bin of the bakkie. They proceeded to Shongwane 1 where the safe was offloaded at an RDP house. The safe was opened when the witness and the others arrived there. The appellant denied that he was involved in the killing of the deceased or the housebreaking and the robbery of the deceased and that he opened the safe.

[15] The witness confirmed that the appellant told them that he has muti that can make someone to sleep. The witness also confirmed that he was unaware that anyone of them was in possession of a firearm.

[16] At the request of the defence the police statement of the witness was handed in as an exhibit. The said statement *inter alia* contained certain information the nature of which was hearsay evidence.

[17] At the closure of the state case application was made for the discharge of the appellant in terms of section 174 of the CPA. The application was dismissed with reasons to follow at the conclusion of the trial. It is a ground of appeal that the learned judge failed to give reasons for the refusal. There is no substance in this ground of appeal. The common cause facts were such that the accused be put on his defence. The reasons provided in the judgment also dealt with the evidence. The appellant suffered no prejudice.

[18] The appellant testified in his defence and called no witnesses. He testified that he proceeded with the state witness, Phineas, Thapelo and Tshepo towards Vaalwater where they turned off onto a dirt road where they stopped. Thapelo was going to show them the gate to the farm. They walked along a road which took them to the farm until Thapelo pointed out a gate to them. Thapelo then returned to the vehicle. They proceeded further until they realised that they were near the house. The appellant was in possession of a bottle containing water that he acquired from a sangoma. The purpose of the muti was to make people sleep. For the muti to be effective they needed to bathe naked using that water. An argument ensued because the others refused to bathe using the muti. The appellant refused to enter anywhere without the muti. They told him to stay where he is if he does not want money. He decided to return back to the car along the way they came. He discovered that the car was no longer there where they departed and he then proceeded to walk along the tarred road like he is going back to Lephalale. After he walked for a long time he saw a bakkie coming. Phineas was the driver. He stopped and opened the door so that the appellant could enter the bakkie. Phineas invited him to enter through the driver's door. He saw blood on the trousers and shoes of Phineas and decided to rather board the vehicle by sitting in the loading bin of the vehicle where the safe was. He, Phineas and Tshepo

drove to an RDP house at Shongwane and entered the said house. The safe was taken from the bakkie into the house. They were assisted by two boys who stayed in the RDP house. Phineas drove off in the bakkie and later returned with the witness who was following the bakkie in a vehicle. They did not want him nearby when they cut open the safe because of the muti issue. The appellant remained outside the house with the two boys. He was given six Black Label beers. Inside the RDP house they continued to cut open the safe. He did not see anything apart from bullets which remained with the owner of the house. At 4h00 when people started to wake to go to work he proceeded to Marapong. He had no idea what happened inside the farmhouse. He only saw the blood on the trousers and a sneaker of Phineas. He had no idea where the blood came from. They had no time to discuss it.

[19] During cross examination the appellant stated that he was requested by Phineas and Tshepo to participate in the robbery because of the muti he had. It was put to the appellant that the muti was for the farmer not for them. The appellant testified that they were supposed to pour the water over themselves whilst naked before putting their clothes on again. When they break in the person inside the house cannot hear you and even dogs do not hear you. He testified that he was only told about a safe and that a single person stays on the farm. He was never told that there is a bakkie at the farm. He realised when Phineas and Tshepo stopped next to him on the road that the bakkie and the safe which was on the bakkie came from the farm where they had gone to. He also realised when he observed the blood on Phineas that things did not go well.

[20] When it was put to the appellant that he associated himself with whatever they had done he answered that he was far from home and that he was walking. He decided to make

use of the transport offered to him. It was put to the appellant that the sudden refusal to use the muti is improbable since the appellant was asked to join the robbery because he had muti. He replied that they refused for reasons unknown.

[21] He testified that he proceeded to the RDP house with them because they used a different route that did not go through Lephalale. He remained with them until 5h00 and took the bus home. When asked if he helped to load the safe back onto the bakkie after it was open he denied any participation.

[22] The court asked the appellant how the muti was going to be used. He explained that he acquired the muti from the sangoma on the same day the robbery was to be committed. He was also given three small sticks after he informed the sangoma that he, Phineas and Thapelo were going to enter the house. He was required to place the sticks inside a two-litre container. Each of them had to keep a stick in their underwear after bathing with the water to have the desired effect. The effect of the muti would have been that the minute they entered through the gate that neither a dog nor the old man will wake up. The muti acted as a repressor so that nobody will wake up once it has taken effect. It is not like a sleeping pill. The person will not wake up after going to sleep once the little stick is placed in the underwear.

[23] The learned judge accepted the evidence of the witness (which included certain hearsay evidence)¹⁰ and rejected the evidence of the appellant as false beyond a reasonable doubt.

¹⁰ I will return to the hearsay evidence elsewhere in the judgment.

[24] Mr Legodi on behalf of the appellant pointed out that the learned judge erred in not applying the cautionary rule pertaining to accomplices. It was held in *R v Ncanana*:¹¹

"What is required is that the trier of fact should warn himself...that it should be warned, of the special danger of convicting on the evidence of an accomplice; for an accomplice is not merely a witness with a possible motive to tell lies about an innocent accused but is such a witness peculiarly equipped, by reason of his inside knowledge of the crime, to convince the unwary that his lies are the truth. This special danger is not met by corroboration of the accomplice in material respects not implicating the accused, or by proof *aliunde* that the crime charged was committed by someone; so that satisfaction of the requirements of sec 285 does not sufficiently protect the accused against the risk of false incrimination by an accomplice. The risk that he may be convicted wrongly although sec 285 has been satisfied will be reduced, and in the most satisfactory way, if there is corroboration implicating the accused. But it will also be reduced if the accused shows himself to be a lying witness or if he does not give evidence to contradict or explain that of the accomplice. And it will also be reduced, even in the absence of these features, if the trier of fact understands the peculiar danger inherent in accomplice evidence and appreciates that acceptance of the accomplice and rejection of the accused is, in such circumstances, only permissible where the merits of the former as a witness and the demerits of the latter are beyond question."¹²

[25] There is no indication in the judgment that the learned judge as trier of fact warned herself of the special danger of convicting the appellant on the evidence of an accomplice. The crucial question that arose is whether any reliance can be placed on his evidence. Of great importance is that certain portions of the evidence of the accomplice is common cause.

[26] It is common cause that:

¹¹ 1948 (4) SA 399 (A).

¹² 405-406.

- (a) the witness as well as the appellant were part of a group of five men who planned and conspired to rob the deceased at his home;
- (b) they proceeded to Sumadi farm where the deceased resided in a grey Mercedes Benz on Sunday evening 6 February 2017;
- (c) the appellant, Phineas, Tshepo and Tshepelo disembarked from the vehicle and proceeded into the farm;
- (d) the deceased died on 6 February 2017 due to blunt force trauma to the head;
- (e) the witness waited where they disembarked until Tshepo returned;
- (f) the witness and Tshepo drove back to their respective homes;
- (g) the Isuzu bakkie and the safe depicted in exhibit C2 and 4 both of which are the property of the deceased;
- (h) Phineas who was the driver of the said bakkie had blood on his trousers and sneaker;
- (i) the appellant was a passenger in the Isuzu bakkie that conveyed the safe to an RDP house situated at Shongwane 1 where the safe was offloaded and placed inside the RDP house;
- (j) Shongwane is 120-130 kilometres from the farm;
- (k) Phineas thereafter drove away with the bakkie and returned together with the witness and a grinder;
- (l) the appellant was present at the RDP house where the safe was opened with the grinder.
- (m) the appellant was taken home by Phineas.

[27] The appellant disputed that he was present when the deceased was killed during the robbery or that he benefitted from the robbery. No direct evidence was presented by the prosecution that the appellant participated in the events at the house where the deceased was attacked but relied on circumstantial evidence to prove his participation. The witness however testified that the appellant assisted to load the safe onto the bakkie before it was removed from the RDP house after it was opened.

[28] The hearsay evidence contained in the witness statement of the witness was accepted by the learned judge as corroborating evidence on the basis that the hearsay evidence has been admitted by the defence in terms of section 3 of the Law of Evidence Amendment Act¹³ as the statement was introduced by the defence without demure by the prosecution. The learned judge, furthermore, relied on *S v Ndhlovu and Others*¹⁴ to allow hearsay evidence in the interest of justice.

[29] The prosecution made no application for the hearsay evidence to be admitted at any time during the presentation of case for the prosecution. The learned judge in my respectful view overlooked the important cautionary words expressed by Cameron J in *Ndhlovu supra*:

"Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on the admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces."¹⁵

¹³ Act 45 of 1988 (Hereinafter called "the Hearsay Act").

¹⁴ 2002 (6) SA 305 (SCA) par 50.

¹⁵ Para 18.

[30] The witness statement was introduced by the defence as proof of a previous inconsistent statement in connection with one aspect only. It will be recalled that it was put to the witness that he did not mention, in his police statement, that the appellant opened the safe with the grinder at the RDP house (which was denied by the appellant).

[30] The excerpts of his statement which the trial judge admitted are the following:

"Phineas said he is going with me. He took the rifle and the ammunition with him. He drove me back to Marapong. He said to me that he and Tshepo and Phillip were arguing because it was the wrong safe, but they said they must take that one. He still wanted to search for another safe, but it was too dark."

And:

"During the day Tshapelo called me and told me that those guys have made shit because they have killed the old man. We called each other to talk about what happened. I went to Terreblanches' place to see Phineas. I asked him what had happened, because I have heard from Thapelo that the old man is dead.

And:

He said it cannot be, because, because he only hit him twice with a shifting spanner. I then go back to my home. I took Tshepo on the phone; he said to me that it is Phineas who killed the old man. I asked him how; he said that he and Phillip entered the house because they have had strong muti for the old man to sleep. Phineas was waiting at the gate.

They did enter the house and tied the old man that was sleeping, after he was tied Phineas entered and just started to assault the old man and further they then start to load the safe on the old man's bakkie and went to Shongoane"

And finally:

"Later in the police cells, me and Phineas were talking about the case and Phineas said that it was Tshepo and Phillip that had killed the old man. After about three weeks then Tshepo was arrested and put in the cells with us. I asked him about the vehicle, he said he and Phillip had sold it at Winterveldt. I know that Tshepo and Phillip are still communicating with each other."

[31] The hearsay portions of the statement contained in the said the police statement does not constitute evidence unless the hearsay evidence is admitted by the court in terms of the provisions of the Hearsay Act. Put differently; the default position is that hearsay evidence is inadmissible unless admitted in the interest of justice.¹⁶

[32] I am unable to agree with the learned judge that it is in the interest of justice to admit the hearsay evidence aforesaid, on the basis that the statement was admitted by the defence. The statement was presented as proof of an inconsistency contained therein and not for the purpose of admitting the hearsay statements contained in the statement. The rule against self-corroboration limits the probative value of the rest of the statement.¹⁷

[33] The prosecution failed to apply for the admission of the hearsay evidence prior to the conclusion of the state case. The appellant, accordingly, had no opportunity to deal with the admissibility of the hearsay evidence prior to it being admitted or to present evidence to refute that evidence. It is to my mind neither in the interest of justice that the hearsay evidence outlined above be allowed nor to attach any probative value to that evidence.

¹⁶ *Makhatini v Road Accident Fund* 2002 (1) SA 511 (SCA) par 21.

¹⁷ "The general rule is that a witness is not allowed to testify that on a previous occasion he made an oral or written statement consistent with his evidence in court." Per Schwikkard PJ and van der Merwe SE *Principles of Evidence* 3rd ed (2009)104.

[34] The fact that the witness omitted to specifically state in his police statement that the appellant took part in grinding open the safe does not detract from the credibility of his evidence. He conveyed who participated in that endeavour without going into detail what each person present has done. The person who wrote down his statement appears not to have wanted to elicit more from him. I do not consider that to be a material deviation from his written statement.

[35] The witness testified that when Thapelo joined him and they then proceeded to near the main road which was 100-200 metres from there where they waited for 30-40 minutes when a call was received by Thapelo. They then proceeded back to Marapong.

[36] The witness testified that the appellant told other members of the group that he has muti to make 'somebody' sleep and not wake up until after they have done whatever they have done whatever they want. The appellant testified he was invited along because he was known to be able to obtain muti to make somebody sleep from a sangoma who was known to the appellant. The muti never made the deceased sleep because the muti never made it to his house.

[37] When questioned the appellant changed his evidence that the muti will make them undetectable to the extent that dogs will not even bark when they enter the premises.

[38] The witness received a call at 2h00 whereafter he proceeded to Terblanche to fetch a grinder and from there he proceeded to the RDP house where he met the members of the group. He was not informed by any of them that the appellant no longer is entitled to any of the proceeds or that there was an argument at the farm about administration of the muti. The witness said that the appellant assisted to grind open the safe.

[39] The probabilities must be considered by the court in the light of the common cause and proven facts as pointed out by Muller JA in *S v Essack and Another*¹⁸ with reference to *Caswell v Powell Duffryn Associated Collieries Ltd* (1939) 3 ALL ER 722 at 733, that:

"Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

[40] The common cause facts are objective facts from which other facts may be inferred. The dissociation of the appellant by refusing further to participate in the robbery because Phineas refused to take part in the ritual to bathe with the muti is inherently improbable as no doubt whatsoever exists from the common cause facts that the appellant, Phineas, Tshepo, Thapelo together with the witness all conspired to rob the deceased of money which was held in a safe in his house. The appellant and Tshepo were specifically recruited at the insistence of Phineas to join them in committing the planned robbery to obtain and administer muti which would have made them invisible to not only the dogs of the victim but also to the victim himself, (or to make them sleep) because the appellant was able to acquire such from a sangoma only known to him.

[41] They arranged the date of the robbery and agreed to meet and travel together to the farm where the appellant, (who was in possession of the muti) together with Phineas,

¹⁸ 1974 (1) SA 1 (A) 16C-E.

Tshepo and Thapelo proceeded to the farmhouse on foot under the cover of darkness. No evidence was presented that any member of the group armed themselves before setting out to rob the deceased. Their failure to take weapons along accord with the probabilities that they were confident that there will be no resistance because the deceased and his dogs will be unaware of their presence.

[42] There was absolutely no reason advanced (save to state that Phineas said that they are there to rob) for the very people who from the time that they have planned the robbery and going through the trouble of carrying the container with the muti along with them to near the farmhouse, suddenly without any provocation, rhyme or reason to change their minds to refuse to apply the muti moments before the robbery commenced and to abandon the appellant to his own devices to get home from the farm. It happened without discussion despite all of them having relied totally on the magical powers of the muti for protection that suddenly left them all vulnerable to detection.

[43] No one has thought of telling the witness who was waiting at the tar road to keep a lookout for the appellant who was on his way back to the vehicle. It will be recalled that the witness testified that Tshepo received a call whilst they were waiting at the tar road and that they then went home. It is highly unlikely that he was informed that the appellant is on his way to the vehicle because he refused to take part in the robbery. Tshepo would have asked the witness to wait for the appellant if he was informed of the unexpected development because the farm was 120 kilometres away from where the RDP house is situated. The call to Tshepo was no doubt made after the robbery was successfully completed to inform him (and the witness) that they may leave because they are able to

convey the safe which they were unable to open, from the farm. (The safe was too big to be conveyed in the boot of the Mercedes Benz).

[44] The version of the appellant that he first observed blood on the trousers and sneaker of Phineas when he was offered a lift whilst walking along the tar road is also wholly improbable. It is too much of a co-incident that they encountered him where he happened to walk along the road. Phineas welcomed him back into the fold like the prodigal son by offering the appellant not only a lift in the stolen vehicle but took him along where the safe was opened. Phineas must have been in a hurry to get away from the farm as quickly as possible. It is simply nonsensical for Phineas to have opened the driver's side door of the bakkie when he invited the appellant to enter the vehicle through the driver's side door when the appellant could have entered onto the back (where he was seated) or he could have entered by means of the passenger door just as quick.

[45] There would have been no reason for the appellant to go to and remain at the RDP house until the early hours of the morning other than to assist with unloading the safe and taking part in grinding open the safe and to assist in discarding the safe.

[46] The appellant took part in the robbery and travelled in the stolen vehicle that conveyed the robbers to the RDP house where the stolen safe was opened with a grinder by the appellant and others present.

[47] The evidence of the appellant that he disassociated himself from the robbery and that he was offered a lift by sheer chance by Phineas whilst walking home after the robbery is improbable. In addition, his version that he proceeded to the RDP house with the robbers where the safe was off-loaded and opened by means of a grinder without taking

part take part is not only improbable in the face of acceptable contradictory evidence of the witness that the appellant actively took part in opening of the safe, it is false beyond a reasonable doubt.

[48] This court is satisfied that in applying the test enunciated in *R v Blom*¹⁹ that the inference sought to be drawn must be consistent with all the proven facts and that the proven facts must be such that they exclude every reasonable inference from them save the one sought to be drawn, that it has been proven beyond a reasonable doubt that the appellant took part in the robbery when the deceased was murdered. They conveyed the stolen safe in his bakkie to the RDP house where they opened the safe and later discarded it. The appellant acted throughout in common purpose with the other robbers. The appellant and this co-robbers may not have intended the criminal result (of murdering the deceased), but there is no doubt that they must have foreseen the possibility of the criminal result if they should be detected by the deceased. In *Dewnath v S* it was held that:

“The most critical requirement of active association is to curb too wide a liability. Current jurisprudence, premised on a proper application of *S v Mgedezi*, makes it clear that (i) there must be a close proximity in fact between the conduct considered to be active association and the result; and (ii) such active association must be significant and not just limited participation removed from the actual execution of the crime.”

[49] I am, however, of the view that there is insufficient evidence adduced by the prosecution how entry was gained into the house. The prosecution has therefore failed to prove beyond a reasonable doubt that the appellant is guilty of housebreaking with intent to rob. (count 2)

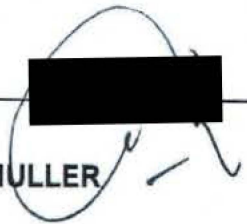
¹⁹ 1939 AD 188, 202-3.

In my judgment the appeal against the convictions in respect of count 1 and 3 should be dismissed whilst the appeal against the conviction in respect of count 2 be upheld.

[50] I now turn my attention to the appeal against the sentences imposed. If the learned judge erred, then she has erred on the side of leniency in respect of the sentence imposed on count 1. Murder committed during a robbery is a serious offence. The deceased was an elderly person who resided alone on a farm. He was attacked at night whilst asleep in the relative safety of his home. His firearm as required by law was locked away in a safe. He was killed because of greed to take what belongs to him. In the end of the day a life was taken for safe that contained papers worthless to the robbers. The appellant is not a first offender. His personal circumstances are not such that a lesser sentence should be imposed. This court must convey that attacks on vulnerable elderly farmers will not be tolerated.

In the result the following order is made:

- 1. The appeal against the convictions and sentences in respect of count 1 and 3 is dismissed.**
- 2. The appeal against the conviction in respect of count 2 is upheld.**
- 3. The sentence of 8 years imprisonment is set aside.**
- 4. The sentences on count 1 and 3 to run concurrently.**



GC MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur



J. NGOBENI

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, Concur



A VAN WYK

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

FOR THE APPELLANT : M. P LEGODI

INSTRUCTED BY : LEGAL AID SOUTH AFRICA

FOR THE DEFENDANT : JJ JACOBS

INSTRUCTED BY : DPP, POLOKWANE

HEARING DATE : 23 MAY 2025

DELIVERED DATE : 17 JUNE 2025