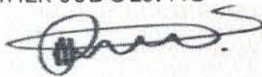




**THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION FUNCTIONING AS MPUMALANGA DIVISION
OF THE HIGH COURT
MZUKALIQA CIRCUIT, BREYTON**

CASE NO: CC 64/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
..... <u>08 February 2018</u>	
DATE	SIGNATURE

In the matter between:

THE STATE

And

**NKOSINATHI DANIEL MALINGA
DUMISANI LAWRENCE NKOSI**

**(ACCUSED NO. 1)
(ACCUSED NO. 2)**

JUDGMENT

RATSHIBVUMO AJ:

1. The two accused stood trial on four criminal charges.

- Count 1: Contravening sec 4 (1) of the Stock Theft Act, no 57 of 1959 (the Stock Theft Act). The State alleged that on 27 August 2016 at Middelpaan Farm which is within the district of Dr Pixley Ka Isaka Seme, the accused did unlawfully and intentionally enter a land enclosed on all sides with a sufficient fence or any kraal, shed, stable or other walled place with intent to steal any stock or produce on such land or in such kraal, shed, stable or other walled place.
- Count 2: Housebreaking with the intent to commit murder. The State alleged that on the date and place as per count 1, the accused unlawfully and intentionally break open and enter the residence of Themba Patrick Sukazi with the intention to commit murder.
- Count 3: Murder. It was alleged that on the date and place as per count 1, the accused unlawfully and intentionally killed Themba Patrick Sukazi a male person.
- Count 4: Robbery with aggravating circumstances. The State alleged that on the date and place as per count no. 1, the accused did unlawfully and intentionally assault Themba Patrick Sukazi and forcefully took a pair of shoes from him; aggravating circumstances being the use of a knife or a sharp instrument.

2. The accused were legally represented by legal representatives throughout the trial, Adv. Matshego for accused no. 1 and Mr. Rasivhaga for accused no. 2. Adv Ntuli who appeared for the State indicated that in case of conviction on counts no. 3 and 4, sentences prescribed in terms of sec 51 (1) and 51 (2) of Act 105 of 1997 respectively, would be sought.

3. Accused no. 1 pleaded Not Guilty in respect of counts no. 1, 2 and 4 and pleaded Guilty in respect of count no. 3. He offered no plea explanation in respect of the counts he pleaded Not Guilty. A statement was handed in in terms of sec 112 (2) of Act 51 of 1977 (the Criminal Procedure Act) wherein he detailed the facts he admitted and why he tendered a guilty plea. In his plea, accused no. 1 alleged that he stabbed Themba Patrick Sukazi (the deceased) with a knife after he (the deceased) had already suffered injuries inflicted by the State witnesses. Although accused no. 1 admitted all the elements of the crime of murder, the State did not accept the plea alleging that the facts in the statement differ materially with the facts contained in the docket. The Guilty plea was therefore altered to one of Not Guilty as provided in sec 113 of the Criminal Procedure Act.
4. Accused no. 2 pleaded Not Guilty in respect of counts no. 1, 2 and 3. He however tendered a guilty plea in respect of a competent verdict of theft in respect of count no. 4, which the State rejected. In this plea, accused no. 2 alleged that he merely took the unattended pair of shoes belonging to the deceased without any force on the owner. The plea which was not accepted was adduced to writing by accused no. 2. Other than this statement, accused no. 2 also chose to make no plea explanation to the charges he pleaded Not Guilty to.
5. Admissions were made by the two accused in terms of which the post mortem report and a number of photo albums were admitted as evidence in terms of sec 220 of the Criminal Procedure Act. I shall refer to these only as far as it would be relevant for purposes of this judgment.
6. **Introduction:** On 27 August 2016 on a farm called Mabhola there was a wedding. As it's the norm, not all in attendance of weddings in the

neighbourhood such as this would be the invited guests. The desire to be part of this wedding was so huge for a group of five young men, amongst them, the two accused so much that they would not allow the long distance to the wedding venue, stand in their way. The two accused were not only the ones who came with the idea to attend this wedding to their three friends, the Mnisi siblings; but they also hatched a plan to travel there, for it was 7 pm already and it could take them two hours if they were to walk. The idea was to go there riding on horses. While the idea was great, the challenge was that they did not have or own horses. The horses would have to be stolen (or “fetched”) from a nearby farm under the custodianship of the deceased, only to be used for this purpose after which they would be released back to their lawful custodian.

7. The easy entry into the yard and also into the stable where the horses were, suggested that the plan was flowing smoothly; but that was until the deceased left the house he used to occupy in the yard and confronted the five intruders in possession of the already subdued two horses, and by then chasing a third horse that was in the yard outside the stable. A short but decisive physical confrontation between the deceased and accused no. 1 saw the deceased retreat into the house where he locked himself shouting that he managed to take a hat from accused no. 1 and that this would be enough evidence for the five young men whom he knew very well, to be arrested the following day. This threat prompted the two accused to walk to the house where the deceased had sheltered himself in. Foreseeing trouble brewing, the Mnisi brothers fled back to their home where they were when the two accused persuaded them to go and attend a wedding.
8. The next morning, the body of the deceased was discovered in a nearby burning veld where it suffered superficial burns. Tracks of the shoe prints

from the house occupied by the deceased led the police to the house of the three Mnisi brothers where and the shoes were taken out and handed over to them by the Mnisis. The deceased's shoes were also taken that same night only to be retrieved from under accused no. 2's bed at his place of residence.

9. **Issues for determination:** Since facts are largely undisputed, issues for determination are narrowed and limited. Accepting that the accused entered the premises in order to catch the horses that would take them to a wedding, can it be concluded that the accused intended to steal the horses as intended by the Stock Theft Act? Did the accused have the intention to deprive the owner permanently of the ownership over the horses? While the evidence on a murder charge points to accused no. 1 based on his own word, can this also be attributed to accused no. 2? The same goes for the robbery charge which points to accused no. 2; can this be attributed to accused no. 1 too?

Summary of facts:

10. A total of 7 witnesses testified during the trial, six for the State and accused no. 2 was the sole witnesses for the defence in respect of his case. Accused no. 1 elected not to give evidence.

Case for the State

11. Mdeni Doctor Mnisi, Siyabonga Banele Mnisi & Melusi Andries Mnisi: Evidence by the three Mnisi brothers was so identical; that it can be summarised altogether. To avoid confusion, I shall refer to them by their first names. The three were together when approached by the accused who persuaded them to go to a wedding. It was accused no. 1 who gave a knife to

Mdeni and Siyabonga with which they cut the ropes that were to be used to tie the horses for purpose of riding before handing it back to him. After a short scuffle between accused no. 1 and the deceased, accused no. 1 informed the others that he stabbed the deceased on his back and that the wound was deep. After the Mnisi brother had fled the scene to their homes, they were joined by accused no. 2 who informed them that he left accused no. 1 chasing the deceased to the direction of the dam. Siyabomga added that accused no. 2 also had a pair of shoes which he claimed to have taken from the deceased's house after they could not find the hat they had gone to look for.

12. Melusi also testified that when they went to the deceased's farm, he was wearing a pair of canvass shoes that did not match. This is because he and accused no. 1 had exchanged one shoe each resulting in him wearing blue and white shoes whereas accused no. 1 had white and blue shoes. It is these shoes that helped the police to track them through the shoe print marks.
13. Mthunzi Roux: He and the deceased worked in the farm that belonged to Reiner Moller. The deceased used to stay in the house in the farm yard. He is the last person to have seen the deceased alive prior to the visit by the accused and the Mnisi brothers later at night. He is also the one who discovered the corpse of the deceased in the burning veld a short distance from the farm as he came on duty the following day on the morning of 28 August 2016. He also observed that the door to the house occupied by the deceased was broken and its door frame was also damaged. The door was however intact and not damaged the previous day when he left the premises.
14. Johannes Stephanus Mare: He is a member of the SAPS who holds a rank of a Warrant Officer. He is the first officer to arrive at the scene of crime on 28 August 2016. Together with his colleague, Sgt Erland from the Dog Unit,

they managed to track down the shoe print marks from the house in the farm, to the main road until they reached the Mnisi homestead.

15. Makhosonke Absalom Mtshali: At the time of the incident, he was a Sergeant within the SAPS, but he has since been promoted to a rank of a Warrant Officer. He is the one who arrested accused no. 1 on 29 August 2016 and was present when accused no. 2 was arrested by his commander, Captain Ackerman on 30 August 2016. The deceased's shoes taken on the night he was murdered were found under accused no. 2's bed on the same day of his arrest at Daggaskraal.

16. With this evidence, case for the **State was closed**.

17. At this stage an application for the discharge of all the accused in respect of certain charges was brought in accordance with the provisions of sec 174 of Act 51 of 1977. Accused no. 1 applied for a discharge in respect of count no. 4 whereas accused no. 2 applied for a discharge in respect of counts 1-3. The application was opposed by the State. The court was of the view that there was evidence upon which a conviction in respect of all these charges could stand. The application was therefore refused. Further reasons appear from this judgment.

Case for the Defence:

18. **Accused no. 1 closed his case** without testifying and he called no witnesses.

19. Dumisani Lawrence Nkosi: He testified that on the date of the incident around 7 pm, he, accused no. 1 and Melusi went to the Mnisi homestead. They suggested to the Mnisi brothers that they should get to the wedding and the Mnisi brothers agreed and started to prepare themselves for that. When Siyabonga asked as to how they would get there, accused no. 1 indicated that they would use horses which they were to fetch from a farm in Middelpa. They left the Mnisi homestead with the three Mnisi brothers to the said farm led by accused no. 1. Everyone went there voluntarily without any undue pressure.
20. Once at the farm, they entered the stable where they caught two horses and exited. He then got separated for the rest of the group when he stayed with Melusi who was busy on the phone while the rest walked out of the camp. He decided to go join the others leaving Melusi alone and at that stage, accused no. 1 and Mdeni were already walking towards the house in the farm yard. He followed them but could not catch up with them as they vanished from his view at the corner. He stopped following them when he found a pair of wet shoes near the house which he picked and started running back to the Mnisi homestead where Mdeni opened for him.
21. Once inside, he started talking to the Mnisi brothers about how they fled the scene where they were catching the horses at the farm. He denied that he robbed the deceased or took part in his murder. He did not even witness the said murder and did not even hear accused no. 1 say that he stabbed the deceased. He denied that he is the one who suggested that they should approach the deceased for accused no. 1's hat.
22. With this evidence, **case for accused no. 2** was closed.

23. **Closing arguments:** Counsel for the State submitted that the accused should be found guilty as charged in respect of all the charges since they acted in furtherance of common purpose. Counsel for accused no. 1 submitted that accused no. 1 should be acquitted of the charges including count no. 3 which he had initially pleaded guilty to since his admitted facts could not be supported by the evidence led by the State. Legal representative for accused no. 2 submitted that accused no. 2 should be convicted only of theft as a competent verdict to count no. 4 and be acquitted in respect of all other charges. The submission made by both the legal representatives in respect of count no. 1 is that the accused could not be guilty because they lacked the intention to steal. They argued that the evidence led was to the effect that the horses would be returned after attending the wedding which removes the intention to permanently deprive the owner of his ownership over the horses.

24. It is **trite** that for a conviction to stand, the State must prove its case beyond a reasonable doubt. There is no duty on the accused to prove his innocence. In case there is a version put forward by the accused, and should the same be reasonably possibly true, the accused is entitled to an acquittal. These are not separate and independent tests, but the expression of the same test ('the proper test') when viewed from opposite perspectives. There is only one test in a criminal matter and that is whether the evidence establishes the guilt of the accused beyond a reasonable doubt or not.

25. For evidence to establish the guilt of the accused beyond reasonable doubt, it will be so only if there is at the same time no reasonable possibility that an innocent explanation has been put forward that might be true. The two are inseparable, each being the logical corollary of the other. In whichever form the test is expressed, it must be satisfied upon a consideration of all the

evidence. It suffices for present purposes to state that it is well settled that the evidence must be looked at holistically – *S v Van der Meyden*,¹ *S v Combrink*².

26. Facts Not Disputed:

- a. The two accused proposed to the Mnisi brothers that they should go attend a wedding at Mabhola farm.
- b. One of the Mnisi brothers raised a concern over the distance and accused no. 1 indicated that they would go riding on horses.
- c. The five of them proceeded to the farm led by accused no. 1 where they caught two horses.
- d. The custodian of the horses, the deceased came out of the house and had a physical confrontation with accused no. 1.
- e. In the confrontation, accused no. 1 stabbed the deceased on his back while the deceased took a hat from accused no. 1.
- f. The Mnisi brothers fled the farm leaving the two accused approaching the house in order to retrieve accused no. 1's hat.
- g. The next day in the morning, the deceased was found dead in a burning veld not far from the farm yard.
- h. The deceased's house was also found to have been broken into through a damaging the door.

¹ 1999 (1) SACR 447 (W)

² 2012 (1) SACR 93 (SCA)

- i. The deceased's shoes were taken during the same night and later found at accused no 2's place of residence.

27. Facts in Dispute:

- a. Did the accused intend to steal the horses or not.
- b. Did accused no. 1 take part in the taking of the deceased's shoes or not.
- c. Did accused no. 2 take part in the murder of the deceased or not.

28. Credibility of witnesses. Under normal circumstances, there would be no need to make credibility findings when the facts are largely undisputed as they are in this case. However the approach by accused no. 2 leaves the court with no choice. Even after he was warned by the court to see to it that every allegation made by the witnesses is disputed if it is wrong to avoid a presumption that he opted not to dispute because he is in agreement thereof; accused no. 2 chose not to dispute so much of the State allegations as advised; choosing to do so only when he took the witness stand to testify.

29. The three Mnisi brothers proved to be credible witnesses to the court whose version also got some corroboration by accused no. 2. The Mnisi brothers place themselves at the scene of crime and also incriminate themselves regarding their role; except that when the accused approached the house, they decided to run away. Accused no. 2 confirms that when he arrived at their home later on that night, they started talking about them fleeing the farm. This confirms their version on a very material aspect especially seeing that accused no. 1 had placed them at the murder scene in his guilty plea statement.

30. Accused no. 2 disputed the version by the Mnisi brothers on aspects I consider to be immaterial even though they deserve the court's attention for purposes of credibility' finding. These are the aspects such as who cut the ropes to tie and subdue the horses; whether accused no. 1 indicated to the rest of the group that he had stabbed the deceased and whether he walked with accused no. 1 to the deceased's house in order to retrieve accused no. 1's hat. The failure on his part to dispute these allegations at the right time leaves the court with no option but to question his motive of doing so. He had all the opportunity to put it to the witnesses as to how it happened and he did not. The court can only reach a conclusion that this must be an afterthought and which is also farfetched.
31. For this reason, the court is not impressed with accused no. 2's credibility as a witness. Beside his failure to dispute the version of the State witnesses while on the witness stand, accused no. 2 failed to take the court into his confidence when questioned on a statement he made on plea – Exhibit B. An innocent reading thereof suggests that he was just alone when he went to the farm of the deceased where he stole a pair of shoes. Nowhere does he mention that he was with accused no. 1 and the Mnisi brothers or what their role was. These he mentions only when testifying on his defence. His determination to protect accused no. 1 and or his willingness not to challenge any of the Mnisi brothers even when he knew he was not in agreement with their evidence leaves his credibility destroyed.
32. The court also has issues with the credibility of accused no. 2 as a witness given his version on where and how he got the deceased's shoes. For some unknown reasons he wants the court to believe that there was no association between the attack on the deceased and the taking away of his property. This version is not in line with other undisputed facts of the case. The facts to the effect that the deceased was already stabbed by the time he helped himself to

his shoes remain undisputed. Yet he wants the court to see the taking of property from a man already injured as theft.

33. **Circumstantial evidence.** It is clear from the facts that no one saw anyone stab the deceased to the death. This however does not mean that as long as there are no eye witnesses, nobody should be convicted of murder when one is unlawfully killed. *R v Blom*³ laid down the basic requirements for a conviction based on circumstantial evidence. There are two cardinal rules of logic which cannot be ignored: first, the inference sought to be drawn must be consistent with all the proved facts. Secondly, the proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.

34. Undisputed facts are to the effect that the deceased retreated into the house after a physical confrontation with accused no. 1 where he shouted that he was in possession of accused no. 1's hat through which the police would arrest him and his friends. Further to this, the two accused are seen approaching the house and later events do not have witnesses as the Mnisi brothers fled. It is also common cause that the house was broken into and the deceased was stabbed on his throat which caused his death. It is further common cause that the deceased's corpse was found away from the house in the veld where it was burned albeit superficially so. And lastly, the deceased's property was found hidden under the bed of accused no. 2.

35. There is no doubt that the inference the State wishes the court to draw, to wit, that the two accused broke into the deceased's house with the intention to murder him; that they robbed the deceased of his shoes and that the two of

³ 1939 AD 188.

them killed him is consistent with the proven facts of the case. It is the second requirement which is not that obvious. Does this inference exclude all the other reasonable inferences to be drawn from the facts? Another possible inference could be that accused no. 2 decided to walk back before reaching the house they were approaching in order to retrieve a hat, only to walk back without reaching the house. Would this be a reasonable inference to draw from the facts? I am of the view that such inference would be unreasonable. What happened that would make him abandon what he wanted to achieve? Such inference is also not consistent with the proved facts and should be excluded. The court finds on circumstantial evidence that the two accused are the persons who broke the door of the deceased's house with the intention to commit a crime.

36. Using the same principles in *Blom, supra*, the court now has to answer if the inference to the effect that the two accused murdered the deceased excludes other reasonable inferences that can be drawn. Asked differently, the question would be whether accused no. 2 was present when accused no. 1 stabbed the deceased on his throat. I doubt if this is the only reasonable inference one can draw from the facts. Accused no 2 is reported to have told the Mnisi brothers that he left accused no. 1 chasing the deceased to the dam direction; and the Mnisi brothers believed it. That is a reasonable inference that can be drawn. It cannot therefore be inferred that accused no. 2 was present when accused no. 1 stabbed the deceased to death. But that is not the end, for the court has to answer if by virtue of the doctrine of common purpose, accused no. 2 cannot be guilty of the crime of murder too or if accused no. 1 is also guilty of the crime of robbery as per count no. 4.

37. Common Purpose: Having accepted the version by the State witnesses, and the circumstantial evidence, the court now proceeds to make a determination on whether the acts by one individual accused can be imputed to a co-accused. The court can only reach this conclusion if the accused acted in furtherance of common purpose. In a full bench decision of *S v Mzwempi*⁴ at para 55, Judge Alkema said, “A party to the agreement, whose function it is to wait in a second getaway car some five or ten kilometres away, will be equally guilty of the offence of robbery under the common purpose doctrine, notwithstanding that he or she may not have been at the scene where the robbery was committed, or that he or she may not have physically participated in the act of robbery.” See also *S v Majosi and Others*.⁵

38. The salient features of the rule may perhaps be summarised as follows: First, a distinction needs to be drawn between liability based on a prior agreement, and liability based on active association. On either basis, the conduct imputed to the accused is the conduct of the participants in the execution of their joint venture. Second, in the absence of a prior agreement, only the active association of the accused in the particular events which contributed to, or caused, the crime, triggers the principle of imputation in the manner described above. In this sense, liability arising from active association is much more restrictive. Such association will depend on the factual context of each case, and must be decided with regard to the individual actions of each accused. In the assessment of the individual actions of each accused, the first four requirements for active association, as set out in *S v Mgedezi and Others*,⁶ must be satisfied. Third, the other definitional elements of the crime, such as unlawfulness and culpa, must be present.

⁴ 2011 (2) SACR 237 (ECM)

⁵ 1991 (2) SACR 532 (A)

⁶ 1989 (1) SA 687 (A) at 705I – 706B.

39. The restrictive meaning of 'active association' is evidenced by the four requirements for liability under common purpose as formulated in *Mgedezi* (*supra*) at 705I – 706C, as follows: 'In the absence of proof of a prior agreement, the accused, who was not shown to have contributed causally to the killing or wounding of the victims, can be held liable for those events, on the basis of the decision in *S v Safatsa and Others*,⁷ only if certain prerequisites are satisfied. In the **first** place, he must have been present at the scene where the violence was being committed. **Secondly**, he must have been aware of the crime being committed.... **Thirdly**, he must have intended to make common cause with those who were actually perpetrating the crime. **Fourthly**, he must have manifested his sharing of a common purpose with the perpetrators of the crime by himself performing some act of association with the conduct of the others. **Fifthly**, he must have had the requisite *mens rea*; so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue.' The fifth requirement — of *mens rea* — was found to be a definitional element of any crime, which must in any event be proved, and is not a requirement of 'active association'.
40. Applying the same principles to the facts *in casu*, it is clear that there was a prior agreement between the accused first in respect of what they were going to do on the farm – to catch the horses. Secondly the accused again had the meeting of the minds when they agreed to go and retrieve the hat from the deceased from the shelter of his house. The two accused knew that the deceased had locked himself in the house and that it would require some force or breaking to get to him. From this prior agreement, it is clear that the

⁷ 1988 (1) SA 868 (A).

accused approached the deceased's house with common purpose in mind, to break open the house so as to access him.

41. In committing a crime of housebreaking, the intention the culprit had when he breaks into the premises is usually guided by his conduct once inside the premises. If the culprit decides to commit the crime of rape, it can be safely concluded that he broke into the premises with the intention to rape irrespective of whether he knew that there were people inside the house prior to breaking into it. Equally, the robbery of the items belonging to the deceased once inside the house points to the intention the accused had when they broke into the deceased's house.
42. Further to this, it cannot be expected that the assailants agree on every detail on how crimes were going to be executed especially when they cannot anticipate how the victim would react. In certain cases, the victim may choose to fight and even kill one of the assailants.⁸ In such cases the courts always found that the fellow robbers were guilty of the murder of their fellow gang member for reason of common purpose and reconciling themselves with the eventuality of the victim fighting back.
43. In *S v Dlamini*,⁹ the three robbers who accosted three women and each of the three men robbed the individual woman he faced, were each convicted of three different counts of robbery being the robbery each robber personally perpetrated and the other two counts of robberies perpetrated by the two other men. The contention by the three men to the effect that this was a duplication of convictions was rejected by the court of appeal.
44. As long as it was accused no. 1 who subdued the deceased by stabbing him first on his back when he fought when the deceased approached the intruders in his yard and later all over the body; accused no. 1 cannot

⁸ *S v Nkombani* 1963 (4) SA 877 (A), *S v Nkosi* 2016 (1) SACR 301 (SCA).

⁹ 2012 (2) SACR 1 (SCA)

therefore distance himself from accused no. 2's conduct when he deprives the deceased of his property. It is in fact accused no 1 who caused the injury that can now be described as aggravating circumstances.

45. Findings: Count 1: Sec 4 (1) of the Stock Theft Act provides that anyone who “unlawfully and intentionally enter a land enclosed on all sides with a sufficient fence or any kraal, shed, stable or other walled place with intent to steal any stock or produce on such land or in such kraal, shed, stable or other walled place” is guilty of an offence. It is clear from the wording of the statute that it is not just the unlawful entry into the fence or kraal that is outlawed, but the entry with the intention to steal. The State seemed to have missed this legislative requirement when drafting the charge when alleging that the accused were guilty of “unlawfully and intentionally entering...” omitting the intention to steal. In essence, the charge in respect of count no. 1 does not disclose an offence for this very reason. Up to this stage the charge sheet was not amended to include the requisite intention to steal.

46. When the property is taken from the owner without the intention to deprive him permanently of his ownership, there is no theft – see *S v Terblanche*.¹⁰ This is the position even if the item is taken through apparent robbery. Robbery has an element of theft and there cannot be robbery if the item is taken for use and have it returned to the owner in its original condition – see *S v Vilakasi*.¹¹ The conduct after such usage of the property will usually guide the court on whether the culprit intended to deprive the owner permanently of the ownership of his property.

¹⁰ 2007 (1) SACR 545 (C)

¹¹ 1999 (2) SACR 393 (N)

47. In *R v Sibiya*,¹² the court of appeal quoted with approval the passage in *R v Laforte*¹³ when the Full Bench of the CPD held, “*if the thing was taken with the intention to return, but while it was in the taker's control he changed his intention into an intention to terminate the owner's enjoyment of his rights, theft of the thing commences at the moment of such change of intention.*” When evidence by the State is to the effect that they and the accused intended to use the horses for riding and then return them back to the owner; the accused could in light of the above only be guilty of theft when they change their mind and decide not to return the horses, something that did not happen in this case. The court finds therefore that the accused did not enter the premises of the deceased with the intention to steal the horses.

48. Count 2: From the analysis of the evidence, it is clear already that the crime that was committed by the accused upon breaking open the deceased's house is one of robbery. Whereas the crime of murder was committed against the deceased, there is no evidence to exclude the inference that when accused no. 2 left accused no. 1; accused no. 1 was pursuing the deceased to the direction of the dam. Perhaps this could explain why he was found dead some 800 metres away from his house. Sec 262 of the Criminal Procedure Act provides that if the evidence on a charge of housebreaking with intent to commit an offence specified in the charge (in this case murder)..., does not prove the offence of housebreaking with intent to commit the offence so specified but the offence of house-breaking with intent to commit an offence other than the offence so specified ..., the accused may be found guilty of the offence so proved – in this case, housebreaking with the intent to commit robbery.

¹² 1955 (4) SA 247 (A)

¹³ 1922 CPD 487

49.Count 3: Accused no. 1 pleaded guilty to this charge and as indicated above, on his own word, he stood to be convicted. It is surprising that in his plea, accused no. 1 suggests that he acted in common purpose with a group that chopped the deceased with pangas, yet he persisted that sec 51 (2) of Act 105 of 1997 was applicable, as opposed to sec 51 (1) of the same Act. Beside his own version which was crafted to implicate and cast doubt on the State witnesses; the court heard the undisputed version of the State witnesses which differs materially to the statement tendered by accused no. 1. For reasons that there are a number of inferences that can be drawn regarding the murder of the deceased, the court cannot therefore infer that accused no. 2 was present when accused no. 1 stabbed the deceased on his throat.

50.Beside the reason of acting as a member of a group acting in furtherance of common purpose as alleged in the statement, there are a number of other reasons from the undisputed evidence through which this murder attracts the provision of sec 51 (1) of Act 105 of 1997. First, the deceased was murdered after he had been robbed of his property. Secondly, from the first physical brawl between accused no. 1 and the deceased until the time accused no. 1 chose to follow the deceased into his house, enough time lapsed to make this a premeditated murder – see *S v Mgibelo*¹⁴

51.Count 4: The taking of any item from the deceased after he had been stabbed on his back by accused no. 1 makes it robbery irrespective of whether the deceased resisted the taking of his property or not. Whether accused no. 1 actively took part in the taking of the shoes is immaterial. By virtue of inflicting an injury that preceded the taking of the shoes, accused no. 1 makes himself guilty of robbery too.

¹⁴ 2013 (2) SACR 559 (GSJ)

52. The court finds therefore that the case for the State was proved beyond a reasonable doubt and that the version of accused no. 2 is not reasonably possibly true.

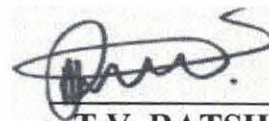
53. **Verdict:** Count 1: Not Guilty – all the accused.

Count 2: Guilty of Housebreaking with the intent to commit robbery with aggravating circumstances – all the accused

Count 3: Accused no. 1: Guilty as charged. Accused no. 2: Not Guilty.

Count 4: Guilty as charged – all the accused.

Section 51 (1) of Act 105 of 1997 is applicable in respect of count 3 and sec 51 (2) is applicable in respect of count 4.



T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

Dates Heard: 5-7 February 2018

Judgment Delivered: 08 February 2018

For the State: Adv. Ntuli

Instructed by: Director of Public Prosecutions
Mpumalanga

For Accused no. 1:

Adv. Matshego

Instructed by:

Legal Aid Nelspruit

Johannesburg

For Accused no. 2

Mr. Rasivhaga

Legal Aid Nelspruit