

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

(1)	NOT REPORTABLE
(2)	NOT OF INTEREST TO OTHER JUDGES
(3)	REVISED

Case Number: A132/2023

In the matter between:

TSHELE THAPELO GABRIËL

Appellant

and

THE STATE

Respondent

Coram: R. Strydom et Noko JJ, and Cox AJ

Heard: 17 November 2025

Delivered: 26 February 2026 - This judgment was handed down electronically by circulation to the parties' representatives by email, uploading to CaseLines and released to SAFLII. The date and time for hand-down of the judgment is deemed to be 10h00 on 26 February 2026.

Summary: *Appeal against conviction and sentence – appellant convicted by trial court on three counts of murder, housebreaking, and attempted robbery based on common purpose – appellant transported assailants to and from crime scene without proven prior knowledge of criminal intent – appeal court found circumstantial evidence and pointing*

out insufficient to establish common purpose – application of R v Blom principles highlighted ambiguity of appellant's utterance – trial court findings set aside – appellant convicted as accessory after the fact under section 257 of the Criminal Procedure Act 51 of 1977 for assisting surviving perpetrator to evade justice – sentences antedated resulting in immediate release.

JUDGMENT

Cox AJ (Strydom and Noko JJ concurring)

Introduction

- [1] This is an appeal against both conviction and sentence. The appellant was convicted by the trial court on three counts of murder (counts 1 to 3), one count of housebreaking with intent to commit an offence (count 4), and one count of attempted robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act 51 of 1977 (“the CPA”) (count 5). He was acquitted on the alternative to count 5 and on the firearm related charges (counts 6 to 8).
- [2] Following conviction on counts 1 to 5, the trial court imposed the following sentences:
- Count 1: Life imprisonment
 - Counts 2 and 3: 20 years’ imprisonment on each count
 - Count 4: 3 years’ imprisonment
 - Count 5: 10 years’ imprisonment
- All sentences were ordered to run concurrently with the sentence of life imprisonment.
- [3] The trial court refused the appellant’s application for leave to appeal. A petition to the Supreme Court of Appeal thereafter was successful, and leave was granted to appeal against both conviction and sentence.

- [4] In issue before us is the trial court's finding that the appellant acted in common purpose with the three males that unlawfully entered the Lipschitz residence leading to the demise of Mr Lipschitz. It was said that the appellant was oblivious as to what the others were going to do after he had dropped them, as he only transported them. In addition, it was stated that the circumstantial evidence that the court *a quo* relied upon was insufficient as it was capable of other inferences than that the appellant was part of the assailants.
- [5] The facts of the case are therefore determinative of the issue whether the appellant was a participant in the crimes committed.

Factual Matrix

- [6] On 28 January 2013, at approximately 20:30, the Lipschitz family was enjoying the tranquillity of their home at 11 Tennyson Road, Senderwood, Germiston when their peace was violently disrupted by a burglary. A gun battle ensued between the intruders and Mr Lipschitz senior. During the shootout, Mr Lipschitz and two of the intruders sustained fatal injuries. A third intruder escaped and contacted the appellant, who had been waiting nearby to ferry them back to Alexandra. They met at the prearranged pickup point. Upon boarding the vehicle, he told the appellant that a shootout had taken place and that the homeowner and two assailants had been fatally wounded. He instructed the appellant to leave the area immediately. The appellant complied and drove back to Alexandra.
- [7] The appellant insisted that he merely provided transport to three individuals. He claimed to be a businessman and taxi owner who was approached by Leonard, one of the deceased assailants, to transport three males on a return trip from Alexandra to Senderwood. When he picked them up he realised that he knew them. After dropping them at 1[...] W[...] Road, S[...], he awaited the phone call of his passengers at a nearby bridge. He described Leonard as someone "like a

brother” and shop owner from whom he would buy snacks. Baker, his co-accused in the court *a quo*, was also a business owner with whom he had traded. He also knew Peter, the third passenger and a soccer player, for more than 10 years. The appellant denied seeing or having any knowledge of his passengers being armed, having balaclavas or that they intended committing any offence. He further explained his failure to report the incident to the authorities as a fear of being arrested.

- [8] Notably, five telephone calls were made to his co-accused later that night (Exhibit O) and four months later, after his arrest, he made a pointing out during which an utterance was made which was construed as an indication that he was aware of the criminal intent of his companions.

- [9] The appellant further admitted that approximately one week before the incident he had transported the same three individuals to the same area. On that occasion he waited at the same bridge but was never contacted to collect them, and he later learned that they had returned to Alexandra without informing him.

- [10] His co-accused denied knowing the appellant and denied being in Senderwood at the time of the incident. The trial court however rejected this version and accepted the evidence establishing that the appellant and his co-accused were together on the fateful night, and that the co-accused was one of the intruders who entered the Lipschitz residence with his two deceased companions.

- [11] The trial court correctly found that there was no evidence of a prior agreement between the appellant and his passengers to commit any offence and relied on the circumstantial evidence to convict the appellant on the doctrine of common purpose.

Common Purpose

- [12] It is trite¹ that the doctrine of common purpose allows criminal liability to be attributed to individuals who jointly participate in the commission of an offence. The conduct of any person acting in furtherance of the shared purpose is imputed to all who are part of that purpose. A common purpose may arise from a prior agreement, whether express or implied, or from active association and participation in a shared criminal design. In the case of a consequence-based crime, such as murder, the usual requirement of a causal link between the accused's conduct and the death of the deceased is relaxed, provided the accused actively associated themselves with the actions of the actual perpetrators.
- [13] In *S v Safatsa*² it was stated that for a common purpose to be established the following is required:
- a. The accused must have been present at the scene when the crime was being committed.
 - b. He/she must have been aware of the criminal acts to be committed by his companions.
 - c. He/she must have had a common cause with those committing the crime.
 - d. He/she must have manifested his/her sharing of a common purpose by performing some act of association with the conduct of the others.
 - e. He/she must have had the requisite *mens rea*. In murder, the accused must have intended that the deceased be killed or must have foreseen the possibility of him/her being killed and performed his own act of association with recklessness as to whether death was to ensue.
- [14] These prerequisites were repeated with approval in *S v Mgedezi*³. In addition, the court should not lose sight of the other definitional requirements for a crime like the elements of culpa and unlawfulness.

¹ *Thebus and Another v S* 2003 (6) SA 505 (CC).

² *S v Safatsa & others* 1988 (1) SA 868 (A).

³ *S v Mgedezi and Others* 1989 (1) 687 (A).

[15] It was submitted that none of the prerequisites applied to the appellant in that:

- a. He was not present at the scene where the violence was being committed;
- b. There is no evidence that he was aware of the assault;
- c. There is no evidence that he intended to make common cause with those perpetrating the assault;
- d. There is no evidence that he manifested his sharing of a common purpose with the perpetrators by himself performing some act of association with the conduct of the others; and
- e. There is no evidence that he had the requisite *mens rea*.

[16] In *S v Makhubela*⁴ the Constitutional Court held that although the applicants may not have intended the resultant murder, they had to have foreseen the possibility thereof ensuing as the other perpetrators were carrying firearms, which they must have known would be used if the plan went awry and that they had nonetheless actively associated themselves with the criminal acts, hence it followed that their convictions in respect of the murder charge also had to stand: “...the fact that the first appellant had prior to the robbery made common cause with his co-robbers to execute the crime, well-knowing that at least two of them were armed, would set in motion a logical inferential process leading up to a finding that he did in fact foresee the possibility of a killing during the robbery and that he was reckless as regards that result.”⁵

[17] Similarly, in *S v Nkosi*⁶, the SCA held that the surviving robber was correctly convicted of the murder of a fellow robber. In that case, a gang of robbers, armed with firearms and foreseeing the likelihood of resistance, engaged in a shoot-out during the commission of the robbery. In the exchange of gunfire, the victim of the robbery shot and killed one of the robbers. These matters are however

⁴ *S v Makhubela & Another* 2017 (2) SACR 665 (CC).

⁵ *S v Lungile & another* 1999 (2) SACR 597 (SCA) para16.

⁶ *S v Nkosi* 2016 (1) SACR 301 (SCA).

distinguishable from this appeal in that in the referenced matters the appellant(s) knew that he and his fellow robbers were armed with loaded firearms which could result in a shoot-out or that they might encounter 'dangerous resistance'.

- [18] In the current matter there is no evidence to suggest that the appellant was aware that his passengers carried firearms or that he had known of their criminal intention. It can therefore not be said that he reasonably foresaw subjectively that his companions intended to commit housebreaking with the intention to commit an offence, armed robbery and nor that in the course of encountering dangerous resistance, firearms might be used with possible fatal consequences.

Circumstantial evidence

- [19] The State relied on circumstantial evidence in an attempt to prove that the appellant had formed a common purpose with the perpetrators and was therefore guilty of the offences. It is accordingly necessary for the Court to apply the well-known principles set out in *R v Blom*⁷ to the facts of this case to determine whether the evidence meets the required standard.
- [20] In *Blom* the court formulated two key principles: (a) The inference must be consistent with all the proven facts. If any proven fact is inconsistent with the proposed inference, the inference cannot stand. (b) The proven facts must exclude every reasonable inference other than the one the State seeks to draw. If other reasonable inferences can be drawn from the facts, then the court must have a doubt, and the accused must receive the benefit of that doubt.
- [21] On the facts before it, the trial court considered various pieces of evidence and concluded that the only reasonable inference to be drawn was that the appellant was a willing participant who was fully aware of what his companions intended to do after he had dropped them in Senderwood. The appellant however argued that the inferences were inconsistent with all the proven facts and that the proved

⁷ *R v Blom* 1939 AD 188.

facts do not exclude every other reasonable inference, one being that in fact the appellant's version is reasonably possibly true. The State held the view that the evidence against the appellant was overwhelming and that his version should therefore be rejected.

- [22] Among other evidence the trial court accepted the evidence of a pointing out and concomitant utterance by the appellant. The State placed a lot of emphasis on both the pointing out and the utterance which was accepted as an admission by the appellant that he was aware that crimes were going to be committed. Notably, however the appellant pointed out a passage next to 1[...] W[...] Avenue whereas the incident complained of happened at 1[...] T[...] Road. That significantly diminishes the value of the pointing out. It goes without saying that had the appellant pointed out 1[...] T[...] Road it would have been significant and of great value. The pointing out in fact lends credence to the version of the appellant that he was just the transporter, as he pointed out the place where he had dropped his passengers and where they entered a passage.
- [23] With reference to the utterance during the pointing out on 30 June 2013 which was recorded as "I dropped off Leonard, Vusi, Modise and Baker where they came to steal" it must be noted that the actual offences were committed four months prior to the pointing out. At the outset it must be noted that the pointing out took place long after the offences, approximately four months later. At that time, the appellant was fully aware that the offences had been committed, as he had been informed of the outcome when his companion returned to the vehicle. The key question is whether the phrase "where they came to steal" refers to the appellant's knowledge before he dropped them off, or whether it reflects knowledge he acquired after the offences had already been committed and subsequently conveyed to him.
- [24] The phrase is capable of more than one reasonable interpretation. One interpretation is that the appellant was informed of the commission of the offences only upon the return of his co-accused to the vehicle, and that his

reference to their coming “to steal” reflects information received thereafter. The alternative interpretation is that he was aware of their intention to steal before dropping them off. The appellant consistently maintained during the trial that he was unaware of their intentions when he transported them. Importantly, he was never questioned during cross-examination about the precise meaning he intended to convey with the phrase recorded during the pointing out.

[25] In circumstances where an accused person’s utterance is ambiguous and susceptible to an interpretation consistent with innocence, the court is obliged to adopt the interpretation that favours the accused, unless the State has demonstrated beyond reasonable doubt that the more incriminating interpretation is the correct one. Given the passage of time between the events and the pointing out, and given that the appellant had full knowledge at the time of the pointing out that the offences had indeed been committed, it is entirely plausible that he was referring to knowledge obtained *ex post facto*. The failure of the State to clarify, through proper questioning, what the appellant intended by the phrase deprives the utterance of the unequivocal meaning that the trial court attributed to it. Against the backdrop of the appellant’s steadfast version that he had no prior knowledge of the criminal intentions of his companions, and in view of the ambiguity inherent in the statement, it cannot be said that the State discharged its burden of proving prior knowledge beyond reasonable doubt.

[26] In the circumstances, the interpretation placed upon the appellant’s statement by the trial court is not the only reasonable one. The possibility that the appellant’s words referred to information obtained after the commission of the offence cannot be excluded. The court therefore finds that the pointing out has limited value and the utterance has no value and that it cannot be included as a consideration in determining whether the circumstantial evidence in the case is sufficient to prove the existence of a common purpose between the appellant and the known perpetrators. The limited value of the pointing out is brought about by the fact that the address where the offences was committed and the address pointed out were not the same.

- [27] The fact that the appellant knew that the others climbed over a fence after dropping them off at night must have alerted him to the fact that they were up to mischief and were not there for innocent purposes. Despite that he waited for them at a nearby bridge and collected Baker after he was called. He was content with waiting and collecting them as agreed. By waiting for them while knowing that they jumped a fence to gain access to a property as opposed to using an entrance/exit he associated himself with the fact that they were up to no good. There is however insufficient evidence to show that the appellant was aware that his companions were armed; that they were going to burgle a house to commit an offence or that they were willing to use firearms to overcome resistance should there be any.
- [28] The fact that the appellant had transported the perpetrators to the same location approximately a week earlier, that he waited for their return on both occasions, that he was in telephonic contact with certain perpetrators both before and after the commission of the offences, and that he subsequently pointed out the scene, does not justify the inference that he had formed a common purpose with those who committed the offences. It is suspicious but not the only reasonable inference that can be drawn from the evidence. The appellant's version, that he merely provided a transport service at Leonard's request, cannot be excluded. In the circumstances, the State has failed to disprove his explanation beyond reasonable doubt, and his convictions on all counts cannot be sustained.
- [29] The behaviour of the appellant, after the fact deserves scrutiny. It is common cause that when he picked up his co-accused after the incident, he was informed that there was a shootout and that the others and the homeowner had died at the scene. He drove off, returning him to Alexandra, without informing the authorities.
- [30] The law of participation deserves consideration and specifically whether the appellant made himself guilty as an accessory after the fact. Section 257 of the Criminal Procedure Act, 51 of 1977 (the CPA) as amended provides that if the

prosecution fails to prove the commission of an offence with which an accused is charged but proves that he was an accessory after the fact he or she may be convicted as an accessory after the fact. The authors Burchell and Milton in their work *Principles of Criminal Law* define an accessory after the fact as “... someone who unlawfully and intentionally, after the completion of the crime, associates himself or herself with the commission of the crime by helping the perpetrator or accomplice to evade justice.” They indicated that the case law seems to suggest two different approaches to the definition of an accessory after the fact namely a wide approach which merely requires that the accessory should have associated himself in a broad sense with the offence committed, and a narrower approach which requires that the association takes the form of assisting the perpetrator to evade justice. The authors appear to favour the latter approach and their definition which is based on that. Preiss AJA described the two approaches in *S v Nkosi and Another*⁸ and referred to most of the leading cases on the subject without deciding whether the wider or narrower approach should be adopted.

[31] In the case of *S v Morgan*⁹ the court of appeal preferred to follow the narrower approach and followed the above-mentioned definition by Burchell and Milton. In that case Corbett CJ with reference to *R v Jonqani*¹⁰ and *S v Jonathan en Andere*¹¹ accepted that *dolus eventualis* as the form of intention, was sufficient to render the accused criminally responsible as an accessory after the fact, and stated that: ‘*This would mean that if the accused had knowledge of facts which indicated to him the possibility that a crime had been committed by X, and the accused proceeded to help X, reckless of what the position was and with the required object, he would be guilty as an accessory after the fact.*’

[32] As a general principle, the mere failure by a member of the public to report the commission of a crime does not, without more, render that person guilty as an

⁸ *S v Nkosi and Another* 1991 (2) SACR 194 (A).

⁹ *S v Morgan and Others* (644/1991) [1993] ZASCA 94 (2 June 1993).

¹⁰ *R v Jonqani* 1937 AD 400 at 405.

¹¹ *S v Jonathan en Andere* 1987 (1) SA 633 (A) at 643 I – J.

accessory after the fact. In the present matter, however, the appellant was not an uninvolved bystander. He knew what had transpired; at the very least, he was aware that his co-accused were involved in the killing of the deceased and regardless of that removed him from the scene. Despite this knowledge, he took no steps to report the matter. Instead, he removed his co-accused from the scene and remained silent thereafter. Logic dictates that he knew that such conduct would assist his co-accused in evading justice, thereby facilitating his escape. There was no evidence before the trial court to suggest that his silence was motivated by a desire to exculpate himself. In the absence of any such evidence he is accordingly guilty as an accessory after the fact to the three counts of murder.

- [33] Section 257 of the CPA states that in the absence of any punishment expressly provided by law an accused who was convicted as an accessory after the fact is liable to punishment at the discretion of the court provided that it shall not exceed the punishment which may be imposed in respect of the offence with reference to which the accused is convicted as an accessory. An accessory after the fact cannot be punished more harshly than the perpetrator could have been sentenced. In imposing the sentence, it needs to be considered that the appellant willingly transported a perpetrator from the immediate vicinity of a crime scene where he knew serious crimes were committed and subsequently remained silent about it. The traditional sentencing factors namely the personal circumstances of the offender, the nature and seriousness of the offence and the interests of society need to be considered. The purpose is to satisfy the main aims of punishment which include prevention, retribution for what he has done, his rehabilitation and deterrence of himself and other potential offenders from committing similar offences. Having considered the personal circumstances of the appellant as it appears in the trial record, the mitigating as well as the aggravating factors the court considers a sentence of 10 years imprisonment on each of the three murder counts to be appropriate in the circumstances.

Conclusion

[34] The appellant was incorrectly convicted of the housebreaking with the intent to commit an offence, attempted armed robbery and the three counts of murder. The conviction of the appellant on all counts is not sustainable. On counts 1-3 the court erred by convicting him of murder as opposed to an accessory after the fact in respect of all three counts. In respect of the housebreaking and attempted robbery counts there is no evidence that links the appellant to the commission of the offences and he should have been acquitted on both counts.

Order

[35] In the circumstances, I make the following order:

1. The appeal against the three convictions of murder, housebreaking with intent to commit an offence, and attempted robbery with aggravating circumstances is upheld.
2. The order of the court a quo is set aside and replaced with the following:
“The accused is found guilty of murder (as an accessory after the fact) on each of counts 1 to 3.”
3. The accused is sentenced on the conviction of murder (as an accessory after the fact), to ten (10) years’ imprisonment on each of counts 1 to 3.
4. In terms of section 280 of the Criminal Procedure Act 51 of 1977, it is ordered that the sentences on counts 2 and 3 are to run concurrently with the sentence imposed on count 1.
5. The sentence is antedated to 11 December 2015, being the date of the original sentence.
6. No order is made contrary to the provisions of section 103(1) of the Firearms Control Act 60 of 2000; the appellant accordingly remains unfit to possess a firearm.
7. The immediate release of the appellant is ordered.

I. COX

**ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

I agree,

R. STRYDOM

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

I agree,

M. V. NOKO

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG**

Heard on: 17 November 2025

Delivered on: 26 February 2026

Appearances

For the Appellant: Adv. E. Crespi
Instructed by: Legal Aid, Johannesburg

For the Respondent: Adv. V. Sinthumule
Instructed by: The National Prosecuting Authority