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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,PRETORIA

DATE: 30/10/2015

CASE NO. A161/13

In the appeal of:

LEFU JANTJIE BAKANE **1st APPELLANT**

SELLO MOIMA **2nd APPELLANT**

ELIAS SEROMULA **3rd APPELLANT**

SIPHO MOHLONGO DLAMINI **4th APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

PRELLER J:

I have had the benefit of reading the judgment of my learned brother but reluctantly find myself unable to agree with the conclusion to which he has come.

The evidence was comprehensively dealt with in the judgment of the court *a quo* and there is no need to repeat it here. Suffice it to say that there were no misdirections in the judgment

and nor did counsel argue to the contrary.

The main problem in this appeal arose from a remark (perhaps made inadvertently) by the court *a quo* in its judgment on the admissibility of certainwarning statements and paintings out made by the appellants. The relevant passage reads as follows:

> **"We accept that some slapping and rough handling took place. The slapping could be classified as assault but not torture. I then exercised my discretion to accept the somewhat tainted evidence in so far as the assaults were concerned in the Interest of justice and for fear that the administration of justice would otherwise be brought into disrepute. Seein this regard S v. Molefe (sic, read "Malefo") 1998(1)(W) 127."**

(The latter judgment is reported in the South African Criminal Reports.)

Although the learned judge indicated elsewhere in his judgment that more would be said on this topic later in the judgment, nothing more in this regard was forthcoming from him. It is important to note that absent from the quoted passage (and the rest of the judgment) is any indication that he found any connection between the "rough handling" and the making of the statements and paintings out. The point that he makes about the administration of justice being brought into disrepute, is that the admission or not of evidence is always a balancing act between the constitutional rights of the accused and the interests of justice, lest the Bill of Rights be seen as nothing but a loophole for criminals through which to escape the consequences of their crimes.

The ruling concerned should be seen in the light of the fact that in respect of the fourth accused (who did not figure in the appeal) all statements made by him were disallowed because his constitutional rights were not adequately explained and respected by the police. As a result he was discharged at the end of the State case, despite the later remark by the

court that he was clearly also guilty of the same crimes as his co-accused. It is therefore clear that the court was well aware of the constitutional rights of the five accused and the discretionary nature of the exclusionary rule contained in section 35(5) of the Constitution. The sub-section reads:

> **"Evidence <u>obtained in a manner</u> that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."**

(Underlining added.)

The prohibition is against the admission of **evidence obtained by** a process that violates the constitutional rights of the accused. That means only that if the accused person has for example been tortured or assaulted in order to force information from him, that information must be excluded. No finding to that effect was made in the judgment. The rule does not mean that any improper conduct, even if unconnected to the making of the statement, results in the exclusion of evidence - that would be an application of the controversial rigid exclusionary rule of North American law.

The trial court is the primary trier of fact and this court can only interfere with a finding if we are satisfied that it is wrong. A vague suspicion that all was not kosher is not enough. Unfortunately we do not know exactly what the learned judge had in mind with his remarks, but the fact is that he considered every detail of the relevant evidence very carefully and came to the conclusion that the evidence should be admitted. In the process he expressly rejected the contentions of the appellants that they had been tortured, as well as their evidence that they had made the statements and done the paintings out under duress and that the information contained in it came from the police. That conclusion was not attacked by counsel in argument, except in so far as they simply argued on the

unfounded assumption that there was a causal link between the "slapping and rough handling" and the statements that were later made.

In my respectful view there was nothing wrong with the conviction and it must stand.

The four appellants were sentenced on the count of murder to imprisonment for life and to 15 years' imprisonment each on the count of robbery with aggravating circumstances. They had been properly informed of the minimum sentences that were applicable to the charges that they faced.

The applicable aggravating circumstances were the following:

- The attack on the deceased was planned in advance and was committed purely for personal gain. It was not a crime committed due to need;
- The deceased was a "soft target" and was attacked in his home where he ran a small shop;
- There was no need to kill the deceased in order to commit the robbery and the murder was a cruel and heartless one;
- There is no sign of remorse on the part of the appellants and they denied all involvement to the bitter end.

Not much could be raised by way of mitigating circumstances. The four appellants range in age between 21 and 29 years and were all regarded as first offenders. They had been in custody for five years awaiting finalisation of their trial, which is unfortunately not out of the ordinary for cases of this nature. The crimes had been committed in June 2004, they pleaded on 6 February 2007 and were sentenced on 21 August 2009. The record had to be partly reconstructed and the evidence, apart from the reconstructed part, runs to nine volumes. The appellants and their legal representatives were not without blame for the long duration of the

case. It would in any event not have been possible to make allowance for the period that they had spent in custody awaiting trial, since a life sentence is the only appropriate one for a crime of this nature.

In the case of the fourth appellant it was submitted that he had played a lesser role in the events as he had only acted as the lookout. Apart from the fact that the trial court rejected that version, that would not have detracted from his moral blameworthiness: See *inter alia:* S **v. Nglengethwa, 1996(1) SACR 737 (A).**

Although there are some mitigating circumstances present, there is nothing substantial and compelling in them that would justify a departure from the prescribed minimum sentence. See: **S v. Matyityi, 2011 (1) SACR 40 (SCA)** at p. 50,and the reference in it to the well-known case of **S. V. Malgas.**

In my view the appeal against both sentence and conviction should be dismissed and that is the order that I propose.

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F G PRELLR

JUDGE OF THE HIGH COURT

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date: 30/10/2015

Case No: A161/2013

In the matter between:

LEFU JANTJIE BAKANE First Appellant

SELLO MOIMA Second Appellant

ELIAS SEROMULA Third Appellant

SIPHO MOHLONGO DLAMINI Fourth Appellant

and

THE STATE Respondent

JUDGMENT

KHUMALO J (Concurring with **PRELLER J)**

[87] I have had the privilege of reading the judgment of both my brothers Manamela AJ and Preller J. Unfortunately I have to disagree with Manamela AJ that the Appeal by all four Appellants against their conviction and sentence for murder and robbery should be upheld. The Appellants were sentenced to imprisonment for life and 15 years for the murder and robbery respectively. I agree with Preller J that the Appeal on both offences should be dismissed, in respect of all the Appellants.

[88] It is not necessary to set out the evidence adduced in the court below as Manamela AJ has done that in some detail in his judgment. My view and position in the matter is informed by the approach advocated by the court in *Take and Save Trading CC v Standard Bank of South Africa* [2004] 1 All SA 597 (SCA); 2004 JOL 12516 SCA; 2004 (4) SA 1 SCA that:

> "A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is

not merely that of an umpire to see that the rules of the games are observed by both sides. A judge is an administrator of justice, he is not merely a figurehead, *he* ***has not only to direct and control the proceedings according to recognised rules of procedure but to*** **see** ***that justice is done."*** (my *emphasis)*

[89] Every person is ensured a right to fair treatment as a suspect and fair trial as an accused by the Constitution. Section 35 commands that arrest processes and criminal trials be conducted in accordance with the basic principles of justice and fairness. To guarantee the protection, subsection 5 thereof makes provision for the exclusion of evidence that has been procured in a manner that violates any right in the Bill of Rights, **if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice**. (my emphasis)

[90] To ensure a fair trial, a presiding officer or judge may therefore only consider evidence obtained legitimately, to establish whether or not an accused is guilty. However in terms of subsection 5, if the admission of the evidence would not render the trial unfair or detrimental to the administration of justice, even though it might have been obtained in a manner that violates a right in the Bill of Rights, it will not necessarily be excluded. Therefore not every violation of a right protected by the Bill of Rights leads to exclusion; see S *v Ndhlovu and Others* (2002] ZASCA 70; 2002 (2) SACR 325 (SCA). The section does not couple the discretion to exclude directly to the violation of a right as argued on behalf of the Appellants, but to the consequential unfair trial. Therefore, the jurisdictional prerequisite for the exercise of the discretion to exclude is the requirement of unfairness or prejudice to the administration of justice. What the subsection accords as fundamental and absolute, is the right to a fair trial.

[91] In S *v Tandwa* (2007] SCA 34 (RSA) para 116 Cameron JA observed the pro-

constitutional approach on the exclusion of improperly obtained evidence to be in these terms:

> 'The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.'

The rational of his observation being that the exclusion by the section extends beyond the fairness jurisdictional requirement to include public policy. As a result In S *v Mthombo* Cachalia JA proceeded to add another dimension to those observations that:

> "public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and

justifiable, the evidence is less likely to be excluded - even if obtained through an infringement of the Constitution.

[92] One of the main contentions raised by the Appellants in this Appeal is on the admissibility of their warning statements and the pointing out which was decided upon in a trial within a trial and their conviction on a planned robbery with aggravating circumstances and on murder on a doctrine of common purpose. To determine whether an accused has had a fair trial the Appeal court considers the irregularities allegedly said to have been committed by the court a quo in the context of all the evidence, as the court does not base its conclusion, whether it be to convict or acquit on only part of the evidence. The conclusion it arrives at must count for all the evidence; see *S v Jaffer* 1988 (2) SA 84 (C). The original record of evidence in this matter could not be found therefore a reconstructed version was made available, which posed a challenge albeit not serious in the proper assessment of the proceedings especially when the admissibility of the contested evidence was considered by the court a quo.

[93] As it usually happens in matters of this nature, the parties in casu agreed that the evidence led by the state in the trial within a trial will form part of the main trial to circumvent a situation where the witnesses would have had to lead the same evidence and be subjected to cross examination again; see *S v Nglengethwa* 1996 (1) SACR 737 (A) at 740h-741c. At the end of the parties' evidence on the merits, during the verdict stage the presiding officer Ranched J, when evaluating all the evidence led to establish the reliability or truthfulness thereof, inevitably also took into account the evidence led at the trial within a trial as part of the whole evidence, giving reasons for his decision to reject or rely on some of the evidence for the purpose of a conviction and made the following remarks:

'We accept that some slapping and rough handling took place. The slapping could be

classified as assault but not torture. I then exercised my discretion to accept the somewhat tainted evidence in so far as the assaults were concerned in the interest of justice and for fear that the administration of justice would otherwise be brought into disrepute."

[94] A mere observation which according to Manamela AJ was not supposed to be revisited "since the court had accepted even though somewhat tainted, the evidence in respect of the slapping or assault of the accused in the interest of justice, and saying to mention it past trial when determining the evidence's probative or evidential value (the guilt of the accused), was a mess up". I do not agree, since as indicated, the parties agreed that the evidence form part of the main trial's merits. It therefore had to be reconsidered and evaluated mindful of the conditions under which it was found admissible and balanced against its evidential value, as it was done by the court a quo. The court a quo clearly stated that the tainted evidence was in so far as the assaults were concerned (evidence regarding the assault) as they got the distinct impression that some of the accused were adjusting their evidence according to what was said by the other co-accused and the state witness. However the presiding officer exercised his discretion to accept the evidence about the assault in the interest of justice and for fear that the administration of justice would otherwise be brought into disrepute which it did by ruling inadmissible the warning statement and pointing out of Accused 4, even though the court felt in the light of the whole evidence he was guilty but for the gross violation of his rights, discharged him, the warning statements of Accused 2 whose credibility the court criticised, finding him to be the most unsatisfactory witness but due to the alleged slapping had to reject.

[95] Also, although it is correct that the admissibility of the evidence was already decided upon however, it must not be overlooked that the decision is not cast in stone and the court

could still decide at the end of the trial to exclude it, if as part of the merits its evidential value was found to exceed its prejudicial nature. What is key to the court when deliberating that point is to note that the finding on the admissibility of a confession or statement in a trial within a trial, is preliminary; see Hiemstra's *Criminal Procedure 24 -63,* so if other factors emerge later in the trial that cast new light on admissibility, the court can reconsider its ruling and amend it (S *v Mkhwanazi* 1966 (1) SA 736 A at 742H-743A. For that reason revisiting the issue at the end of the main trial during consideration on merits cannot be a mess up but logical; S *v Muchindu* *2000 (2)* SACR *313 (WLD) at 315 (g)* and *316 (f - g);* Therefore the court's comment during its evaluation of the weightiness of the whole evidence, that in the interest of justice and in fear of bringing the administration of justice into disrepute it accepted the evidence of assault and rough handling despite it being somewhat tainted was not inopportune and in so doing, did not err.

[96] In *Muchindu Schultz J* said in this regard at *316 g* the following:

> "This principle in itself shows that subsequent evidence in the main trial may decisively affect the determination of the issues in the trial-within-the-trial. If subsequent evidence may, why not also earlier evidence? What if before anyone even asked for a trial-within-a-trial the investigating officer in cross examination rejected a suggestion of the accused's innocence by proudly pointing out that after he had been beaten he confessed ? "

[97] It is, likewise not something new or rare to provide the reasons for finding the extra-curial statements or confession admissible at the end of the whole trial when dealing with the final decision. **The court a quo painstakingly at the end of the trial went through the whole trial within a trial providing extensive reasons why some of the statements were found inadmissible and others admissible. It was only where the court was**

unconvinced that the assaults happened and there being evidence that due process followed that the court accepted the admissibility of the statements. In all other instances where there was doubt about the assaults, the court rejected the statements and pointing outs. As courts are cautioned to guard against compartmentalising of the trial in multiple subdivisions, to rather consider any new evidence on the trial within a trial already held, if it emerges, at the end of the case. This principle is clearly enunciated in *Moshepi and Others v R* 1980-1984) LAC 57 and 59F-H in a statement of the court that:

> "The question for the determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking of evidence into its components parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. **Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence**. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, it is *Moshepi and Others v R* 1980-1984) LAC 57 and 59F-H in a statement of the court that:
>
> > "The question for the determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking of evidence into its components parts is obviously a useful aid to a proper understanding and evaluation of it. But, in

doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is, after all, a mosaic of proof. **Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when It is evaluated again together with all the other available evidence.** That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it, there is no substitute for a detailed and critical examination of each and every component in a body of evidence. But, once that has been done, **it is necessary to step back a pace and consider the mosaic as a whole.** If that is not done, one may fail to see the wood from the trees."(my emphasis)

[99] Hence as indicated, if the court had found, at the end of the trial on the merits, that the voluntariness of the evidence judged against all the evidence seems no longer obvious, following the tenets of justice and fairness on which our criminal justice system is built, the court would review its decision on the admissibility of the evidence in the light of the later evidence; see S *v Muchindu* 2000 (2) SACR 313 (WLD) at 315 (g)). This is a very delicate process the court navigates to ensure a fair process, balancing the rights of the accused against the interest of society whilst also making sure that criminal conduct is rightly and fairly prosecuted and punished.

[100] Further criticism has been directed at the court a quo for having considered the contents of the 1st Appellant's statements when dealing with its admissibility in the trial within a trial, specifically that the contents should have formed part of only the main trial. That is a general principle but it is subject to exceptions; see S *v Lebone* 1965 (2) SA 837 (A}; S *v Mafuya* 1992 92) SACR 381 (W)). The first exception finds application in the

instance where it is alleged by a deponent that the contents of the statement is false and had been provided to him by the police. In such an instance the State is allowed to cross-examine an accused person on the

contents of the statement in order to show that he was indeed himself or herself the source of that information and not the police as he alleges. The object of allowing cross-examination is not to show that the contents of the statement are true but to attack the credibility of the accused person (see p780 line 1 - 20 of Ranched J's judgment) which is exactly what transpired in this matter in respect of Accused 2, the 2"d Appellant. In *S v Letake* 1986 (3) SA 196 (A) it was proposed that where the court is assisted by assessors it is essential to test the accused in their presence to enable them, in terms of s 145 (4) (a) of Act 51 of 1977, to take part in deciding whether evidence of confession made by the accused is admissible against him.

[101] The second exception is applicable in the instance where the accused person admitted having given the statement himself or herself, however alleging that the contents of such a statement has been invented and that it was done in order to avoid being assaulted further by the police; see *S v Gxokwe and Others* 1992 (2) SACR 355 (C). This was the case with the Appellants, especially the 1•1 Appellant who made allegations that contents of his statement were false and provided to him by Spies. In *Gxokwe* at [12] dealing with those instances, the court expressed itself as follows on 358 (a - c):

> "As I understand the rationale of those decisions, it is that such an allegation by the accused is so much part and parcel of his attack upon the admissibility of his statement, and so, plainly relevant to the question of whether or not he was coerced or unduly influenced to make the statement, that in the interest of fairness the State must be permitted to explore by appropriate cross-examination the truth or untruth of

that particular allegation. The outcome of such cross-examination is obviously highly relevant to both the accused's credibility as a witness in a trial within a trial, and the control issue which is being considered in such a trial, namely the voluntariness of the tendered statement. I emphasise that here has to be a close logical correlation between the accused's allegation and the issues which are being considered in the trial within a trial before it becomes legitimate to cross-examine him upon the contents of his statement."

[102] A further situation where the exclusion of such evidence (outside the question of admissibility) is advocated to ensure a fair trial, is as per the Appellants complaint when it is the only evidence upon which the court is reliant for the purpose of conviction, or that links the accused to the offence. The weight to be placed on the confession/statement indeed does become an issue as, standing alone, it is regarded insufficient for a conviction. In this instance a confession as evidence for the purpose of a conviction is differentiated from a confession for the purpose of admissibility, where the weight thereof instead of its voluntariness becomes an issue. In respect of the purpose of a conviction, s 209 provides that:

"An accused can be convicted of any offence on the single evidence of a confession by such accused that he committed the offence in question, if such confession is confirmed in a material respect or, where the confession is not confirmed, if the offence is proved by evidence, other than such confession to have been actually committed."

Therefore before the court can convict on the basis of a confession two things should be present, that is:

[102.1] confirmation of the confession in a material respect; or

[102.2] proof by means of evidence other than the confession that the offence was in fact committed.

[103] What the subrule refers to as material respect is either corroboration or confirmation thereof, which was found in *R v Sikosana* 1960 (4) SA 723 (A) at 729 (C) that it could be provided by circumstantial evidence or any other evidence even from the accused himself. In the latter instance the courts are cautioned to exercise more restraint if that is the case. The required corroboration does not have to be in the form of evidence but can be by means of any other (extraneous reliability guarantors) probative material.

[104] It is the Appellant's contention that the court convicted them only on the basis of the admissions in the warning statements and the pointing out, therefore bar the statements there could be no conviction. Manamela AJ agrees with that submission on the assumption that the state led no evidence on the merits except that of Tupper. See Paragraph [93] about what the parties agreed upon regarding the repetition of the evidence in the main trial, see also Harms JA's comment in *S v Nglengethwa supra* at 740h-741c regarding the trend of taking into account evidence led at the trial within a trial for the purposes of the merits, to avoid a repetition. So all the evidence led by the state at the trial within a trial formed part of the main trial.

[105] It is therefore not correct that the admissions made by the accused in their warning statements (and not confessions as sometimes referred to by Manamela J) and the evidence on the pointing out was the only link or evidence upon which the Appellants were convicted, the following findings by the court a quo are noted that indicate that various parts of evidence linked the Appellants to the offences. The sequence thereof being: first evidence linking 1•1 Appellant found, leading to his arrest and thereafter to the arrest of his co-perpetrators and conviction, which was :

[105.1] Pieces of clothing found 80 to 120 meters near the scene of crime. Officer Tupper testified that based on information he received from the community, the 1st Appellant was seen wearing these clothes during the period when the deceased was murdered.

[105.2] The butcher knife that the 2nd Appellant had testified belonged to the 1st Appellant found near the crime scene.

[105.3] Failure to prove an *alibi* that is raised after a *prima facie* case has been established and evidence by the Appellants themselves that is contrary to the alleged alibi.

[105.4] The unreliability of their evidence resulting in the court a quo making a negative credibility finding against the Appellants.

[105.5] 1st and 3rd Appellant, ("Seromula"), chose to answer questions, after being warned that they did not have to answer without legal representation, and that one can be organised for them. Both Appellants admitted being present at deceased's place with 4 other people around the time when another witness Johannes Theledi saw 5 people running out of the deceased's place. Although Theledi denied that the 5 people he saw were the Appellants the court did not accept his denial as he had testified that he could not see their faces therefore it found that it was not possible for Theledi to deny or confirm if it was the Appellants. Their statements and Theledi's evidence placed them at the scene of crime. Theledi's statement ties up with the 2nd Appellant's evidence that they ran away when Theledi, who stays in the plot, arrived.

[106] The proposition that the police should have insisted or encouraged the Appellants to

get legal representation notwithstanding their choice to answer the questions without such representation and the suggestion that any incriminating answers or linking of the crime to the accused emanating from such answers should as a result be declared inadmissible is too constricting. There is no obligation on the police to advise the accused how best to exercise his or her constitutional rights; see *S v Mngeni* 2013 (1) SACR 583 (WCC) [114] - [116]. It is therefore sufficient that they were told that they have a choice to answer the questions in the presence of a lawyer and that one can be arranged for them. Froneman J in *S v Melani* and Others 1996 (1) SACR 335 explained the right as follows:

> "the purpose of the right to counsel and its corollary to be informed of that right ... is ... to protect the right to remain silent, the right not to incriminate oneself and the right to be presumed innocent until proven guilty."

[107] The warning statements of the 2nd Appellant, Moima was rejected precisely on the basis that he was not warned of this right whilst his pointing out admitted because then he was made aware of his rights including his right to legal representation. In *S v Vumase* 2000 (2) SACR 579 (W) the court confirmed that the requirement that the accused be warned as to his rights does not mean that a policeman who arrests the accused has to advise or encourage the accused to obtain legal representation before making a statement. I have already elaborated on finding corroboration on circumstantial evidence or statements or admissions made by the Appellants themselves even during the trial which is applicable to all the Appellants.

> [105.6] Furthermore, Theledi incidentally at the time was staying in the deceased's yard whilst three months before the murder of the deceased, 1st Appellant was a tenant at the deceased's place as well. Theledi was also friends with 1st Appellant's sister and came often to their house visiting the sister.

Theledi knew and grew up with the father of the 3rd Appellant. Therefore knows him very well. He was also familiar with seeing 4th Appellant around the area. 2ndAppellant looked after him when he was sick with asthma. Therefore there is no chance that Theledi would not recognise the Appellants when they were coming out of the deceased's place. If Theledi called the police and he was able to identify whether or not the suspects were the perpetrators, and they indeed were not the perpetrators, it is unlikely that at the arrest of the Appellants and their incarceration for three years he would have kept quiet and not inform the police that they arrested the wrong people. All this pointed to the guilt of the Appellants outside their statements.

[108] Taking into account all the above circumstances, it is therefore not true that the court a quo almost relied exclusively on the extra-curial statements and pointing out to convict the Appellants.

Common Purpose and Conspiracy

[109] Manamela AJ criticises the court a quo for finding that there was conspiracy to commit robbery and murder he says the common purpose of the Appellants was to go and steal. Further he states that in his view if there was conspiracy, it was for theft. He however says the appellants were not charged with conspiracy, but having committed the offences with a common purpose; see Par 64] and [65] of the judgment. **[43] and therefore laments that he is not entirely certain as to why the trial court found conspiracy to be applicable, as opposed to common purpose.** On par [82] and [83] he comments further that the court held that there was proof of prior arrangement amongst the Appellants and held that common purpose was not applicable. He argues that the court found that there was conspiracy amongst the Appellants to robbery and murder even though conspiracy was not part of the indictment, so not the charge the

Appellants faced.

[110] The Appellants as *per* indictment, were charged with murder and robbery with aggravating circumstances. According to the summary of the substantial facts provided in the indictment in terms of s 144 (3) (a) of Act 51 of 1977, the facts that the State intended to prove against the Appellants were, inter alia, that the Appellants had conspired or planned to rob the deceased. It is therefore not correct that conspiracy was not part of the indictment. It was also the State's intention to prove that the accused when murdering the deceased acted with a common purpose (probably on the murder charge).

[111] With regard to the Appellants conspiring to go and rob the deceased, evidence led established that 1st Appellant explained that "he went to look for money", "It was the old man's money that **we wanted to take."** He also explained how they then robbed the deceased. Whilst the 2"d Appellant's statement was that the 1st Appellant had stolen cigarettes from the deceased before and had **"planned with them to go and steal again saying he wants money."** With regard to the 3rd Appellant when the deceased was being overpowered with violence he robbed the deceased of his cigarettes plus liquor and ran. The 4th Appellant said **1st and** 3rd **Appellant said** to him that **they should go to Masheshe because there is money there.** So they were all agreed to go and rob the deceased of his money (the fact that other things stolen as well of no consequence, there was a conspiracy). Abandonment of the scheme after this stage is no defence; see *C R Snyman on Criminal Law 297* on *"General aspects of act of conspiracy".* The parties did not have to agree about the exact manner in which the crime was going to be committed. 3rd Appellant therefore could not have disassociated himself as suggested by Manamela AJ .

[112] The court a quo correctly found that as a result of the Appellants' prior agreement the principles of common purpose do not apply; see *S v Moumbaris* 1974 (1) SA 681 (T) 687A-B. Since the Appellants' conspiracy has been followed by the commission of the crime envisaged, the deceased being robbed albeit with aggravating circumstances, the Appellants (as conspirators) were charged as co perpetrators of the commission of the crime itself; as set out by the authorities; see S *v Milne and Erleigh* (7) 1951 1 SA 791 (A) 823; S *v* Fraser 2005 (1) SACR456 (SCA) par 7. The conclusion by Manamela J that the 3rd Appellant ran away and therefore was no longer part of the conspiracy is incorrect. He could not escape being responsible for the murder as when he took the cigarettes the deceased was being strangled. The fact that he ran away could not exonerate him from liability of the deceased's murder. Abandonment at that stage was not possible.

[113] As it was mentioned that the deceased was strangled during the robbery and all five of the Appellants were seen running away from the scene of crime, the implication is that all five Accused as charged were present there, aware of the assault on the deceased. They were aware that the deceased would be in the house that is why the pretence about charging the battery. They must have also been aware that the deceased would resist a robbery and would need to be overpowered. They therefore not only conspired to rob the deceased but to do so by violent means

(his death being foreseeable). The murder of the deceased was correctly imputed to all of them even though evidence pointed at 1st and 2nd Appellant being the executioners.

[114] The court a quo consequently correctly found the state to have proven beyond reasonable doubt that the Appellants were responsible for the robbery and murder of the deceased.

[115] On sentence, the accused have been found guilty of violent crimes for which the legislature has ordained minimum sentence that can be imposed as in *S v Vilakazi* 2009 (1) SACR 552 (SCA) the court held that:

> "Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of "flimsy grounds that Malgas warned that should be avoided."

The court actually went to as far as mentioning that in some violent crimes the circumstances that are personal to the offender will recede to the seriousness of the crime.

[116] The courts have been warned not to lose sight of the objectives of the Minimum Sentence Act under which the accused have been charged and found guilty. In *S v Malgas* 2001 (1) SACR 469 (SCA) it was said such objectives should be the uppermost in the mind of the trial court when imposing this sentence as it was described as a measure aimed to responding to:

> "[A]n alarming burgeoning in the commission of crimes in the kind specified resulting in the government, the police, prosecutors and the courts constantly being exhorted to use their best efforts to stem the tide of criminality which threatened and continues to threaten to engulf society."

[117] I therefore agree with Preller J that the Appeal against conviction and sentence be dismissed.

_____

NV KHUMALO

JUDGE OF THE HIGH COURT G

AUTENG DIVISION, PRETORIA

FG PRELLER

JUDGE OF THE HIGH COURT OF SA:

GAUTENG DIVISION, PRETORIA

I agree and it is so ordered.

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Date: 30/10/2015

Case No: A161/2013

In the matter between:

LEFU JANTJIE BAKANE	First Appellant
SELLO MOIMA	Second Appellant
ELIAS SEROMULA	Third Appellant
SIPHO MOHLONGO DLAMINI	Fourth Appellant

and

THE STATE	Respondent

DATE OF HEARING **10 NOVEMBER 2014**

JUDGMENT

MANAMELA AJ (PRELLER *ET* KHUMAL DISSENTING IN SEPARATE JUDGMENTS, BOTH CONSITUTING MAJORITY JUDGMENT)

FOREWORD:

I have read the judgment by my colleagues Preller J received on 14 September 2015 and Khumalo J received on 23 October 2015. However, I do not agree with the conclusions reached therein and the reasons for the conclusions. My views and conclusion appear below in a judgment prepared and sent to both judges on 03 February 2015 and do not include the quoted words attributed to me in paragraph [94] of the judgment of Khumalo J.

INTRODUCTION

[1] On 13 July 2009, the appellants were convicted on counts of murder, and robbery with aggravating circumstances by Ranched AJ (as he then was) assisted by an assessor (the trial court). They were sentenced to life imprisonment for the murder conviction and 15 years imprisonment for the robbery. The trial court found that there had been conspiracy amongst the appellants in committing these criminal offences, although the indictment states that they acted in furtherance of a common purpose. They are now appealing both their conviction and sentence with leave of the trial court. The appeal is opposed by the State.

[2] The appellants were charged, together with a fifth man, a Mr Amos Khoza for the robbery (of four cellphones; an unknown amount of cash and four remote controls) with aggravating circumstances and the unlawful and intentional killing of Mr Johannes Albertus Mare. [1] They are said to have gained access to Mr Mare's house,

from which he also operated a small shop or colloquially a *spaza,* under false pretences; robbed and "strangled him with an instrument"[2] . They all pleaded not guilty to the charges; offered no plea explanation and were legally represented. Mr Khoza was discharged in terms of s 174 of the Criminal Procedure Act 51 of 1977 (the CPA).

[3] The appellants' conviction was based on incriminating written warning statements and pointing out reports, ruled admissible as confessions or admissions by the trial court, against the appellants' protestations that the confessions were either coerced from them or attributed to them without their input (thus fabricated) by the police. They uniformly argued, before the trial court and before us on appeal, that

they were assaulted and threatened by the police to sign the statements and make the pointings out. Therefore, with these being violations of their constitutional rights,[3] they contend, the material produced ought to have been excluded by the trial court. They further argue that, even if the trial court was correct in ruling the statements and reports admissible, their respective contents do not sustain their conviction. Consequently, a trial-within-a-trial was held to deal with the admissibility of the impugned documents.

[4] The appellants testified, both in a trial-within-a-trial and the main trial, and some of them even called witnesses in their defence. They distanced themselves from the crimes and uniformly stated that they had been at work (at a place called Why Not Wood) on 22 June 2004, when Mr Mare was murdered at his house at Plot [.....] D. S., Timsrand, Pretoria. The trial court lamented the fact that their *alibi* defence had not been raised earlier, presumably as part of their plea explanations, but only later in the trial-within-a-trial. The trial court's view was that this did not give the police enough opportunity to follow up or investigate the claims. Also, the trial court was unimpressed with the fact that the appellants did not call their employer to confirm their whereabouts on the day the crimes were

committed. These statements by the trial court do not appear to have appreciated that more than 18 months elapsed between the trial-within-a-trial[4] when the *alibi* defence was raised, and the main trial[5] In my view, the State had ample opportunity to cause an investigation to be conducted regarding the appellants' claims. It is also incorrect that the police became aware that the accused [or at least the fourth appellant] were employed only during the trial-within-a-trial. Captain Christoffel Johannes Smit, who had been involved in the fourth appellant's pointing out, told the trial court that the fourth appellant had given his work address as Why Not Wood, Laezonia.[6] However, I am aware that, this was not mentioned as an *alibi* defence at that time. Therefore, even if the State generally bears the burden of proof on the charges, it is also a principle of our law that the accused has a duty to present evidence in support of his or her *alibi* defence, as the mere *ipse dixit* of the accused is of little probative value.[7]

Evidence must be presented which properly places the issue in dispute, so that a trial court can properly consider the truth of the *alibi.* I am not satisfied that the appellants presented sufficient evidence to enable a finding in their favour in this regard. They could, even with the limitations imposed by their incarceration, have adduced more details about the veracity of their employment, possibly with the help of their legal representatives. Therefore, I agree with the rejection of their *alibi* defence by the trial court.

[5] As stated above, the appellants also contend before us on appeal that, even with the admittance of the confessions the convictions are unsustainable, as their contents do not support the convictions on robbery and murder. However, the principal ground of appeal is located in the following *dicta* from the judgment of the trial court:

> *"We accept that some slapping and rough handling took place. The slapping could be classified as assault but not torture. I then exercised my discretion to accept the*

somewhat tainted evidence in so far as the assaults were concerned in the interest of justice and for fear that the administration of justice would otherwise be brought into disrepute." [8]

[italics and underlining added]

[6] The trial court - to a great disadvantage of this court of appeal I must reluctantly add with respect- did not expound on the statements quoted above, in its judgment. Therefore, it is unclear from the record, reconstructed as it may be, to determine the source of the trial court's findings. It is trite that a court of appeal does not have the advantage of being steeped in the atmosphere of the trial like a trial court, and only depends on the written word of the record, which is not always helpful regarding some aspects of the matter in hand, including those to do with credibility of the accused and witnesses. Be that as it may, the findings appear to have been of such significance to the judgment of the trial court that, even leave to appeal to this court appears to have been granted exclusively on the basis thereof.

[7] However, the above statements by the trial court are indicative of a predicament the trial court may have found itself to be in when deciding the admissibility of the confessions. For, it accepted that the appellants were assaulted or slapped and that this somewhat tainted the evidence before it, but then proceeded to accept the evidence in the interests of justice. In my respectful view, this predicament was avoidable, because the slapping or assault was only relevant at the stage when the admissibility of the confessions was determined in the trial-within-a trial. At that stage only the admissibility[9] of the confessions was to be determined and not the guilt of the appellants [10]

The court had to rule there and then on whether the slapping or assault contributed to the voluntariness in the making of the confessions. The issue could not have been kept hanging

or undecided, as it appears - with respect - to have been the case at the end of the trial-within-a-trial in this matter. The trial court appeared to have moved on to determine the probative or evidential value of the confessions, still in doubt or undecided about their admissibility. This led to what I have labelled the predicament. At the end, the trial court appears to have found itself having to balance, on the one hand, the interests and rights of the accused, particularly those attaching to fair trial, and on the other hand, the interests of society regarding the administration of justice. This is always a very delicate balance and unfortunately the scales had to tilt to only one side and it did so in favour of the State, hence this appeal, whose grounds Ideal with, next.

GROUNDS OF APPEAL

[8] I have already stated above that, the appellants, in the main, challenge their conviction predominantly due to the findings of the trial court that they were indeed assaulted by the police. They argue that their confessions are the fruits of these unlawful police acts or fabrications by the police. Then, there is the almost lateral challenge to their main one, which is to the effect that the contents of the confessions are not supported by other evidence and on their own do not sustain the convictions, as they fail to meet the essentials of the crimes of robbery[11] and murder[12]. Although their grounds of appeal are significantly similar, I consider it warranted to deal with the main grounds, which I consider dispositive of the issues in this appeal. I deal with the grounds per appellant.

First Appellant ***(Bakane)*** ***[13]***

[9] As it was the case with all accused, the first appellant was legally represented during the proceedings before the trial court. He was convicted on the basis of admissions he was found by the trial court to have made. The admissions were in the form of answers he gave to questions posed by Captain Johannes Marthinus Spies, as part of a warning

statement (Exhibit H)[14] he signed after his arrest. The questions and answers are contained in a schedule to the statement *(Bylae B*)[15] It is common cause that Bakane refused to make a statement, but was said to have agreed to answer questions. I deal with this issue a little later below. *Bylae B* comprises of a set of 9 questions and answers posed by Spies to Bakane, aided by the interpretation of Senior Inspector Nhlane Onismus Mashabela from Afrikaans to Sotho and *vice versa.* Mashabela admitted during cross-examination in the trial- within-a-trial that Spies did not write what he was interpreting. [16] I will deal with the contents of these documents later below.

[10] Other than disputing that the material in *Bylae B* was freely and voluntarily procured, due to the police assaults and threats, it is also submitted on behalf of Bakane that, the police violated his legal right to remain silent when they proceeded to ask him questions, despite his assertion against making a statement. Bakane submits that the trial court erred in rejecting his evidence in this regard.[17]

[11] Bakane also argues that he was not advised of his constitutional rights when he was arrested and that the police failed to serve him with a document called a Notice of Rights. T[18]he State failed to produce a copy of the Notice of Rights given to Bakane.[19]

[12] It is also submitted the trial court misdirected itself mainly in the following respects.

> [12.1] By considering the contents of Exhibit H when dealing with the admissibility thereof in the trial-within-a-trial.[20] The contents should have formed part of only the main trial. I have already dealt with this issue briefly above[21] , but will revert to it below.
>
> [12.2] By incorrectly using the material obtained during the trial-within-a-trial in convicting the appellants. It is submitted in this regard that, the state failed to adduce evidence linking the accused with the crimes after the trial-within-a- trial.

[12.3] The trial court found that a common purpose or conspiracy existed amongst the accused when the crimes were committed, but from Exhibit H or *Bylae B* thereof, no inference can be drawn of prior agreement to murder the deceased. There is also no evidence or indication that Bakane associated himself with the killing of the deceased or that he was in fact in the same room when the deceased was strangled. This submission is expounded to the effect that, as s 219 of CPA proscribes the admissibility of a confession by one person against another person,[22] therefore, none of the confessions and pointing-out by the other appellants ought to have been considered to supplement the deficiencies in the State's case, whether the statements amount to admissions or confessions. It ought to be mentioned, even at this stage, that the trial court found that there was conspiracy amongst the accused,[23] although the indictment stated common purpose.[24]

[12.4] By not appreciating that the State and not the accused has the onus to disprove an *alibi* defence regarding the fact that the appellants were at work when the offences were committed. I have already associated myself fully with the trial court's finding in this regard.[25]

Second Appellant **(Moima)**

[13] Moima is said to have made a warning statement and a pointing out. The trial court ruled the warning statement (Exhibit C) inadmissible because the certificate confirming that the contents thereof were read back to Moima by the police was not completed or signed by Moima and no language interpretation was used. However, the trial court admitted the pointing out (Exhibit F).

[14] Further from arguing that freedom and voluntariness were absent for the pointing out, he submits that the trial court erred in rejecting the evidence of Mr Johannes

Theledi,[26]especially regarding the identity of the appellants. Theledi testified that the appellants (and the discharged accused 4) are not the five men he encountered on the day the deceased was murdered. Moima also challenges the reasonableness of the inference drawn by the trial court that Theledi is shielding the accused, considering that Theledi always stated that he was assaulted by the people he encountered at the crime scene.

Third Appellant **(Seromula)**

[15] Seromula was convicted on the basis of a warning statement (Exhibit J)[27] and pointing out (Exhibit G[28]), he was found by the trial court to have made. The essence of his grounds of appeal are centred around the remarks of the trial court about assault or slapping, referred to above[29], and consequently that the so-called admissions or confessions were not freely or voluntarily made.

Fourth Appellant **(Dlaminil**

[16] The trial court admitted a warning statement (Exhibit E[30]) it ruled Dlamini had made. Consequently his grounds of appeal also concentrate on the remarks of the trial court about slapping or assault to entrench his arguments that the statement was not freely and voluntarily made.

[17] Dlamini also submits that the trial court erred in finding the evidence supporting conspiracy to kill the deceased, as he distanced himself from the murder. It is added that, the murder of the deceased was not possibly foreseeable by Dlamini and therefore, at best, the evidence relating to him supports robbery and not murder.

THE STATE'S OPPOSITION* OF *[OR ARGUMENTS ON] APPEAL

[18] I indicated above that the State, as the respondent in this appeal supports both conviction and sentences by the trial court. However, in mounting such support the State has

to contend with the remarks or findings of the trial court, as stated above, regarding the slapping or assault of the appellants enmeshed in that court's judgment. To clear this patent hurdle, the State had methodically dissected the evidence before the trial court, in order, to prove that there was no proven assault or unlawful incidents which unduly influenced the making of the statements by the appellants. Part of this submission, in my opinion, is incorrect and unavailable to the State. I deal with this next.

[19] The State cannot argue in this appeal that there was no slapping or assault on the appellants when this is the finding of the trial court. However, it behoves the State to dispute that the slapping or assault did not influence the freedom and voluntariness required when making confessions or admissions. The State is alive to this avenue. To this end, it dealt extensively with the appellants' contentions that the statements should have been disallowed due to the assaults and other violations by the police. However, there is another submission made, in this regard, on behalf of the State that the trial court found that the slapping and gloving did not influence the making of the admissions.[31] This, in my respectful view, is incorrect. The trial court did not make any direct finding about whether the slapping or assault influenced the voluntariness and freedom of making the confessions. This is only mentioned in the judgment granting leave to appeal [by that court] to this court.[32] But, perhaps even the argument that the slapping did not influence the admissibility of the admissions, may not be entirely available to the State, when looking at the material content of the trial court's judgment. [33]

[20] The trial court mentioned in its judgment that it considered the evidence "somewhat tainted"[34] . I have already lamented the fact that, the trial court did not explain what it meant by these and other words in the impugned statements. Therefore, any analysis of its judgment in this regard may possibly resemble some decoding of words. In my view, the

tainting of the evidence is only possible, if the trial court was convinced that the assault or slapping had an influence on the making of " the statements by the appellants. In its judgment granting leave for this appeal, the trial court stated the following:

> *"In my view another court may well come to a different conclusion as regards the slapping, to what extent it might have affected the voluntariness issue ..."**[35]***

[italics and underlining are added]

I interpret the above passage, especially the underlined words, to mean that for the trial court the issue of voluntariness can be measured in degrees. In other words, a confession may be made involuntarily or with undue influence which is of such a lesser degree that it would not adversely affect the admissibility of a confession. I respectfully differ with such an approach. I understand the principles underlying admissibility to be that, once the evidence before the court proves that the statement was involuntarily made, it is therefore inadmissible.[36] It would therefore not matter whether one classify the slapping *"as assault but not torture",* as held by the trial court[37]. I am aware that not every degree of influence will afford sufficient grounds for exclusion[38], but once influence is considered to be undue (influence}, the relevant threshold is reached for exclusion. This is not advocacy of automatic exclusion of unconstitutionally obtained evidence. In my opinion, by admitting the confessions found to have been made by the appellants, trial itself was rendered unfair and the administration of justice was brought into disrepute.[39] The trial court ought to have excluded the statements based on its findings of the slapping and gloving. Besides, our courts have applied international conventions on confessions which hold torture can also be mental, let alone slapping or gloving.[40]

[21] Therefore, considering the above, it is my view that, it does not avail the State to argue that the slapping or assault did not influence the freedom and voluntariness of the appellants

when they made the impugned confessions. These are findings of fact by the trial court. I will therefore proceed to look at other issues after determining the decisive issues in this appeal, garnered from the appellants' grounds of appeal discussed above.

ISSUES TO BE DETERMINED IN THIS APPEAL

[22] From what is stated under grounds of appeal above, I consider the central issues dispositive of this appeal to be the following. Firstly, whether the trial court erred in ruling that the warning statements and pointing out reports were admissible, when it also found that the appellants were slapped or assaulted? Secondly, whether the contents of the warning statements or pointing out reports support convictions of murder and aggravated robbery? And finally, whether there was a conspiracy to commit robbery and murder? The second and final questions are interlinked.

[23] I have already answered the first question in the discussions above. As for the other two questions, I will deal with them both in the discussions that follow. Firstly, I deal with the applicable law, and thereafter analyse the critical evidence before the trial court and its findings.

APPLICABLE LAW

[24] Many legal principles are touched by the findings of the trial court or otherwise find application due to the contentions raised in the grounds of appeal. Therefore, I deem it warranted to dedicate some special attention to some of these principles. In my view, this will later facilitate discussions of the pertinent issues of this appeal.

Confessions or admissions (and admissibility thereof)

[25] A confession is defined in ***R v Becker*** 1929 AD 167 as an unequivocal acknowledgement of guilt, the equivalent of a plea of guilty before a court of law. All elements

of the criminal offence have to be admitted and possible defences should be excluded.[41] The definition in *Becker* posed a problem for the courts over the years, in particular regarding whether the subjective intention of the declarator or maker is decisive or whether the contents should be viewed from an objective sense. In S *v* ***Yende*** 1987 (3) SA 367 (A) the court held that an objective analysis was preferable when determining whether a declaration meets the requirements of a confession, but surrounding circumstances may also be taken into consideration. This will be relevant and important when discussing the contents of the confessions and other admissions later below.

[26] In our criminal law, admissibility of confessions is primarily governed by s 217 of the CPA[42] . This statutory provision prescribes requirements that are to be met for a confession to be admissible in evidence against the maker thereof at criminal proceedings relating to an offence in respect of which the maker is indicted. All confessions have to have been freely and voluntarily made by the particular person in his sound and sober senses, and without having been unduly influenced. As it has become clear already above, the freedom and voluntariness requirements for a confession, constituted some of the core issues in this appeal. The issue of voluntariness has already been disposed of. The remaining core issues are the actual content of the confessions or what has been found by the trial court to be confessions. What is critical about these is whether the trial court was correct in finding that there was acknowledgement of guilt by the appellants, covering all elements of the offences (i.e. robbery and murder) in the indictment. I deal with the elements of the crimes of robbery and murder before going into the contents of the confessions.

Essential elements of a crime of murder

[27] Murder consists of *"the unlawful and intentional killing of another person".****[43]*** Therefore,

the essential elements thereof are: (1) unlawful; (2) killing; (3) of a person; (4) with intention. For current purposes, only three of these elements are critical. I briefly deal with them next.

[28] *Unlawful:* Where the perpetrator has a defence excluding unlawfulness, the intentional killing of a human being by the perpetrator is not unlawful.[44]

[29] *Killing:* Human life is very sacred and it enjoys unlimited protection. Therefore, all types of killing of a human being are prohibited. Death may be caused by direct means as in shooting or stabbing, or indirect means, like where the victim is frightened by someone and suffers a fatal heart attack.[45] However, whether a direct or indirect method of killing is employed, it is essential to establish that the means employed did cause the victim to die. In other words, it must be proved that, but for the accused's conduct the victim would not have died when he did.[46]

[30] *Intention:* It must be proved by the state or prosecution that an accused or perpetrator had the intent to kill. Intention may take the form of *dolus directus, dolus indirectus* or *dolus eventualis.**[47]*** However, *dolus eventualis* suffices for a conviction on a murder charge.[48]

[31] Therefore, for the conviction of the appellants in this matter, the trial court would have found the aforesaid elements to be present or indicated in their warning statements or admissions. This will be determined when the contents of the confessions are discussed below.

Essential elements of a *crime of robbery*

[32] According to Burchell's *Principles of Criminal Law* robbery *" . ..consists in the theft* of *property by intentionally using violence or threat of violence to induce* a *person to submit to the taking of the property." **[49]***The same textbook denotes the essential elements of robbery to be: (1) theft; (2) violence (in the form of force or threat of force enough to

constitute assault); (3) submission; and (4) intention.[50]

[33] *Theft:* It is a trite fact of our law that robbery is a form of theft and that no conduct constitutes robbery, unless it is also theft.[51] It therefore involves two acts, being the taking or removing and appropriation of property of another, and the performance of an act of force on the person of another.[52] Further, the act of theft (meeting its essential elements) must be completed, otherwise the conduct may only constitute assault.[53]

[34] *Violence:* As already stated above, other than an act of theft, the second required act for robbery is violence, in the form of physical force or threat of force. The latter should be sufficient to constitute assault and must be aimed at inducing the victim to submit to the taking of the property.[54]

[35] *Submission:* The violence or act of force or threat of force directed to a victim of robbery stated above, should be aimed to induce the victim to submit or not to resist the taking of the property. The resistance could be actual or potential. In the latter instance a robber act forcefully or threaten to do so in pre-emption or anticipation of resistance from a victim.[55]

[36] *Intention:* What is discussed generally under the essentials of a crime of murder as the three forms of intention may find relevance here.[56] For an accused to be convicted of a crime of robbery, he must also harbour an intention to commit robbery. In other words, there must be evidence proving that the accused intended to steal the property of another and intended to use force or threats to diffuse any resistance and thereby induce submission by the victim to the taking of the property.[57]

Robbery with aggravating circumstances

[37] Although it is not a constituent element of the crime of robbery, I deem it

appropriate to briefly deal with this topic as the appellant herein were convicted of robbery with aggravating circumstances. S 1 of the CPA defines *"aggravating circumstances"* for purposes of robbery. These include the wielding of a firearm or any other dangerous weapon or the infliction of (or threat to inflict) grievous bodily harm.

[38] The court found that they had conspired to rob and murder the deceased and that a knife was wielded during the commission of these crimes. The indictment had made reference to common purpose. Therefore, Ideal briefly with the legal principles relating to common purpose and conspiracy, for completeness.

THE DOCTRINE* OF *COMMON PURPOSE

[39] As alluded to above, the appellants are stated in the indictment to have acted with a common purpose when committing the crimes. However the trial court found that there was a conspiracy. I will nevertheless and for completeness briefly discuss the doctrines of common purpose and conspiracy. Common purpose is applicable where two or more persons collude in an undertaking with an unlawful purpose. However, each will be responsible for the acts which the other performed in furtherance of the common purpose, if he or she foresaw the possibility that the other could perform that act in the furtherance of their common purpose, and was indifferent to such acts and their consequences. [58] Proof is required that the participant actually foresaw the act of the other and was indifferent to the result.[59]Also, the doctrine does not connote vicarious liability, but is based on the guilt of the participant *(mens* raa).[60] Each of them ought to be connected on the basis of his or her own knowledge of wrongfulness or guilt.

[40] In **S *v Mgedezi and Others*** 1989 (1) SA 687 (A), which appear to have been relied upon by the trial court for its findings[61] , it is stated that where there is no proof

of prior agreement and no causal link to the death or wounding of a victim is proved, the

accused can only be held liable for the death or wounding if five pre-conditions are present, being, "presence at the scene of the violence"; "knowledge of the assault on the victim"; "the intent to make common cause with those who in fact committed the assault"; "manifest participation in the common purpose with the perpetrators of the crime by some or other act of association with the conduct of the others", and "presence of the necessary *mens* raa with regard to the killing of the deceased, *dolus diractus or dolus eventualis".**[62]***

[41] *Mgedezi* was an attempt by the courts to elucidate the application of common purpose in mass actions as previously done in **S *V Safatsa and Others*** 1988 (1) SA 868 (A). I am not entirely certain whether the court intended to apply the principles in *Mgedezi* or if it wanted to refer to another case.[63]

CONSPIRACY

[42] As stated above the court applied the principles of conspiracy as opposed to common purpose, despite the latter being part of the charges. Conspiracy is an agreement between two or more persons to commit a crime. The parties must be *ad idem* as to their purpose and the agreement be such that it would have been enforceable had it been legal. [64]

[43] I must say that I am not entirely certain as to why the trial court found conspiracy to be applicable, as opposed to common purpose. I will discuss this and the other applicable legal principles further in the next topic, which is about analysis of the evidence and findings of the trial court.

EVALUATION* OF *EVIDENCE AND FINDINGS AGAINST APPELLANTS

General

[44] All defence counsel agreed with the State counsel that, witnesses who testified in the

trial-within-a-trial were not required to read their documents into the record again in the actual trial. The documents were to be accepted to be what they purport to be.[65] The State decided to only lead the evidence of Inspector Tupper, the investigating officer at the material times in the matter. Therefore, the State relied, almost exclusively, on the warning statements and pointing out reports for the conviction of the appellants on the charges.

The Crimes and Crime Scene

[45] As stated above, the deceased operated a small shop or what is colloquially called a *spaza* from his house. According to the indictment[66], the four appellants and Mr Amos Khoza, the fourth accused discharged by the trial court, went to the deceased house at around 18h00 on or about 22 June 2004. They gained access or made the deceased open his house for them to gain access, through false pretences.[67] They then attacked the deceased and robbed him of 2 Nokia 3510 cellular telephones; 1 Nokia 3339 cellular telephone; 1 Ericson T65 cellular telephone; 4 remote controls for electrical appliances and an unknown amount of cash.[68] It is common cause that no stolen or robbed goods were recovered from any of the appellants or the discharged accused 4. It is also common cause that no evidence was adduced before the trial court indicating that any property was taken from the deceased's or linking the property stated in the indictment to the deceased or any other person. The only evidence of the property that may have been taken from the deceased is contained in the warning statements of the appellants.

[46] The deceased was found bound[69] , blindfolded and already dead the next morning. No evidence was led as to who encountered the deceased's body, although a witness called Johannes Theledi, found by the trial court to be unreliable, testified that he contacted the police that morning after a violent encounter with some five black men at the

crime scene the previous evening or afternoon.[70] The deceased's house was also found in a disorderly condition *(deumekaar toestand).* An autopsy report[71] was handed in by agreement between the parties. No other medical or forensic evidence was adduced, besides the autopsy report. However, the autopsy report although stating that *"die dood plaasgevind het* soos *meegedeel op 2310612004"* [my italics] does confirm that the deceased died from strangulation. [72]The aforesaid date obviously differs with that stated in the indictment and the other evidence being that the deceased was murdered on the 22 June 2004, but the information appears to have been relayed by a third party to the compilers of the autopsy report. The relevance and import of this, is with regard to the actual moment of death of the deceased. I will deal with it further when looking into contents of the confessions.

[47] Photographs of the crime scene as found by the police were admitted into the record. Inspector Michael Sibiya, took the photographs[73]and also drew sketch plans of the house and the crime scene. He did not lift any finger prints. This was the responsibility of another policeman called Inspector Lekalakala, who was also at the crime scene. Despite the photographs referred to above confirming the existence of human hair at the crime scene no forensic evidence was tendered before the trial court. In the application for leave to appeal, the State or defence counsel had something to say about DNA on the human hair and the clothes found in the veld, but it was all vague. He conceded that there was nothing before the trial court in this regard.[74]

[48] The photographs depicted the gruesomely savaged body of the deceased, the outside and inside of his house, where his body was found. The following is, among others, also depicted on the photographs: alleged blood spots inside the house; pellet gun; knives (including butcher knife); alleged human hair on a duvet inner; revolver; binoculars; music

or video machines set, stack of CD's and tapes; TV in the main bedroom; revolver on the dressing table and a music player. It is common cause that the deceased did not sustain any other injuries, except for those related to the strangulation.

[49] Some items were found in the veld at [.....] M. or B. H..[75]According to Sibiya this place is about 200 metres from the crime scene[76], although Detective-Inspector Albertus Behardus Cilliers, who was involved in the arrest and interrogation of the appellants, estimated the two places to be between 80 and 120 metres apart.[77] A jacket and hood with RSA flag; knife on a jacket and remote controls[78] were found in the veld. A certain Mr Van Eeden[79] alerted the police to the items in the veld. Some unidentified person informed the police that the first appellant was seen around the area wearing the jacket and hood. This led to the first appellant's arrest, and on his information the arrest of the other appellants. He denied link to the clothing items and this could not be refuted by the State. Next are the warning statements and pointing out reports.

Warning statement and conviction of the first appellant **(Bakane**)

[50] Bakane was born in [.....] 1980 and was therefore 24 years old at the time the offences were committed. He attended school until grade 8 and had one minor conviction[80] prior to those he is now appealing. He is unmarried; lived with his sister (at the time of his arrest) and his child was 9 years old at the time of his sentencing. [81] As part of his *alibi* defence he had submitted that he was employed, like the other four accused, by a timber business called Why Not Wood. The trial court rejected this and considered him unemployed. I have already agreed with this finding.[82]

[51] As indicated above, he was linked by an unknown person to the jacket and hood or cap found in the veld next to the crime scene. No evidence linked him to the crimes and he denied any link to the clothing items. His arrest and interrogation thereafter led to the

arrest of the others.

[52] Like the others, Bakane testified that he was assaulted by the police when he was arrested, which was denied by the police. His warning statement (Exhibit H)[83] consists of 11 sections. Captain Spies, who took his warning statement did not complete *"verklaring deur verdagte"* section thereof *(Bylae* A). *Bylae A* is the portion of the statement where a suspect would make the actual statement after the preceding 11 sections. The trial court found that these accords with Spies' testimony that Bakane did not want to make a statement, but merely to answer some questions. In my opinion, the police should have not persisted to ask Bakane any questions, when he had indicated he does not want to make a statement. It is an unreasonable circumvention of Bakane's right to silence and consequently right to fair trial. The answers to the questions in essence amount to making a statement. Further, Bakane's indication that he would have required a lawyer only at a later stage is obviously *per incuriam* and the police ought to have endeavoured that his patent unsophistication in this regard is cleared, by explaining that the right to legal representation included even then when he was asked the very same preliminary questions he was already answering.[84] Therefore, in my respectful view, the trial court erred in allowing the subsequent questions and answers, coerced by the police in violation of Bakane's constitutional right to silence.[85] These alone militated against the admissibility of the admissions or confessions in Exhibit **H..**

[53] Exhibit H had *Bylae B* as an annexure. This part contains information which the State submitted came from Bakane in response to the questions posed by Spies. It contains some admissions regarding the crimes Bakane was charged with. Bakane denied being the source of this information, but the trial court found that it would only have come from him.

[54] *Bylae B* contains, among others, the following information:

"VRAAG 1: Ken jy die adres waar die oorledene in hierdie saak gebly het?

ANTWOORD:Ek ken nie die adres besonderhede nie, maar ek weet waar die adres is aangesien ek daar gewoon het.

VRAAG 2: Wanneer het jy by die oorledene se adres gebly en waar presies?

ANTWOORD:Ek is nie presies seker nie. Dit was ongeveer Februarie of Maart 2004. Dit was 'n Zozo huisie op die plot.

VRAAG 3: Ken jy die oorledene, Mnr Mare?

ANTWOORD: Ja ek ken die oorledene ek het reeds gese dat ek op die perseel gebly het. Ek het ook goedere by sy winkel gekoop.

VRAAG 4: Was jy op die perseel van die oorledene op die aand van 22 Junie 2004?

ANTWOORD: Ja ek was daar om ± 18:15

VRAAG 5: Wat het jy daar gedoen?

ANTWOORD: Ek het geld gaan soek.

VRAAG 6: Wie en watse geld?

ANTWOORD: Dit is die oorledene se geld wat ons wou vat.

.....

VRAAG 7: Wat het julle daar gedoen by die huis?

ANTWOORD: Ons het die blanke man [eienaar] doodgemaak en ek het sigarette en geld gevat.

VRAAG 8:Hoeveel geld is gevat?

ANTWOORD:Ek het net honderd rand gekry.

VRAAG 9: Wie is die ons waarvan jy praat?

ANTWOORD: Dit is persoon bekend as One One [Amos Khoza], Modise [Elias Serumula], Sello Moima en Sipho Mhlango."

[55] It is common cause that Bakane was convicted on the strength of the contents of *Bylae B.* No oral evidence was led regarding the contents of this document except for when its admissibility was contested. It is one of Bakane's grounds of appeal Gust like with the others) that, other than the admissibility issues, the above stated contents of *Bylae B* do not prove the crimes of murder and robbery with aggravating circumstances. I deal with this next.

[56] I deal with robbery first. I refer to the essential elements of robbery discussed above. [87] The statement indicates the taking of cigarettes and an amount of R100. It is common cause that Bakane was not charged with robbery or theft of these items, but I will accept for discussion purposes that these items were taken. Regarding the element of violence, it is stated that a white man (owner) was killed *(doodgemaak).* Although, a personal pronoun *"ons"* [we] is used and later explained as referring to the four other accused before the trial court, Bakane weirdly doesn't appear to include himself therein in response to question 9 of *Bylae B.* I accept that this is a genuine error, which in consideration of the surrounding circumstances should include Bakane. However, what is rather strangely remarkable is that Bakane appears to have been prompted by the interrogator by the inclusion of the word *"julle "* in the question posed (i.e. in *VRAAG 7 : Wat het julle daar gedoen by die huis?).* [Underlining and italics added] Be that as it may, it is not clear what the role of Bakane was in the killing of the deceased. The deceased was strangled and although there is no evidence as to when he actually died, the element of violence appears to be present. Subject to what is stated below regarding intention as an element of robbery, it is trite that any violence that causes death of a person would always have been sufficient to cause the deceased's

submission to the taking of property.

[57] However, I found the element of intention not indicated in respect of this appellant. The contents of *Bylae B* clearly indicates that, Bakane went to the deceased's place looking for money *(geld gaan soek* and *geld wat ons wou vat)* belonging to the deceased *(oorledene se geld).* This doesn't mean that they intended to violently take the money away from him, let alone kill him. They may have intended to acquire the deceased's money through means not involving violence. Obviously this may have changed if the owner of the property caught them in the act or they encountered him there at the scene. However, there is no evidence indicating that the killing was intended to overcome the resistance of the deceased in order to commit the robbery.

[58] Further, one cannot beyond reasonable doubt that the reference to the *"blanke man* [eienaar]" is the reference to the *"oorledene"* used in the other questions. This former reference (with racial connotation) is only used in respect of the answer to question 7, whereas the latter is used elsewhere. The deceased *(oorledene)* is clearly identified in question 3 as Mr Mare, whom again we have to assume is the same person as Mr Johannes Albertus Mare, the deceased in this matter, as nowhere in the *Bylae* B or the actual Exhibit H is his name mentioned.

[59] I therefore find in this regard that, not all elements of robbery have been met, let alone robbery of the items indicated in the indictment.[88]

[60] Now turning attention to the crime of murder, it must be pointed out that some of what is stated above regarding robbery is applicable to murder, whose elements were discussed in detail above.[89]

[61] There is clearly material in this *Bylae B* confirming the killing of a person named, among others, Mr Mare. I have already expressed the lack of evidence confirming that, this

person is Mr Johannes Albertus Mare, the deceased in this appeal matter. However, in my view, there is no evidence of the murder of Mr Mare and why he was killed. What the indictment says is that the deceased in this matter was strangled with an instrument on 22 June 2004 and the available evidence before the trial court confirmed that his body was discovered the next morning. However, *Bylae B* does not explain how the person there died and what time, more or less, he died. There is further no evidence indicating that Bakane participated in his killing and what role he played in the killing. It still also not proven that the conduct of Bakane contributed to the death of the deceased and that without Bakane's conduct the deceased would not have died. It can also not be said beyond reasonable doubt that the deceased's death was intentionally caused by the perpetrators or in particular Bakane. The death may be the result of negligence of the perpetrators, but even this cannot be reasonably inferred, in my view. There is also no evidence from *Bylae B* suggesting a common purpose or conspiracy to murder the deceased. Therefore, it is my view that, Bakane ought not to have been convicted of the murder of the deceased on the basis of *Bylae B.* I now turn to the second appellant.

Pointing out report or notes and conviction of the second appellant **(Moima)**

[62] Moima was 22 years old at the time of the offence. He is the third appellant's brother. His highest schooling achievement is grade 8. He is unmarried and stayed with his mother, who died between the time of his arrest and sentencing for these offences. The conviction at the trial court was his first.

[63] A warning statement (Exhibit C) attributed to him was ruled inadmissible, but the pointing out (Exhibit F[90]) was ruled admissible by the trial court. The police were found not to have assisted Moima to acquire legal representation before making the statement (Exhibit C), despite his clear choice in this regard. The trial court indicated, curiously so in my view,

that Exhibit C was in any way of *"little value…except that it does go on to state that he is prepared to do* a *pointing* out".[91] I respectfully disagree with this assessment by the trial court. Exhibit C had immense impact on any subsequent steps by Moima. The fact that the pointing out is mentioned therein clearly confirms that the rejected confession or warning statement preceded the pointing out. Therefore, with the trial court having accepted that Moima was denied the exercise of his right to legal representation, it should have ruled the pointing out (Exhibit F) also inadmissible. His right of legal representation is permanent and uninterruptable and is linked to his right to fair trial.[92] It does not matter that the police may have again read Moima his rights, including the right to legal representation, in respect of the pointing out. He had already made this election before and the police denied him the right. It is not unreasonable to infer that Moima may have confused his choices when the police were advising him about his rights regarding the pointing out, after his initial experience in respect of the warning statement (Exhibit C). Things may have turned out differently if he was immediately allowed his right to legal representation and he may even have not made the pointing out on advice by his legal representative. It is common cause that Moima was convicted on the basis of the pointing out (Exhibit F). Other than the instructions or directions to the scene of the crime, the material contents of Exhibit F are the following:

"VRAAG: Wat het hier gebeur?

ANTW: Ek het 'n pap kar battery na die spaza winkel geneem om te herlaai. Verdagte wys deur - Het klokkie gelui, 'n ouerige (Foto 10 + 11) blanke man het deur oopgemaak. 4 antler swart mans het ook by die deur gewag.

VRAAG: Wat het toe gebeur?

ANTW: Jantjie Sipho, Amos en Modise het ou man gegryp en binne in die huis

geforseer. Ek het toe my battery in die portaal gelos - Fotos 12 + 13 Jantjie se toe vir my dat ek moet die items soos sigarette en kruideniersware uit die Spaza uit haal, wat ek gedoen het. Fotos 14 + 15 Ek het die items in 'n box gepak. Die ander mense het in [sic] die huis die TV, radio en items in die huis by mekaar gekry.

VRAAG: Waar was die ou man toe?

ANTW: Hy het op die bank in die TV Kamer gesit. Jantjie en Sipho het horn [ou man] geslaan. Fotos 16 + 17

VRAAG: Wat het jy toe gedoen?

ANTW: Ek het die items wat ek bymekaar gemaak het in die ingansportaal neergesit, want vanuit die Spaza se venster, Foto 18 + 19 het ek gesien dat 'n swart persoon na die huis aangestap kom. Ek het weggehardloop.

VRAAG: Wanneer het hierdie voorval gebeur? ANTW: Maandag aand ± 18:30, 21/06/04.

VRAAG: Ken jy die man wat na die huis toe aangestap gekom het? ANTW: Ja, sy naarn is Johannes. Hy bly ook hier op die plot.

VRAAG: Weet jy of die ou man doodgemaak is?

ANTW: Ek weet dat Jantjie en Sipho die ou man geslaan het, maar ek weet nie of hy met 'n mes gesteek is nie. Jantjie was in besit van 'n groot butchers mes.

VRAAG: Toe julle hierheen gekom het, het julle beplan om die goedere te steel?

ANTW: Jantjie het al voorheen sigarette hier gesteel, en hy het ons oortuig om weer die goed hier te kom steel. Jantjie het gese hy soek die geld.

VRAAG:Is hier nog iets wat jy vir my wil se of wys?

ANTW: Nee, ek is klaar."[93]

[64] Clearly the contents of Exhibit F above, does not indicate that any person was killed or is dead. The old man is beaten or hit *(geslaan)* by two people, but there is nothing suggesting that he died from this beating. The trial court found although words like *"gesteef"* is used there was a conspiracy to rob the deceased. With respect, I disagree. This inference is not reasonable and borne by the facts. The plan is stated as having been to steal and it is said Jantjie [presumably the first appellant], who had stolen there before, persuaded the rest to go there to steal. Moima does not seem to associate himself with the violence perpetrated on the *"ou man".* There is further no evidence indicating that any violence was possibly foreseeable as Jantjie appeared to have gotten away with stealing there before, seemingly without violence. The common purpose was to go and steal and there is no evidence indicating that this ever changed. However, the trial court found that there was a conspiracy to commit robbery and murder.

[65] In my view, if there is any conspiracy it is for theft of the old white man's property and the appellant where not charged with conspiracy, but having committed the offences with a common purpose. At best the evidence suggests crimes of theft for Moima, but not murder or robbery. Further, it is also an issue of value that the name of the *"ouerige man"* or *"ou man"* is not identified and there is further no evidence that the deceased was the only person at the pointed out address. Therefore, in my view, Moima's conviction is not sustained by the purported admissions in Exhibit F.

Warning statement. pointing out and conviction of the third appellant **(Seromula)**

[66] At 29 years of age at the time of sentencing, Seromula was the oldest of the four accused before the trial court. As stated above, he is the second appellant's brother.

[67] He unsuccessfully challenged the admissibility of a warning statement (Exhibit

J[94]) and pointing out (Exhibit G [95]) he was found to have made. He still argues on appeal that they were not made freely and voluntarily. He testified that he was merely told to sign and did not know what the document contained, as he could not read. Just like it was the case with the other appellant, Seromula is stated to have chosen to make a statement without legal representation and that he will have a legal representation at a later stage. I repeat, in this regard, that this was a patently uninformed choice on the part of Moima and the police ought to have endeavoured to alert him of the immediate availability of his right to legal representation. I am not suggesting that the police have a duty in this regard, but clearly the contents of the warning statements and in particular the requirement to advise an accused of his or her rights is not a matter of form, but substance. Surely the crafters of the warning statement document used by the police were aware of the fact that, members of the police are the very first people who will come into contact with accused persons, and not even the accused legal representatives. Therefore, how the police explain the contents of a warning statement is critical for the full enjoyment of the right to fair trial, which includes access to legal representation. How the police act in this regard is very decisive to the exercise of the rights of the accused in this regard. In my view, the contents of Exhibit J and consequently Exhibit G (the pointing out) ought to have been excluded.

[68] Exhibit J (warning statement) contains the following in the material part:

> "...Op Maandag 22 Junie om ± 18:00 het ek en Sello,Sipho, "Ma One One" en Jantjie na Plot 11 aangekom te Timsrand. Jantjie het 'n motor battery gehad wat gelaai moes word. Hy het die battery na die eienaar van die huis geneem om te herlaai. "Ma One One" het 'n knoppie by die venster gedruk. Die eienaar van die plot het toe na die venster toe gekom en gevra of hy kan help. "Ma One One" [Amos] het gevra dat die battery gelaai moet word. Die eienaar het toe die kombuis deur oopgemaak. Die

eienaar het toe die battery gevat en horn in die laaier gesit. Ons het toe alma! in die huis ingekom. Selio en Sipho het toe die eienaar gegryp en horn laat val. Hulie het horn toe gewurg. Ek het toe drank en sigarette gevat en ek het toe uit die huis gegaan en weggehardloop. Toe het Sello en Sipho ook weggehardloop. Die verdagte is steeds bewus van sy regte en word gevra of hy die toneel sal uitwys."

[69] From the above portion of Exhibit J, it is clear that Seromula, together with four other named people, ostensibly his co-accused went to Plot 1 in Timsrand, to recharge a motor battery which Jantjie [presumably, the first appellant] had. One of them pressed the button, the owner came out and the same person asked to charge the battery and the owner opened the kitchen door. The identity or name of the owner is not disclosed and there is no evidence in Exhibit J to confirm that it is the deceased in this appeal. However, so far there is no suggestion of an intention on criminality, but this changes next. Once the owner opened the kitchen door he is grabbed by Sella [presumably the second appellant] and Sipho [presumably the fourth appellant] and brought down *(laat val).* The two then strangle *(gewurg)* the owner. Seromula does not appear to take part in the actions of Sella and Sipho and nothing suggests that he associated himself therewith. He grabs alcohol and cigarettes and runs out of the house, which could possibly be interpreted as dissociating himself with the actions of his colleagues or even being taken by · surprise thereby, as they came in to recharge the battery. Seromula is clearly committing a crime of theft when takes the alcohol and cigarettes. Also, as indicated above it is not clear whether the strangled person is Mr Mare, the deceased herein. Further, but not really influential, it is not stated whether the stranglers used an instrument (lace curtain) indicated in the photographs to cause the person's death.

[70] However, the trial court's attention centred around the words: *"Hulle het horn toe*

gewurg". It found this to confirm that Seromula was present even though the *"hulle"* appears to refer to the second and fourth appellants. The trial court found that Seromula *"associated himself with what was happening and that he in fact, at the time, when someone was killing the deceased took some goods out of the house and ran* away".[96] I have already expressed the view that Seromula's behaviour is not indicative of any conspiracy or common purpose with the perpetrators and is only fallible with the theft part. Therefore, it is my view that, Seromula did not confess to crimes of murder and robbery on the basis of Exhibit J. I now turn to his pointing out (Exhibit G).

[71] I find the contents of Exhibit G, if anything, to be exculpatory of Seromula. It refers to unknown suspects and the murder of an unidentified white person and, in my view, does not take what is stated in Exhibit J any further. Therefore, my view that Seromula was wrongly convicted on both counts persists.

Warning statement and conviction of the fourth appellant **(Dlamini)**

[72] Dlamini left school after completing standard 4. He appears to have been the youngest in this group of accused, being 21 years of age when the offences were committed. It was submitted that he is from KwaZulu-Natal, but the indictment referred to him as a 23 year old Mozambican with no fixed address. The latter aspect is incorrect. As stated above, Dlamini had provided the name of his employer (Why

Not Wood) and his residential address (Plot [.....] L.) to the police as early as when he made the pointing out, which was ruled inadmissible.[97] He was convicted on the strength of a warning statement (Exhibit E), which he also denied making freely and voluntarily. He stated that his inked thumb was forced onto the statement by the police. The following is the material part of Exhibit E:

"Op 22/6/04 om ± 18:00 was ek saam met Sello en Lefi [Jantjie] Hulle het vir my gese

dat ons by Masheshe toe moet gaan want daar is geld daar. Ek, Sello, Lefi en Ma One One en Modise het toe na Masheshe toe geloop. Ons het daar aangekom Lefi en Sello het toe by die huis ingestap. Toe Myself Modise Ma One One is toe geroep deur Sello en Lefi in die huis. Lefi het aan my gese dat ek by die ingang van die woning moet staan sodat ek kan sien as antler mense kom water skep. Modise het binne die huis ingestap en "Ma One One" het na 'n antler deur gegaan. Ek het deurklokkie hoor lui. Ek het toe by die deur gestaan. Ek het die eienaar in die huis hoor skreeu. Dit het geklink of hy baklei. Ek het toe weggehardloop. Ek het nie gesien wat met die man gebeur nie. Lefi Ma One One Sello en Modise het toe later by my aangesluit by my woonplek. Ek het vir hulle gevra wat hulle in die huis gekry het. Hulle het vir my gese dat hulle selfone gekry het en hulle het die selfone aan Dekeledi gegee. Dit is al wat ek weet. Die beplanning was gedoen deur ons om die huis te roof.

Dis al wat ek weet."

[73] Exhibit E does not link Dlamini to a crime of robbery, let alone murder. From the initial intention or plan of going to Masheshe because there is money there *(want daar is geld daar)* until Dlamini runs away, there is no indication of criminality by anyone. There is no evidence suggesting that they all went to Masheshe to steal or rob the owner or anyone for that matter, of money. They went there because there is money there *(want daar is geld daar).* This does not exclude them having intended to acquire the money through non-violent or non-criminal means. When they arrive Dlamini is asked to stand by the entrance to the building, so that he can see other people come and fetch water, whilst the others get into the house. At this moment there is an indication (or suspicion is raised) of an intention or plan to commit crime, but it is not clear whether Dlamini is aware of this. Even if he is assumed to be aware, is it robbery or is it burglary. He then hears the

doorbell rings, which is weird since he is standing by the entrance *(ingang)* of the building and could possibly see the others or was it perhaps a doorbell elsewhere. He then heard the owner scream and it sounded like he is fighting, but there is nothing to confirm this or to indicate whether the owner was fighting with the same people Dlamini came with to the house or residence. He also does not appear to be aware that the screaming is linked to the money they were looking for. Also, Dlamini does not explain why out of all the people in the house, he thinks it is the owner who is screaming. Ultimately, it is mentioned that the other people got cell phones which were given to Dekeledi [sic] and it is stated that the planning was done by us (ons) to rob the house. Which house? Is it the same house referred to above or was the plan for a different house? From the available evidence, I do not see any execution of a robbery plan, and even if there was some plan or prior agreement the appellant appears to dissociate himself with the violence, it is indicated that he ran away after the "screaming" and fighting. *"Ek het toe weggehardloop. Ek het nie gesien wat met die man gebeur nie."* In my view, if ever there was a plan, it would have been to steal from the house and not robbery and even if it later changed, there is nothing to suggest that Dlamini was part of it. This, in my view, may explain why Dlamini ran away after the screaming and fighting. He also does not know what happened to *"die ou man".* Therefore, I do not find that either the elements of a crime of robbery or murder exist. Clearly no person is mentioned to have died due to the conduct of Dlamini or the people he was with at the stated place.

[74] However, the trial court found that although Dlamini distanced himself *"to* a *certain extent from the murder'* he is still linked. That court's attention was caught by the words *"Die beplanning was gedoen deur ons* om *die huis te* roof'.[98] It did not find it necessary to determine whether the elements of robbery were present, but convicted Dlamini

primarily on this one line for robbery. However, the court did not explain why Dlamini was also convicted of murder, when clearly he did not confess to any killing and no one died in Exhibit E. I find this to constitute misdirection.

[75] It is common cause that the state did not adduce any evidence and relied on the "confessions". The witnesses called by the state were all policemen who participated in the arrest or interrogation of the appellants. These witnesses, except for Tupper, only testified in the trial-within-a-trial. But even if their evidence, including Tupper's is considered, it only fortified the admissibility of the "confessions". On the other hand, the appellants testified in the trial-within-a-trial and the main trial. They also called other witnesses. Ideal next with the crux of their testimonies.

Other defence witnesses' evidence

[76] *Johannes Theledi:* Tupper, the investigating officer traced a witness called Johannes Theledi. Theledi said in a statement (Exhibit O) that he went to the deceased's shop that fateful night and saw five black males come out of the deceased's house. One hit him on the head with a bottle and they all ran away. He also fled. He could not see their faces properly. Tupper testified that Theledi had told him he would even point out the people at that stage, but Tupper did not follow this up and this appear nowhere on Exhibit O and even seems to contradict its contents. However, Theledi testified that the accused were not the people he saw that night, and this had already led to the State allowing him to testify for the defence. The trial court expressed dismay that Theledi would say this when he did not see the culprits clearly, but Theledi stated that the accused's respective body built (including height) was different to that of the men he referred to in Exhibit O. Tupper denied that Theledi ever told him this and said that if he did, he would have let the appellants go.

[77] The trial court stated that it gained the "distinct impression" that Theledi was attempting

to protect the accused. The court pointed out to direct and indirect personal relationships or connections Theledi had with the accused or the accused's relatives and concluded that this may be the reason he is shielding the accused. The trial court drew an inference that the fact that he knew them may be why he decided not to go to the police and why he says they are not the persons who killed the deceased. The aforesaid is not entirely correct as Theledi testified that he is the one that either called the police or caused them to be called from the neighbouring plot[99], unless if the trial court had rejected this part of this evidence too. Further, the trial court also considered his testimony regarding an open wound he claimed to have suffered from one of his attackers on that fateful day for the deceased to be a recent fabrication. Ultimately, the court considered Theledi a very poor; evasive (at times) and unreliable witness.

[78] However, the trial court accepted the part of Theledi's testimony that five males had come out of the house and threatened him before they fled away. The court accepted that this places Theledi at the crime scene and therefore that he is the *Johannes* referred to in the second appellant's (Moima) pointing out (Exhibit F) referred to above[100] The court found the two statements to corroborate each other. I respectfully find this problematic. In my view, there is no evidence suggesting that the Johannes referred to in Exhibit F is Theledi or that Theledi was the only Johannes on the plot. Be that as it may, neither Theledi's evidence nor Moima's Exhibit F are conclusive on the murder and robbery charges.

[79] *Ms Martha Math/are.* Her evidence extended the focus from the five accused before the trial court to two other people, who were only named as Kleinbooi and the Rastafarian. She told the trial court that she overheard Kleinbooi; the Rastafarian and a third man discuss "a move" from the morning of the day the deceased was murdered. She

understood "a move" to be reference to a criminal activity that was to be perpetrated in the Fourways area by Kleinbooi and his associates. She later in the afternoon saw them and three other males, carrying a car battery, walk to the direction of deceased's house. She would later learn from her late brother's child, Mr Brian Kutumela that him, Ernest and Lucas were chased away by Kleinbooi from the deceased's shop, when they were there on an errand [to buy some maize meal]. She added that she identified the woollen hat and jacket which the police had as Kleinbooi's. Also, according to her he late daughter Maria and her [Mathlare's] youngest child, Ernest were taken by the police to an identity parade.

[80] *Mr Brian Kutumela.* He significantly corroborated his aunt Ms Mathlare. However, he battled to remember most of the events of the day when he was chased by Kleinbooi from the deceased's shop. This could be due to the lapse of time since the incident and his very young age at the time. However, he was able to tell the trial court that, he thinks he saw five people in the shop that day, although he was only able to identify Kleinbooi. He could not see the faces of the others. He also identified from the photographs before the trial court the hat and the jacket as belonging to Kleinbooi.

[81] However, the trial court did not believe that Kutumela and his friends were at the scene that evening. It also did not believe Mathlare's testimony about "the move" allegedly planned by Kleinbooi and the Rastafarian. It found that, a witness with that sort of information would have passed it on to the police than let innocent people stay wrongfully incarcerated. That court was also unmoved by Mathlare's statement that her late daughter and another kid attended an Identity parade and that the two other people who were released are Kleinbooi and the Rastafarian. It found the whole identity parade theory to be a fabrication.

CONCLUSION

[82] I have stated the trial court's findings above in respect of each appellant. In sum, the

trial court held that there are a number of facts in the admitted exhibits which indicate the appellants' participation in the crimes. The trial court held that there was proof of prior agreement amongst the appellants and held that common purpose was not applicable. It found that there was a conspiracy amongst the appellants to rob and murder the deceased. It arrived at this conclusion after rejecting the exculpatory evidence of all the appellants, as being not possible true and the evidence of the defence witnesses.

[83] On whether there was a conspiracy to commit robbery and murder, I have expressed a view that this was not part of the indictment the appellants faced. They were stated to have acted on common purpose in the robbery and murder of Mr Mare and not conspiracy. However, be that as it may, I am of the view that, the contents of the individual warning statements and paintings out do not indicate a conspiracy to commit robbery when viewed individually. When viewed jointly or collectively, the statements are very contradictory in what the appellants' purpose was for going to the deceased's residence. They went there: looking for money *(geld gaan soek)* (according to the first appellant) [101]; to recharge his flat battery *(pap karbattery ... te herlaai)* (according to the second appellant) [102]; to recharge the first appellant's battery *("Jantjie het 'n motor battery gehad wat gelaai moes word')* (according to the third appellant) [103] and *"want daar is geld daar"* (according to the fourth appellant) [104]. Evidently, two of the appellants mentioned money, whereas the other two mentioned the charging of a car battery, but there is no unanimity regarding the ownership of the battery. The second appellant said it is his battery, whereas the third appellant stated it is Jantjie's battery. Further, the appellant's alleged admissions contradict each other regarding what happened there. According to: the first appellant they killed the white man and took his property *(" Ons het die blanke man* [eienaar] *doodgemaak en ek het sigarette en geld gevat"; "Ek het net honderd rand*

gekry")[105]; the second appellant, knew that the old man was beaten up, but he was not aware of whether he had been stabbed *("Ek weet dat Jantjie en Sipho die ou man geslaan het, maar ek weet nie of hy met 'n mes gesteek is nie")* ***[106]*** ; the third appellant, Sella (second appellant) and Sipho (the fourth appellant) strangled the owner *("Hu/le het hom* [die eienaar] *gewurg")* ***[107]****,* and the fourth appellant, whilst standing guard by the entrance to the house, he heard a scream which he thought was the owner's; thought it was the owner fighting and he ran away[108]

The trial court did not even attempt to reconcile these contradictions or to explain how the contradictory statements could be indicative of an agreement or conspiracy to rob and murder. There is clearly no indication of the appellants being *id adem* (which is an essential an element of conspiracy) about the offences in respect of which they were convicted. But, the trial court found that there was no reasonable doubt that the appellants committed robbery with aggravating circumstances and murder. I clearly hold a different view. There was no direct evidence to sustain these findings of the trial court and the circumstantial evidence available did not support the inferences drawn by the trial court. In my view, the facts did not exclude other reasonable inferences than those drawn by the trial court.[109]Therefore, I respectfully disagree with these findings, for reasons stated above.

[84] Further, despite finding that there was misdirection regarding the conclusions of the trial court based on the alleged confessions, I have found that the confessions should have been excluded in the first place when the trial court found that the appellants were assaulted. I have found, with regard to some of the appellants, that there are other grounds than assault which militated against the trial court ruling the confessions admissible. Obviously, without the confessions the convictions collapse.

[85] With the above being my findings, I see no need to deal with the submissions on

sentences.

[86] For the aforementioned reasons, I would uphold the appeal and set aside conviction of the appellants by the trial court.

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K.LA.M ANAMELA

Acting Judge of the High Court of SA:

Gauteng Division, Pretoria

[1] The record, at times, reflects his surname as Marais, but I have relied on the spelling in the Indictment (on p 2 of the record).

[2] Loosely translated from the Afrikaans *"vereense/wigbaar met instrumentele verwurging"* stated on the Summary of Substantial Facts, accompanying the Indictment, and the Autopsy Report (on pp 4 and 1095 of the record, respectively).

[3] S 35 the Constitution of the Republic of South Africa, 1996.

[4] The trial-within-a-trial commenced on 07 February 2007 and the last accused closed his case therein on 06 July 2007. See S-5 of the record (being the supplementary volume comprising of the reconstructed part of the record in terms of the order of Masipa J; Pretorius J and Mabuse J of 30 October 2013) and p 413 of the record.

[5] The main trial commenced on 26 January 2009 (p 465 of the record), after the court made its rulings

regarding admissibility of the statements and reports on 27 May 2008; and some postponements.

[6] See lines 11-19 on p 91of the record.

[7] Kruger, A. *Hlemstra's Cr/mlna/ Procedure* (2008) (Issue 1) on p 14-32 and the further authorities referred to there.

[8] See lines 17-22 on p 795 of the record.

[9] See *S v Majonjo* 1963 (4) SA 708 (FC).

[10] See S v Slthebe 1992 (1) SACR 347 (A), together with S v De Vries 1989 (1) SA 228 (A).

[11] See paras [321 - [36] below.

[12] See paras [27] - [31] below.

[13] I will use the appellants' surnames under these subheadings and will revert to their numerical references later. I will repeat this when discussing the contents of the confessions later below.

[14] See pp 1012 - 1034 of the record.

[15] See pp 1024 - 1025 (manuscript version) and 1033 and 1034 (typed version) of the record.

[16] See p 205 from line 10 onwards and line 1on p 206 of the record.

[17] See para [52] below.

[18] See s 35 of the Constitution of the Republic of South Africa, 1996.

[19] See lines 17 - 25 on p S-14 (supplementary or reconstructed volume) and 12 - 25 on page 278 of the record.

[20] See para 9.8 of the first appellant's heads of argument. See further S v Sithebe 1992 (1) SACR 347 (A).

[21] See para 171 above.

[22] See s 219 of the CPA. See further *Lltako & Others v S* [2014] 3 All SA 138 (SCA).

[23] See p 813 of the record.

[24] See p 4 of the record.

[25] See para [4] above.

[26] See paras [76] -[78] below.

[27] See pp 1035 - 1046 of the record.

[28] See pp 1002 - 1011of the record.

[29] See para [5] above.

[30] See pp 974 - 985 of the record.

[31] See para 13 of respondent's heads of argument.

[32] See line 5 onwards on p 874 of the record.

[33] See lines 17-22 on p 795 of the record.

[34] *Ibid.*

[35] See lines 5 - 12 on p 874 of the record.

[36] See s 217 of the CPA and paras [25] - 126] below.

[37] See lines 18-19 on p 795 of the record.

[38] See *Hiemstra* on p 24-55 and the further authorities referred to there.

[39] See *Tandwa and Others v S* (2007] JOL 19535 (SCA) at para (116].

[40] See at *Mthembu v S* [2008] 3 All SA 159 (SCA) / 2008 (2) SACR 407 (SCA) at para [30].

[41] *Hiemstra* on p 24-51.

[42] Read together with ss 218, 219 and 219A of the CPA.

[43] Burchell, J. *Principles of Criminal Law,* (4 edition), Juta, Cape Town (2013) on p S62.

[44] See Burchell on p S63. See further Snyman, C.R. *Criminal Law* (6 ed) (2014) at page 97 onwards.

[45] See Burchell on p 563.

[46] *Ibid*

[47] See Burchell on p 345.

[48] See Burchell on p 565.

[49] See Burchell on p 706.

[50] *Ibid* on p 707.

[51] *Ibid.*

[52] See *S v Malata* 1982 (1) SA 844 (A) 850A. See further Burchell on p 707.

[53] Burchell on p 708.

[54] See Burchell on p 710.

[55] See Burchell on p 711.

[56] See para [30] above.

[57] See Burchell on p 714.

[58] See *Hiemstra* on p 22- 27.

[59] See *R v Hercules* 1954 (3) SA 826 (A).

[60] See *S V Ma/Inga* and Others 1963 (1) SA 692 (A).

[61] See lines 10 - 14 on p 813 of the record.

[62] See Hiemstra on pp 22-29.

[63] It actually referred to *Ndedezi* but I assumed it to be a spelling or transcribing error and that it is actually reference to Mgedezi. See line 12 on p 813 of the record.

[64] See *S V Ubazl and Another* [2011] 1All SA 246 (SCA) at paras [18] - [19]. See further *Burchell* on p 528

onwards and Snyman on p 287.

[65] See lines 1-2 on p 796 of the record.

[66] See pp 1-3 of the record, as well as, the accompanying Statement of Substantial Facts on p 4 of the record.

[67] See p 4 of the record.

[68] See p 2 of the record.

[69] From the photographs (taken by the police) the deceased appears to have been strangled by a lace curtain; his feet bou nd together around the knees by an electrical cord. See pp 952 - 962 of the record.

[70] See lines 2 - 6 on p 574 of the record.

[71] See pp 1095 - 1098 of the record.

[72] Stated as *vereenselwigbaar met instrumentele verwurging* on p 1095 of the record.

[73] Exhibit A appearing from pp 895 -970 of the record

[74] See pp 871 and 872 of the record.

[75] See lines 8 - 12 on p 22 of the record.

[76] Sibiya's sketch plans did not include the Mulberry crime scene. See lines 18 and 19 on p 24 of the record.

[77] See lines 14 - 22 on p 43 of the record.

[78] See pp 964 - 970 of the record.

[79] Presumably, a Mr Jan Hendrik van Eeden of Plot 120 Dassies Street, Timsrand, Pretoria, appearing as witness 4 of the State's list of witness (on p 5 of the record).

[80] For which he paid R200 admission of guilt fine in 2002.

[81] See p 836 of the record.

[82] See para [4] above.

[83] See pp 1012 - 1034 of the record.

[84] See (c) of part 3 of Exhibit H on p 1027 of the record.

[85] See s 35 of the Constitution.

[86] See pp 1033 - 1034 of the record.

[87] See paras [32] - [36] above.

[88] See p 2 of the record.

[89] See paras [27] – [31] above

[90] See pp 986 - 1001 of the record.

[91] See lines 21- 24 on p 776 of the record.

[92] See Woolman, S. and Bishop, M. *Constitutional Law of South Africa* (2 ed) (Vol.4) on p 59 - 68.

[93] See pp 1000 - 1001 of the record.

[94] See pp 1055 - 1046 of the record.

[95] See pp 1002 - 1011 of the record.

[96] See lines 3 - 15 on p 814 of the record.

[97] See para [41 above and further lines 11-19 on p 91 of the record.

[98] See lines 3 - 8 on page 815 of the record.

[99] See lines 2 -6 o p 575 and lines 15 - 21 on p 589 of the record.

[100] See para [63] above.

[101] See paras 154] and (56] above.

[102] See para [63] above.

[103] See para [68] above.

[104] See paras [72] and (73] above.

[105] See para [54] above.

[106] See para [63] above.

[107] 'See para [68] above.

[108] See para [72] above.

[109] See *R v Blom* 1939 AD 188.