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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: A5/2024

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|-----|---|
| (1) | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES /NO |
| (3) | REVISED: YES /NO |

17/9/2025
DATE

SIGNATURE

In the matter between:

SILENCE MAGATA THATSHA

First Appellant

LETHABO G NTSOANE

Second Appellant

and

THE STATE

Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 17 September 2025.

JUDGMENT

MAKHOBHA J (FRANCIS-SUBBIAH J – Dissenting Judgment) AND MORE AJ

Background

[1] The first appellant was accused number one in the court *a quo*. The second appellant was accused number four. Both appellants were convicted by the court *a quo* on two counts of murder and one count of robbery with aggravating circumstances.

[2] The first appellant was sentenced to life imprisonment on count 1 and 2, and to fifteen (15) years' imprisonment on the robbery count. The sentences were ordered to run concurrently. The second appellant was sentenced to twenty-five (25) years imprisonment on count 1 and 2, and fifteen (15) years' imprisonment on count 3. The sentences imposed on counts 2 and 3 are to run concurrently with count one.

[3] The appellants were legally represented and both pleaded not guilty. Leave to appeal was refused by the court *a quo* in respect of the first appellant but was subsequently granted on petition by the Supreme Court of Appeal (SCA) on 7 February 2024. In respect of the second appellant, leave to appeal was automatic.

[4] In terms of section 220 of the Criminal Procedure Act,¹ the appellants admitted that the cause of death is consistent with asphyxia. However, in respect of count 2, the cause of death is blunt force head trauma.

[5] The evidence of the state is that the two appellants, together with the other two accused, in the court *a quo*, murdered the deceased and his son. Thereafter they stole items in the house, including a motor vehicle which was parked in the premises. The vehicle was a 2009 Renault Clio with registration number Z[...] (hereinafter referred to as "vehicle").

Evidence for the State

[6] Mr Ayanda David Bongani bought the Renault Clio from a person by the name of "Cheese" for an amount of R 10 000.

¹ Act 51 of 1977.

[7] Mr Thabiso Jack Moretsi assisted in removing the tracker from the stolen vehicle. A search for the tracker device was conducted in an open space next to a school in Ga-Rankuwa. The first appellant and other two accused in the court *a quo* drove away with this vehicle. Under cross-examination, he testified that he was not certain of the identity of accused 1 to 3.

[8] Mr Mpho Tema met accused one and the first appellant on the night of 23 July 2019. Accused one informed him that he had a problem and required a loan of R 4 000.

[9] Accused one offered him a Lenovo laptop, Sansui television set, LG home theatre system, a printer speaker, and a DVD player. Mr Tema told accused one that he did not have the money but could connect him to a person who could assist.

[10] Accused one and the first appellant subsequently came to Mr Tema's residence and placed the aforementioned items in his vehicle. The items were sold to a Tanzanian national by the name of "Moody" for R4000.00. Accused one gave him R 500.00 for petrol. Thereafter, Mr Tema took both accused one and the first appellant to the BP Garage in Zone 2, Ga-Rankuwa.

[11] Mr Tema testified that he realised that the items were stolen when the police later questioned him about them.

[12] Mr Aaron Kotsokane testified that on 23 July 2019, he met accused one, accused three, and the first appellant. They were travelling in the vehicle and were seeking someone to remove a tracker from the vehicle.

[13] Inside the vehicle in which the second appellant was present, Mr Kotsokane saw a plasma television set but could not identify some of the items. A person by the name of "Moholo" left with the first appellant and others to sell the items he saw in their vehicle.

[14] Meanwhile, accused three left with “Mdala” in the vehicle to search for the tracker device.

[15] Mr Kotsokoane further testified that accused one took them to Orchards and showed them where he had obtained the vehicle.

[16] The vehicle was recovered by the police. The registration number had been changed, except the VIN number remained the same. All four accused were arrested.

[17] Mr Elias Motsepe testified that he met accused one, accused three, and the first appellant when they were travelling in the vehicle. Inside the vehicle, he saw a microwave, cell phones and a plasma television set. Accused one indicated he was looking for someone to assist in finding the vehicle’s tracker.

[18] A trial-within-a-trial was held regarding a statement made by the first appellant. The court *a quo* ruled that this statement was admissible against him.

[19] Sergeant (Sgt) Evans Mongwe, the investigating officer in this matter, testified that the second appellant admitted to knowing accused one, who was a friend to the deceased in count 2.

[20] The second appellant informed him that on the day of the murder, he entered the premises of the scene, because he was fleeing from a Pitbull dog roaming the street.

[21] Whilst inside the premises, the second appellant called the deceased in count 2, but the deceased did not answer his mobile phone. The second appellant’s brother informed Sgt Mongwe that there was a CCTV camera in a neighbouring house, which he suggested should be viewed.

[22] Sgt Mongwe testified further that he downloaded footage from the CCTV. He could not identify the people in the footage, except for the second appellant, who was wearing school uniform.

[23] The footage showed the second appellant entered the premises, albeit briefly, before leaving. Four video clips were played in court.

[24] A picture of the deceased's vehicle in count 1 was found on the second appellant's cell phone.

[25] In the other four video clips, three people were seen entering the deceased's house. The deceased in count 1 was also seen arriving and entering her premises with the vehicle.

[26] A young man was seen chasing a dog away, while three children returned to their previous position once the dog had been chased off.

[27] The second appellant entered the premises after the three men had entered. The deceased's vehicle was subsequently seen leaving the premises.

[28] During the trial, in cross-examination, it was put to Sgt Mongwe that the second appellant knew nothing about the incident.

[29] Mr W[...] S[...], who is fifteen (15) year-old, testified for the state. He stated he knew the second appellant, also known as Shimmy, and that the deceased in count 2 was a friend to the second appellant.

[30] Mr S[...] confirmed that the second appellant was very fearful of dogs, especially Pitbulls. On 23 July 2019, he saw the second appellant returning from school. The second appellant told him that he would approach his parental house from another street because a dog was roaming nearby.

[31] He further testified that he was the one who opened the gate for the deceased in count 1 and closed it thereafter.

[32] Later, he saw the second appellant at the corner of the street, approximately 7 to 10 metres from the deceased's house.

[33] The second appellant asked Mr S[...] whether he had seen the deceased in count 2. This, in a nutshell, was the state's evidence.

[34] Accused one testified and denied all the allegations against him. He also testified that he did not know the second appellant. The second appellant elected to remain silent and called no witnesses to testify on his behalf.

[35] Accused three testified that he attended the same school with accused one, but they were not friends. He resided on the same street as the second appellant.

[36] On the day of the murder of the deceased, he was at a car wash where he is employed. He denies allegations against him.

[37] The second appellant testified that he knew accused one through the deceased in count 2, who was his friend.

[38] On 23 July 2019, while returning from school, he encountered a dog and entered the deceased's yard out of fear.

[39] He phoned the deceased in count 2, but the call went unanswered. He then left the premises, and upon seeing the dog again, approached his home from another street.

[40] He denied telling Sgt Mongwe that he entered the deceased's yard to confirm whether his friends were committing offences inside. He denied any involvement in the commission of the offences.

[41] Mr Elvis Ntsoane, the second appellant's brother, testified that Sgt Mongwe solicited money from him in exchange for exonerating the second appellant. He admitted that he did not report Sgt Mongwe to his superiors.

The Grounds of Appeal

The first appellant

[42] The first appellant raises five grounds of appeal, wherein he contends that the court *a quo* erred and misdirected itself in convicting him. His grounds of appeal against conviction and sentence are the following:

42.1 That there was common purpose to commit the offences mentioned in the indictment.

42.2 That the court *a quo* erred in relying on CCTV footage against the first appellant. The footage was never disclosed to him, and the State expressly stated that it did not relate to him. Moreover, no witness identified the first appellant from the footage. In addition, the footage was admitted without being tested for authenticity and reliability. The court *a quo*'s reliance on the CCTV footage infringed the first appellant's right to a fair trial.

42.3 That the court *a quo* erred in admitting into evidence the first appellant's extra-curial statement. Alternatively, if it was correctly admitted, the court erred in treating it as a confession on which it convicted the appellant.

42.4 That the court *a quo* relied on other co-accused extra-curial statements to conclude that the offences were pre-planned, contrary to section 219 of the Criminal Procedure Act.

42.5 That the effective imprisonment of life is shockingly inappropriate.

The second appellant

[43] The second appellant's grounds of appeal against conviction and sentence are as follows:

43.1 The evidence concerning the removal of household contents does not establish any involvement, nor that he was ever in recent possession of the contents.

43.2 The section 204 witness did not implicate him in possession, or recent possession, of either the stolen vehicle or household contents.

43.3 As the offences were committed inside the house in his absence, it cannot be said that he intended to make common cause with those who perpetrated the offences.

43.4 He did not perform any act of association with the conduct of others.

43.5 He ought not to have been convicted of murder, as he was not at the scene when the murders were committed.

[44] Counsel for the respondents insisted that the court *a quo* did not misdirect itself in convicting both appellants, and that the sentences are in accordance with justice.

[45] The principles laid down in the seminal matter of *R v Dhlumayo and Another*,² and the long line of court cases following it, are trite: an appeal court will only disturb the factual finding of the trial court if the latter had committed misdirection.

[46] This Court must therefore determine whether the trial court erred and/or misdirected itself in the analysis of the evidence and its final findings.

[47] The court *a quo* acknowledges that there is no direct evidence against the appellants.³

Evaluation

The first appellant

[48] The court *a quo* found that because Mr Otsile Motsepe and Mr Aaron Kgotsokwane met the first appellant in the company of accused one and three, who were driving a vehicle belonging to the deceased in count 1. As the vehicle was

² 1948 (2) SA 677 (A); *S v Francis* 1991 (1) SACR 198 (A) at 198J-199A.

³ Vol 18-page 1639 line 3 of the Judgment.

laden with household appliances, namely a plasma TV set and other appliances, it could be inferred that the first appellant and accused one and three were the perpetrators of the robbery and murders.⁴

[49] Furthermore, the court *a quo* relied on the doctrine of recent possession in convicting the first appellant.⁵

[50] It is trite law that the doctrine of recent possession is only applicable where an accused person is charged with an offence of theft. The reason being that in our law, theft is a continuous offence.

[51] In my view, the court *a quo* misdirected itself in convicting the first appellant of murder and robbery based on the doctrine of recent possession.

[52] However, such misdirection does not necessarily mean that the conviction of the first appellant must be set aside. It is trite that an appeal is directed at the order of the court *a quo*, not its reasoning.

[53] It is trite law that an accused person can only be convicted of an offence based on direct or circumstantial evidence.

[54] In *R v Blom*,⁶ Watermeyer JA referred to two cardinal rules of logic, which govern the use of circumstantial evidence in a criminal trial, as follows:

“1. The inference sought to be drawn must be consistent with all the proved facts. If not, the inference cannot be drawn.

2. The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable

⁴ Vol 18-page 1639 line 20 of the Judgment.

⁵ Vol 18-page 1642 lines 1-6 of the Judgment.

⁶ 1939 (AD) 188 at 202-203.

inferences then there must be doubt whether the inference sought to be drawn is correct.”

[55] In *R v Mlambo*,⁷ Malan JA said the following:

“It is sufficient for the Crown to produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to conclusion that there exists no reasonable doubt that an accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused.”

[56] In *S v Reddy and Others*,⁸ the Court held that:

“The fact that a number of inferences can be drawn from a certain fact, taken in isolation, does not mean that in every case the State, in order to discharge the onus which rests upon it, is

‘obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the Court is called on to seek speculative explanations for conduct which on the face of it is incriminating.’”(references omitted)

[57] In my view, the court *a quo*, having accepted the evidence of witnesses who interacted with the second appellant shortly after the murder and robbery, should have convicted the first appellant based on circumstantial evidence for the following reasons:

57.1 The first appellant and the co-accused in the court *a quo* were found in possession of a vehicle and household appliances shortly after the murders and robbery.

57.2 The only reasonable inference is that they were involved with the commission of the offences. Particularly, in the absence of an explanation as

⁷ 1957 (4) SA 727 (A) at 738A.

⁸ 1996 (2) SACR 1 (A) at 10B – C.

to reason he was seen inside the deceased's vehicle, which was laden with stolen items.

57.3 The removal of the tracker by the first appellant and two accused persons, further supports that the only reasonable inference is that he was involved in the murder and robbery. It is my view also that the three individuals observed on the video footage could reasonably be inferred to include the first appellant and the other two accused in the court a quo.

[58] Furthermore, it is my view that the extra curial statement by the first appellant was made freely and voluntarily, and he implicated himself. On that evidence alone, the court *a quo* was entitled to convict him.

[59] In *S v Boesak*,⁹ the Court held that although an accused person has a right to remain silent, there are consequences: if evidence calls for answer but the accused chooses to remain silent, a court may well be entitled to convict him or her.

[60] There is overwhelming circumstantial evidence against the first appellant, including his own statement, yet he chose to remain silent. In my view, the court *a quo* was correct in convicting him.

[61] I must add, even if another court were to find the extra-curial statement by the first appellant to be inadmissible, the conviction could still be sustained on the circumstantial evidence and his failure to testify.

[62] Thus, I am of the view that the appeal by the first appellant against the convictions on all three counts must be dismissed.

⁹ 2001 (1) SACR 1 (CC) at para 24.

[63] In *S v Malgas*,¹⁰ the Supreme Court of Appeal set out ten factors to be considered by the courts when applying minimum sentence legislation and determining whether there are substantial and compelling circumstances to justify departure from the prescribed minimum sentence.

[64] The constitutional Court in *S v Dodo*,¹¹ endorsing the approach stated in *S v Malgas*, stated thus:

“To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity.”

[65] Life imprisonment is the ultimate punishment that may be imposed. In *Rammoko V Director of Public Prosecution*,¹² the Supreme Court of Appeal held that an accused person must not be subjected to the risk that, due to inadequate evidence, the substantial and compelling circumstances are deemed absent.

[66] In *casu*, my view is that the evidence on record concerning the first appellant’s sentence cannot be faulted. The aggravating factors are that there are two human beings who have been brutally murdered.

[67] There is no doubt in my mind that the court *a quo* was correct in imposing the sentence on the first appellant.

[68] The appeal against the sentence in respect of the first appellant, on all three counts, must fail and be dismissed.

¹⁰ 2001 (1) SACR 469 (SCA).

¹¹ 2001 (1) SACR 594 (CC) at para 38.

¹² 2003 (1) SACR 200 (SCA) at para 13.

The Second Appellant

[69] In *S v Mgedezi and Others*,¹³ the Court held that in regard to the doctrine of common purpose, the accused person must have been present at the scene and must have been aware of the offence perpetrated. The court said further that the accused person must have intended to make common cause with those who were actually perpetrating the offence and he must have by himself performed some act of association with the conduct of others.

[70] In *S v Yelani*,¹⁴ the accused person presided at an informal meeting at which the deceased was sentenced to death. The execution took place later when the accused person was not present. The Appellate Division confirmed that in these circumstances, the accused person was liable for the killing. The court said;

“ . . . at the hands of those who perform the actual killing pursuant to a common intent, irrespective of whether or not he was present at the time of the actual killing. The court said the accused person had subjectively foreseen that the execution would take place and he has made a common purpose with those who had killed the deceased. It was thus irrelevant, the court held, that he had not been present at the time of the actual killing”.

[71] In regard to the second appellant, there is no evidence before court that he was physically present when the murder and robbery took place. There is no evidence that he was present when the murder was planned or associated himself in any way with the killing and robbery of the deceased. Neither did he share in the spoils after the robbery and murder were committed. In regard to the second appellant, there is no evidence before court that he was physically present when the robbery and murder took place. The evidence is that he was on the premises and left after a few minutes, and he gave his reasons under oath why he was on the premises.

¹³ 1989 (1) SA 687 (A) at para 15.

¹⁴ 1989 (2) SA 43 (A) at 46G.

[72] Furthermore, there is no evidence that he was present when the murder and robbery were planned. In any event, it does not appear from the evidence on record that the first appellant and his co-accused planned the murder of the two deceased.

[73] In *R v M*,¹⁵ it was held that the court does not have to believe the defence story; . . . “*it is sufficient if it thinks that there is a reasonable possibility that it may be substantially true*”.

[74] The court a *quo*’s inferences of guilt of the second appellant based on his failure to attend the funeral of the deceased in count 2 is misplaced and a misdirection on the part of the court.

[75] Furthermore, the photo of the vehicle of the deceased in count one found in the second appellant’s phone does not prove the case against the second appellant beyond reasonable doubt. He furnished the reason why the photo was in his mobile phone.

[76] The evidence about the second appellant’s sim cards does not corroborate the state case against the second appellant.

[77] The second appellant’s version about the dog and him seeking shelter in the deceased premises cannot be said to not be reasonably possibly true. There is no independent evidence to contradict his testimony as to why he was in the premises.

[78] Mr W[...] S[...], the state witness, testified and corroborated the second appellant’s version that on 23 July 2019, he saw the second appellant, and the second appellant informed him that he was scared of the dog, which was on the street.

¹⁵ 1946 AD at 1027.

[79] It must be borne in mind that it is trite that a confession of one accused person is not admissible against the co-accused person.

[80] Where no common purpose can be proved, no liability can arise in terms of the doctrine of common purpose.

[81] The trial court held that the presence of the second appellant, on the facts of this case, constitutes an act or acts of association that are sufficient to satisfy the requirements for the establishment of a common purpose.

[82] In my view, that finding is clearly wrong and constituted a misdirection. Although the second appellant, at some stage, was at the scene of crime, I am not satisfied that the state has proved the guilt of the second appellant beyond reasonable doubt. He is, therefore, entitled to his acquittal on all charges.

[83] In the premises, I find as follows:

1. The appeal of second appellant succeeds. His conviction and sentence on all counts are set aside and he is acquitted, and;
2. The appeal of first appellant is dismissed. His conviction and sentence on all counts are confirmed.

D. MAKHOB
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

B. MORE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Date of Hearing: 21 JULY 2025

Judgment delivered: 17 September 2025

Appearances

For the appellants: Adv Ziphozihle Raqowa

Appellant 1

Adv M.E. Manala

Appellant 2

For the respondent: Adv Robert Molokoane

Francis-Subbiah, J

[1] I agree with my brother Justice Makhoba in respect of the dismissal of the appeal of the First Appellant and the confirmation of the conviction and sentence of the First Appellant who was accused no. 2 in the court *a quo*.

[2] My dissent lies in respect of the Second Appellant who was accused no. 4 in the court *a quo*. Second Appellant maintains an automatic right of appeal to this court.

[3] Second Appellant was convicted:

On Count 1 of murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 and

on Count 2 of murder read with the provisions of section 51 (1) of the Criminal Law Amendment Act 105 of 1997 and

on Count 3 robbery with aggravating circumstances, as intended in Section 1 of the Criminal Procedure Act 51 of 1977 and read with sections 51(2) of the Criminal Law Amendment Act 105 of 1977.

[4] Second Appellant was sentenced on Count 1 and Count 2 with 25 years imprisonment in terms of the provisions of section 77 (4) of Act 75 of 2008, the Criminal Justice Act. On count 3 he was given 15 years imprisonment, and the effective sentence is 25 years.

[5] Second Appellant was a friend of the second deceased, Rorisang, a minor, who he visited at the latter's house. The first deceased, Ms Matseme was the mother

of Rorisang. The offence occurred inside the home of the first and second deceased that is situated in Orchards.

[6] The admitted confession of accused 1 provides an explanation of how the crime to rob the deceased was planned and the steps taken in executing the plan. Accused 1 met the Second Appellant, Thabo, also known as Shimmy at the Crew - a place to drink and braai. He told Second Appellant he needed money. Second Appellant told him that they must try Rorisang's house, where they could gain easy access to the house. Informing him that Rorisang's mother had received pension money from teaching. Accused 1 knew Rorisang's house and had visited him frequently outside his house.

[7] He met Shimmy, Second Appellant on Saturday before the incident, then met him again on Sunday, to give him feedback that he found guys to 'pull the move with' -steal. On the date of the offence, 23rd July 2019, accused 1 met appellant 1 and accused 3 at Mighty Carwash to polish their plan and travelled to Orchards to carry it out.

[8] While accused 3 knocked the door and Rorisang opened, they grabbed him and put the wollen hat over his head and went inside the house. They tied Rorisang's hands behind his back with cable ties as well as his legs. Accused 1 heard the gate opening and he saw Second Appellant at the gate. Second Appellant got in the yard and phoned Rorisang on his cell phone. Accused 1 answered and told him that they were inside the house. The Second Appellant asked if everything was okay then he left the premises.

[9] While the three accused were inside the house, Second Appellant was seen on video footage within the premises, and he was there for approximately 4 minutes. This independent collaboration from the video footage accords with the confession of accused 1.

[10] This video footage was introduced into evidence by detective Sergeant Mongwe, who testified that during his investigation Second Appellant's brother informed him about the video footage to confirm Second Appellant's alibi. This video

footage was in the house adjacent to the house of the deceased persons. The video footage shows three figures entering the house of the deceased from a distance but could not identify the faces of the three individuals. The video footage depicted Rorisang, the deceased child as the first person entering the house. Later, three figures, whose identity at the time were unknown, entered the house. Thereafter Second Appellant entered the yard of the deceased. Later during the day, Ms Matseme entered the premises driving her vehicle. Around this time, Second Appellant was seen on the video footage walking on the street, this time in different clothes. The robbed vehicle was seen on the video footage around 19h36 leaving the premises.

[11] The State argued that it was the Second Appellant, Shimmy who was the connecting person between the other accused and the planned crime. Second Appellant confirmed that he knew accused 1 as Alex through Rorisang and they were friends on Facebook. The evidence of Sergeant Evans Mongoe, the Investigating Officer also confirmed that Second Appellant admitted to knowing accused 1.

[12] Mpho Kenneth Tema, the 6th witness, testified that he was called by accused 1 on the date of the fatal incident and he was given the robbed items to sell in Pretoria. He was paid for the service.

[13] The witness B[...] W[...] S[...] testified that the Second Appellant is known as “Shimmy” and he resides four houses from his own. Second Appellant himself testified as Shimmy. B[...] further testified that he saw Second Appellant, in the yard of the deceased. Second Appellant also asked him about the whereabouts of Rorisang. Later during the day, he saw Rorisang at the corner of the street, where he was standing, approximately 7 to 10 meters from the deceased’s house and he was in full view of the house of the deceased.

[14] No reason is provided by Second Appellant why he was standing and observing the deceased’s house on the day of the crime. In addition, he provides no explanation why he asked B[...] about whether he had seen his friend, Rorisang, on that fatal day.

[15] Witness, Otsile Goodwill Elias Matsepe had testified that he wanted to know where the stolen motor vehicle was from. He was then taken to a house in Orchards where he was told about a person, “Shimmy” as the one who must be paid for a job well done.

[16] Second Appellant’s version is that he saw a dog from a distance and is the reason why he went to Rorisang’s yard. He just walked in and walked out and did nothing there. He then stood at the gate and he called Rorisang’s phone, which rang without being answered. He then left and went down the street, where he met B[...]. He asked B[...] whether he had not seen Rorisang because he did not answer his phone. He saw the dog again and told B[...] he had better change his lane because of the dog. B[...] confirmed that Second Appellant was scared of the Pit Bulldog. However evident from the video footage when Second Appellant was at Rorisang’s house, the dog was not anywhere near him and visible on the footage.

[17] The court *a quo* made the inference that it was improbable that Second Appellant was scared of the dog but still came through the same street knowing well that the dog is normally loose on that street. For this reason, the court *a quo* held that it is quite unlikely that it was because of his fear of the dog that he went into the premises of the deceased.

[18] Second Appellant is visible on the footage at the time when accused 1,3 and first appellant were already at the Rorisang’s house when he entered the yard. The court *a quo* observed in its judgment that Second Appellant walked slowly towards Rorisang’s house in no hurry to get there. His conduct was different from that of the two young girls who were seen running away from the dog. One would expect that if a person were scared of an approaching dog, they would run away from that dog. The court further rejected Second Appellant’s reason for entering Rorisang’s yard as false.

[19] Second Appellant confirmed that the video footage camera had captured him when he went to Rorisang’s house. He further testified that he never left home after that, in contradiction to B[...] testifying that about 30 minutes later, he once again

saw Second Appellant at the corner when he went to the tuck shop to buy sweets. Second Appellant denied this, saying that he could not remember meeting him again.

[20] On a different day, Second Appellant testified to a different version than previously that he never left his house after being at the deceased's house and speaking to B[...]. Instead, he testified that when he got home after school, he met his brother Nico and accompanied him to Rosslyn Station. It was on his way back when he met B[...] and asked him whether he had seen Rorisang.

[21] Second Appellant on his own version confirmed that he was using 2 sim cards in his phone. One was on a Telkom network and the other a Cell C network. His version put to the trial court was that he phoned the deceased, his friend, after entering the yard but received no response. Lieutenant Colonel Beecher testified that there was no record of Second Appellant calling Rorisang's phone. It was put to Second Appellant that the number 0[...], a Cell C number was used only after 23 July 2019 to which he responded that Mr Mongwe was lying because he started using the number from December 2018. Although the confession of Accused 1 confirms the call from Second Appellant to Rorisang's phone, the contradiction lies in that Accused 1 answered the call and informed the Second Appellant that they were inside the house and that everything was in order.

[22] The video footage recorded that Second Appellant was in the yard where the crime took place for approximately 4 minutes. So why did he not simply walk into the house of his friend and inquire about his friend? He was asked in cross examination why he did not knock at the door to find out where his friend Rorisang was, and his response was that he did not want to disturb him. A reasonable person looking for a friend would normally knock and make some effort to contact them — especially if they've gone to their house. Saying that he didn't want to disturb him makes no sense if the whole purpose was to see or speak with the friend. In addition, he spent approximately 4 minutes in the yard before he was seen leaving the crime scene. The court *a quo* correctly viewed this as fabricated or an after-the-fact excuse to explain presence near the crime scene.

[23] In *S v Mtsweni*¹⁶ for example, the court held that false explanations by an accused can strengthen the inference that he was involved in the crime — particularly where the explanation seeks to distance him from incriminating circumstances. As a result, in the present matter the court *a quo* could conclude that the Second Appellant's presence in the yard of the deceased was not innocent.

[24] The appellant's conduct is not consistent with what an innocent person would do. He went into the yard of his friend, but did not attempt contact, yet being present where his friend and mother was killed and goods were stolen raises serious suspicion. Once again, an hour and half later he was seen walking past the house, as seen on the video footage as testified by Sergeant Mongwe. The trial court is allowed to draw adverse inferences from such conduct, especially if the explanation is weak and inconsistent. It is inconsistent with normal human behaviour and goes against the grain of being reasonably possibly true.

[25] The court *a quo* also made the following observations: according to Kgothatso, Second Appellant was always at the place of the deceased. On this occasion, why did Second Appellant only inquire from people about the whereabouts of his friend, when he could have simply gone over to his house to check up on him, he knew that his friend was asthmatic, and he had in the past suffered asthmatic attacks, but he still remained unconcerned. Additionally on the following day, he did not make any effort to check on his friend, which is strange behavior from a person who was in the company of the deceased on a daily basis.

[26] It makes no logical sense for him not to directly contact his friend. This response is likely to be a deliberate attempt to fabricate an innocent reason for being near a crime scene, and so the court viewed it as a false exculpatory explanation, strengthening the inference of guilt.

[27] While the confession of Accused 1 is not directly admissible against the Second Appellant, such a confession may draw material value when it is independently corroborated by admissible evidence. From the proven facts it can

¹⁶ 1985 (1) SA 590 (A).

further be inferred that he was well aware that the accused were inside the house committing the offences when he entered the yard, walking at a slow pace, with no dog in sight, stayed there for approximately 4 minutes. When Sergeant Mongwe conducted the interview with Second Appellant, he confirmed that the accused persons were inside the house when he entered the yard.

[28] As set out in ***R v Blom***¹⁷ it was said that:

In reasoning by inference there are two cardinal rules of logic which cannot be ignored:

- (1) that the inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inferences sought to be drawn is correct.

[29] There are no other reasonable inferences to be drawn from the circumstances surrounding the Second Appellant's failure to give the police the cell phone numbers he was using on the day of the incident. This omission, coupled with the fact that Accused 1 intended to give him a share of the proceeds after selling the stolen items, strongly suggest that communication between them likely took place on that day. The court concluded for those reasons; it could be safely inferred that the Second Appellant conspired with accused 1,2 and 3 to commit robbery at the home of the deceased persons. In the process of the robbery, tragic murders were committed.

[30] In ***S v Mgedezi***¹⁸ the Appellate Division held that for an accused to be held liable under common purpose, the State must prove the presence at the scene, the awareness of the commission of the crime, the intent to make common cause with perpetrators and the performance of some act to further the common purpose.

¹⁷ 1939 AD 188 at 202-203.

¹⁸ 1989 (1) SA 687 (A).

[31] In the present facts the court *a quo* found that the Second Appellant met the necessary criteria for legal liability, notwithstanding the fact that he did not physically commit the offences. He was, at a certain stage, present at the scene of the crime. He was observed monitoring or watching the residence of the deceased and had images relating to the stolen vehicle downloaded on his phone. On the facts of this case, these acts constitute conduct amounting to association that show intent and participation with the other accused and are sufficient to satisfy the requirements for the establishment of common purpose in respect of the robbery of the household items and the motor vehicle. This cumulative effect of his conduct demonstrates active association.

[32] Second Appellant denied being involved in the killing of the deceased. It is evident from the admitted confession that the Second Appellant had no intention or prior plan to have his friend or the latter's mother killed. His involvement was limited to the planning and execution of the robbery. Accused 1's confession further states that he met with the Second Appellant who was given R1 500 as a reward for informing them about the opportunity to rob Rorisang's house. Further his confession sets out that it was an after-thought to commit the murders because their identity was seen by the deceased and this could incriminate them. For this reason, it is my view that no common purpose was established in respect of the murders in count 1 and count 2.

[33] In evaluating consistency of a version, probability of the explanation and the facts set out in the confession accord with the Second Respondent being involved in the robbery of items from the deceased house but not the murder of both deceased persons. The trial court correctly held that the Second Appellant's testimony is highly improbable and correctly convicted him on the third count of robbery based on circumstantial evidence linking him to the robbery perpetrated by the three other accused.

[34] In my view, the conviction and sentence of the Second Appellant in respect of Count 3 ought to be confirmed. The sentence of 15 years imprisonment as handed down by the Court *a quo* reflects the seriousness of the offence, protects society

from the appellant and yet remains proportionate to this appellant and allows him the opportunity while in custody to rehabilitate.

[35] **In the result the following order is made:**

35.1 The appeal against conviction and sentence on Count 1 and 2 is successful and set aside.

35.2 The appeal against conviction on Count 3 is dismissed and the conviction and sentence are confirmed.

R. Francis-Subbiah
Judge of the High Court
Pretoria Division