

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT  
JOHANNESBURG

CASE NO: SS 122/12  
DPP REF NO: JPV 2012/0001  
DATE: 5<sup>th</sup> February 2013

(1)	<u>REPORTABLE: YES</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: NO</u>
(3)	<u>REVISED.</u>
<u>7/2/13</u> DATE	
<u>[Signature]</u> SIGNATURE	

In the matter between:

THE STATE

and

MODIBA, IGNATIUS MALEKUTU

Accused

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J U D G M E N T

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MUDAU, AJ:

[1] The accused, Mr Modiba Ignatious Malekutu, has been arraigned for trial on an indictment consisting eight (8) charges. The charges are: robbery

with aggravating circumstances (count 1), unlawful possession of a firearm as well as ammunition in contravention of the Firearms Control Act 60 of 2000 (counts 2, 7 and 8), housebreaking with intent to rob and robbery with aggravating circumstances (counts 3, 4 and 5), finally, murder (count 6) read with section 51(1) of Act 105 of 1997.

[2] Adv Steyn represents the state whereas the accused is represented by Adv Buthulezi. The accused pleaded not guilty to all the charges. No plea explanation as to the merits of the matter was tendered on the accused's behalf.

[3] The charges preferred against the accused arise from four (4) separate incidents, all having occurred at three different houses and at restaurant in the Norwood, Fellside and Orange Grove areas within the district of Johannesburg. The incidents span over a period of approximately two (2) years, the first having occurred on or about 8 May 2009 and the last on or about 10 May 2011.

[4] It is apparent from the evidence that I shall deal with below that the primary issue for consideration is whether the accused is implicated by the fingerprints evidence in the commission of the offences.

[5] Before I proceed to deal with the evidence, it is convenient to refer to the formal admissions (Exhibit "A") that are by consent, recorded in terms of section 220 of the Criminal Procedure Act. The formal admissions *inter alia*

relate to the identity of the deceased; the date and place of the deceased's death, the cause of his death, this being as a result of a perforating gunshot wound to the head; that the body of the deceased sustained no further injuries from the time of his death until a *post-mortem* was conducted by Dr Candice Geraldine Hansmeyer on the deceased's body as recorded in exhibit "A"; the depiction of the scene of the crime (count 6) in the photo-album, as well as the key thereto.

[6] Furthermore, it has not been disputed or seriously challenged that except for the charges that I shall refer to below the state was successful in proving all the essential elements in respect of the robbery charges (counts 1 and 3). In respect of the latter count (3) the state failed to prove that the offence was preceded by the act of housebreaking. The state also proved all the essential elements in respect of housebreaking and robbery charges (i.e. counts 4 and 5) as well as murder (count 6).

[7] A convenient point of departure is to refer to the charge regarding which the state had led no credible evidence for some or other reason and for that reason, does not require a detailed consideration.

Counts 2, 7 and 8 as indicated above relate to the unlawful possession of firearms and ammunition in contravention of the Firearms Control Act 60 of 2000. Although the uncontested evidence of the assailants in possession of a firearm(s) in at least 3 of the incidents, no particulars of the firearm were given. In addition, and as readily conceded by counsel for the state in respect

of count 2 only, the evidence is insufficient to sustain a finding of possession or joint possession of the firearm (s) as referred to by the witnesses' evidence. Similarly, there is no evidence that the accused was in possession of ammunition and thus, in violation of the relevant law.

[8] This brings me to the remaining charges. I shall, for purposes of convenience and ease of reference adopt and adhere to the classification of the charges under the respective counts as set out in the indictment. Against this background, it remains for me to consider the evidence with regard to each of the incidents under a relevant sub-heading.

#### COUNT 1

##### ROBBERY AT THE STEERS RESTAURANT: NORWOOD

[9] Five witnesses, namely the complainants, referred to in the indictment in respect of this count testified for the state. The incident of robbery is not in dispute, and therefore, does not require a detailed evaluation. A brief summary of the events is as follows. On 9 May 1009 and at about 21h00, the complainants were at their place of work (Steers Restaurant, Norwood). They were preparing to close the restaurant for the day, and it was quiet.

[10] Three unknown males walked into the restaurant and ordered a cup of coffee and two canned cool drinks. The three males sat down and had their drinks. Later on, one of them approached the staff at the counter under the pretext of ordering another cup of coffee. In the process, one of the remaining

two men joined but pointed a firearm at the manager. The complainants were robbed of their cellular phones. An unknown amount of cash was also stolen from the tills and the safe.

[11] Sometimes later, police arrived. Fingerprints were uplifted from the cool drink cans that the assailants drank from. The complainants attended an identity parade but failed to point or identify anyone in the line-up. They all failed to identify the accused as one of the robbers before court. They attributed this to shock and the fact that they were ordered not to look at their assailants.

[12] A local police fingerprint expert, Inspector Chuene Jonas Mokwele, testified that on the same day of the robbery, he attended to the scene at Norwood Restaurant. He checked a Sprite cool drink can which was left on the table by the robbers for fingerprints. The cool drink can was pointed out to him by Mabasa (the complainant).

[13] He found an identifiable fingerprint which he lifted from the Sprite can by means of a scotch tape. This he marked, signed and dated in the presence of the complainant who countersigned on the backside thereof (Exhibit "H1").

[14] Sometime later, he received a set of fingerprints from his commander on which the names of the accused appeared (Exhibit "H2"). He compared the print lifted at the scene of robbery at Steers Restaurant and found them to

match. To explain his evidence, he had prepared a court chart (exhibit H3) depicting an enlarged print lifted at the scene of robbery as well as a right ring finger from the set of finger prints received from his commander. Both prints had been enlarged to the same size. Shortly before the court proceedings commenced he took a print of the accused's right ring finger (Exhibit "H4"). This he compared with the set of prints referred to above. He found 9 points of similarity which he demonstrated before court.

[15] It is Mokwele's evidence that the print found on an empty Sprite can at the Steers Restaurant, Norwood, on the night of the robbery belongs to none other than the accused.

### COUNT 3

#### ROBBERY WITH AGGRAVATING CIRCUMSTANCES AT NO 151 IVY ROAD, NORWOOD

[16] On this charge, the complainant (Mrs Gatta) had gone shopping on the morning of 10<sup>th</sup> December 2009. She had left her housekeeper busy with house chores. Upon her return at about 11:30 am, she opened her front door. It was at that point that she was attacked by an unknown male assailant. She fell to the ground and started bleeding from her nose.

[17] Another male assailant ran past and accosted her housekeeper. The second assailant threatened the housekeeper (Mrs Ratshili) with a knife.

[18] The two of them were tied up after which their assailants ransacked the house, took jewellery, money, clothes and thereafter left the scene. The incident of robbery was not preceded by any housebreaking,

[19] The police, including a fingerprint expert attended to the scene a short while later. A fingerprint was lifted in the complainant's presence from a tin that contained a Chivas Regal Whiskey bottle. The tin, which was a gift from her son who is based abroad, was originally on a shelf. The intruders had then left the empty tin on the bar counter. Mrs Ratshili also testified and confirmed the gist of this evidence.

[20] Both she and her housekeeper (Mrs Ratshili) failed to identify the accused as one of the two robbers.

[21] Police fingerprint expert Inspector Mashale attended to the incident of the robbery at No 151 Ivy Road, Norwood. He confirmed that he lifted a fingerprint from Exhibit "1" (Chivas Regal Whisky tin) using the same method described above in respect of count 1 (para 13 to 15). He found 8 points of similarity.

[22] It is his evidence that the left ring finger lifted from the tin of whisky belongs to the accused. He testified that only 7 points of similarity are sufficient to establish a person's identity beyond any doubt.

COUNT 4HOUSEBREAKING WITH INTENT TO ROB AND ROBBERY WITH AGGRAVATING CIRCUMSTANCES

[23] In this instance, Mr and Mrs Endres testified that they were asleep in the early hours of the 28<sup>th</sup> March 2011 in the main bedroom of their house. They woke to the presence of 3 unknown male assailants who were inside their bedroom. The couple were tied up with cords. At knifepoint during which Mr Endres sustained a cut on his arm, the couple were robbed of valuables such as gemstones, a laptop, clothing, jewellery and money by their assailants. Entry, they later established, was gained through a study room window. Burglar bars had been forced open to facilitate easy access.

[24] Neither of them could identify the accused before court.

[25] Another local fingerprint expert (Sgt Moloi) testified to the effect that he visited the scene of this incident (at no 21 Forbes Street). He examined the scene for possible finger and palm prints. He lifted two prints. The first was lifted from a jewellery box (Exhibit 2) in the couple's bedroom. The second print was lifted on the tiled floor plus minus 30 cm from the study room wall directly below the broken window.

[26] Using the same process as described above by other fingerprint experts (Exhibits "G1" to "G8") it is his evidence that both prints have 8



identifiable features, respectively. It is Moloi's evidence that both prints belong to the accused.

COUNTS 5 AND 6

HOUSEBREAKING WITH INTENT TO ROB AND ROBBERY AS WELL AS  
MURDER

[27] As at the 10<sup>th</sup> of May 2011 Mrs Cecily Singer and her late husband, Howard Martin Singer, lived at No 39 Hope Road, Orange Grove. They had been married for 39½ years by the time he was murdered during a house robbery. He was 67 years of age whereas she was 68 years old then. The incident as described by Mrs Singer happened on his birthday and a few months short of his 40th wedding anniversary.

[28] At about 9 pm that night, she was watching a television programme alone in the lounge of their house. She was waiting for the deceased who was at a choir practice. She had locked herself inside the house. All the windows as well, were closed.

[29] Suddenly there was a large noise that emanated from the side of their main bedroom. She went into the main bedroom to investigate the source of the noise. What she saw when she entered the main bedroom confounded her. Her bedroom window was broken and the burglar bars had been forced in. There were two males who were in the process of entering the house through the caved in burglar bars. Their heads were already inside the room.

She shouted and asked loudly: "*What are you doing in my house?*" This, she had hoped, might intimidate and scare them to run away.

[30] The two men were undeterred by her screams. She turned and ran into the passage for her life. They came into the house, ran after her and caught up with her in the passage.

[31] They held her hands behind her back which they tied with telephone cords. One of them held a gun to her head. She was forced to the floor on her knees. They wanted to know who else was in the house. As she was uncooperative they threatened to rape her. When she saw the gun she said her last prayers, in Hebrew. It is a prayer said when someone is about to die. Her pyjama pants had already been lowered. The prayer seems to have worked for they pulled her up after she had asked them not to rape and murder her.

[32] Her engagement and wedding rings were taken. They wanted to know where the safe and firearms were. She told them there were none, but some cash in the bedroom. She was taken to her bedroom whereupon a pillowcase was put over her head to prevent her from identifying the intruders.

[33] Her house was ransacked, money and jewellery were taken. Whilst one was ransacking the house the other one remained with her in her bedroom. The one who remained with her made her bend over on the bed, lowering her pyjamas bottoms which she quickly pulled up.

[34] Suddenly it all became very quiet. Although hard of hearing, she knew that the deceased had come back home. They ordered her to be quiet. The next she heard, was his scream followed by a gunshot. After a shot interval, the two intruders came running into her room and climbed out through the window they had come in and left.

[35] After some struggle, she managed to untie herself. She phoned an ambulance service as well as the police who arrived not so long thereafter. The deceased who appeared to be alive, was propped up against the front door from the inside in a sitting position wedging the door. The deceased had a gunshot wound on the head. Deceased was taken to Milpark Hospital for treatment, but eventually succumbed to his injuries on the 13<sup>th</sup> May 2011.

[36] Similarly, a fingerprint expert (Warrant Officer Naicker) of the Johannesburg local criminal record centre visited the deceased's home address on the night of the incident. From the bathroom, and using the same method described above (at para 13-15) he retrieved two identifiable prints. The first print, (the accused's thumb print) was retrieved from a square container that contained wet wipes. From this print he was able to identify 8 distinguishing features. The second print (the accused's right palm) was retrieved from a medicine box called "*morvicol*" also found lying on the bathroom floor. Using the same process, describing above, he found 8 points of similarity.

[37] Another fingerprint expert also qualified as a laboratory technician (Warrant Officer Moya) retrieved an identifiable print from a clear plastic bag. The bag had been found on a dressing table by her colleague, Jones. The bag was subsequently secured and sealed in a forensic bag until she conducted her examination. She identified the print as the accused's left thumb print by 9 unique features (see Exhibits "M3" to "M5").

[38] Captain Moni is the last witness to testify for the state. His evidence briefly stated, is that he orchestrated the arrest of the accused. With the accused on the police's list of most wanted suspected criminals, he received a report that led to the arrest of the accused in Germiston.

[39] The accused was driving a motor vehicle upon being cornered by the police who were travelling in unmarked vehicles but with sirens on. The accused tried to flee on foot. The accused however, was caught. When the accused was informed that he was under arrest for the Norwood murder, the accused's response was: *"I know about the case"*. The accused was thereafter detained and charged for these offences.

[40] The defence conceded that there is no material criticism they could level against the state witnesses. In my view, this is a justifiable concession as all the witnesses testified clearly, in a credible manner and without any material contradictions.

[41] As against the evidence I have summarised above, the accused's version falls to be considered. The accused relies on a bare denial in respect of all the incidents. The accused asserts that all the fingerprint experts made wrong findings in linking him to the various crime scenes.

[42] It is furthermore the accused's version that he suspects police collusion in this regard as the fingerprints experts work together. Under cross-examination however, the accused's version was less convincing. When he was asked what makes him state that the fingerprint expert was mistaken about his prints at the Singers' residence, he responded as follows: "*I do not remember going to the address*". For some one who testified that he does not know the address in question his response was, to say the least, baffling. The accused it appears, is astounded by the allegations that his finger and palm prints were found at various scenes where crimes have been committed. By his own version, accused lives in Norwood. Yet he was quick to state that he does not know the area where the various incidents occurred. I find this to be a contradiction. The other two suburbs are not far from Norwood. His suggestion that there is police collusion to implicate him falsely is in my view stretched and not supported by facts that are common cause (e.g. all the prints were lifted on the days that the offences were committed and within a short period of time). It must be accepted that the prints, given the circumstances, were still fresh. I did not hear any argument to the contrary. I do not hesitate for a moment to reject the accused's suggestion of a conspiracy in implicating by his prints. I accordingly reject the accused's denial at these incidents as false beyond any doubt.

[43] I find that regard being had to the totality of the evidence, all the expert witnesses testified satisfactorily with regard to the circumstances under which the fingerprints were lifted at each scene. There was no challenge with regard to the manner in which the fingerprints were uplifted. Neither was there any challenge with regard to any of the points of similarity leading to the conclusions arrived at.

[44] I accordingly find that, based on circumstantial evidence, the inference that the accused was one of the perpetrators at the various scenes is consistent with the fingerprint evidence. Given the circumstances of each incident of crime as described above, the accused is intimately associated with what happened at each scene. In addition, I find that the accused's statement to the effect that: "*I know about this case*" is an informal admission which incriminates him regarding counts 5 and 6. It is improbable that the accused would have known about Mr Singer's death unless he was present. The statement was made spontaneously and voluntarily to the arresting officer, and before his rights after arrest could be explained. With this admission, this bolsters the circumstantial evidence found to exist.

[45] On the evidence as a whole the dispute this Court is required to determine is indeed a narrow one. It is whether the state has managed to discharge the *onus* it has in proving the guilt of the accused beyond a reasonable doubt regard being had to the totality of the evidence.

[46] It is trite law that an accused can be convicted of a crime based on circumstantial evidence. This entails invoking the two cardinal rules of logic as enunciated in the classic case of *R v Blom* 1939 AD 188. Firstly, the inference that the accused committed the various offences (referred to above) must be consistent with all the proved facts. If not, the inference cannot be drawn. Secondly, the proved facts should be such that they exclude every reasonable inference from them save that it is the accused who was the perpetrator.

[47] The answer to the second principle referred to in *R v Blom* (above) is dependent on the probative value attached to the accused's prints found at the different scenes.

[48] In *D H Swanepoel v The State* [2006] SCA 171 (RSA), the following passage in D T Zeffert *et al The South African law of Evidence* at page 94 was quoted authoritatively:

*"Circumstantial evidence is popularly supposed by laymen to be less cogent than direct evidence. This is, of course, not true as a general proposition. In some cases, as the courts have pointed out, circumstantial evidence may be the more convincing form of evidence ..."*

[49] On the facts described above which are common cause or not seriously challenged, I conclude that the accused was one of the perpetrators on the various scenes of crime. It is further, my finding that his finger and/or palm prints were not innocently left at the scene. All these prints were uplifted shortly after the various crimes were committed on the various dates referred

to by the witnesses. With regard to the allegations of murder, I conclude that it must have been an inherent part of the plan and his companion to use the firearm that one of them had, if necessary. The accused if not himself, saw it being used against Mrs Singer.

[50] From the undisputed version by the deceased's wife, none of the intruders left or disassociated themselves with the act of confronting the deceased on his return home. Instead, they both went to meet him whereas they could have left through the window through which they broke when they initially arrived. By virtue of the doctrine of common purpose, it is immaterial as to whom at that time, possessed the firearm and fired the fatal shot.

[51] With regard to the remaining charges of unlawful possession of a firearm as well as ammunition, there are numerous cases where the question of joint possession of a firearm in the execution of a common purpose was considered (see for example *S v Mbuli* 2003 (1) SACR 97 (SCA), *S v Nkosi* 1998 (1) SACR 284 (W), *S v Kwanda* 2011 JDR 0287 (SCA), *Motsema v S* 2011 JOL 28089 GSJ).

[52] In this case however, it has not been established as to who physically possessed the firearm. Although I found that the accused for purposes of this judgment, conspired with his companion(s) to commit the various acts of robbery and murder, the state still has an onus to prove that the accused had the necessary mental intention (*animus*) to possess the firearm.



[53] What the SCA held in *S v Kwanda* (above) at para [5] is apposite. *"The fact that appellant conspired with his co-accused to commit robbery, and even assuming that he was aware that some of his co-accused possessed firearms for the purpose of committing the robbery, does not lead to the inference that he possessed such firearms jointly with his co-accused"*.

[54] In this matter, there are no facts from which it can reasonably be inferred that the accused possessed a firearm and ammunition personally or through his companion(s), or that the latter possessed the firearm and ammunition (if any) on his behalf.

[55] In the result and for the foregoing reasons, the accused is found guilty on:

- Count 1: Robbery with aggravating circumstances.
- Count 3: Robbery with aggravating circumstances.
- Count 4: Housebreaking with intent to rob and robbery with aggravating circumstances.
- Count 5: Housebreaking with intent to rob and robbery with aggravating circumstances.
- Count 6: Murder as charged.

The accused is acquitted in respect of the remaining charges (counts 2, 7 and 8).

POSTEA ( 7<sup>TH</sup> FEBRUARY 2013)

### SENTENCE

[56] With the accused having been convicted for the various crimes as set out above, it remains for me to deal with the aspect of sentence. This is, and always has been, a difficult task. The purpose of sentencing is aimed at punishing the wrongdoer for his crimes, to deter the accused and other potential offenders from committing offences as well as creating an environment for the offender to rehabilitate. In the determination of an appropriate sentence, I am duty bound to consider the following aspects: (a) the accused's personal circumstances (b) the nature and gravity of the offence or offences committed and (c) the interest of society. Mercy is also considered as the fourth aspect.

[57] In this case, the accused has been convicted of offences that oblige this court to impose in the case of murder, a sentence of life imprisonment and for each count of robbery with aggravating circumstances, fifteen (15) years of imprisonment according to section 51 of the Criminal Law Amendment Act 105 of 1997. The court may only deviate provided there are substantial and compelling circumstances found to exist justifying the imposition of a sentence or sentences less than prescribed.

[58] It is convenient to deal with the personal circumstances of the accused. The accused is currently 34 years of age. He must have been 31 years old when he committed the first robbery in this matter. He originates from Tzaneen, in the Limpopo province. He attended school till grade 11. The accused is unmarried, but a father to two minor children (a boy aged 8 as well as a girl who is 6 years old). The minor children are currently under the care and custody of their biological mother. The mother sells clothing for a living. At the time of his arrest, the accused was self-employed. He transported goods and earned an average of R5000,00 per month which he used to support his unemployed mother. The court was informed from the bar that, since his arrest, the accused has discovered that he suffers from arthritis. The accused admits to records of previous convictions. The first is malicious damage to property on the 3rd of June 2008. A fine of R150,00 was paid. The second record relates to an escape from custody whilst in detention in contravention of the applicable law. The latter conviction was on the 17<sup>th</sup> June 2010, as a result of which 6 months imprisonment was imposed but wholly suspended on customary conditions.

[59] I have been requested to find the presence of substantial and compelling circumstances in that it was not established as to who fired the fatal shot with regard to the murder charge.

[60] It remains for me to deal with the nature and gravity of the various offences for which the accused, has been convicted. Besides the Steers Restaurant robbery (count 1), the rest were committed at residential

properties. For the remaining victims, all are senior citizens. I cannot think of a worse contact crime than one which, is carried out within the sanctity of your home where one is supposed to feel safe. The victims had high walls erected and burglar bars on their windows to keep unwanted people away. In the case of the Singers, they also had raiser wires installed over the high walls. All these measures never deterred the accused and his co-perpetrators.

[61] I find it aggravating, in respect of counts 4, 5, and 6 that the offences were committed after a break-in. In their nature, robbery and murder are very serious offences. The high rate of these incidents is unacceptably high. I can think of no worse crime, than one committed at a residential property and in the deep of the night when one is most vulnerable. This, in my view is a violation of the right to privacy in its worst form. There is no doubt therefore, why Mrs Singers had to abandon her house since the incident.

[62] The crimes in respect of counts 3, 4, and 5 were not only brazen, but accompanied by unnecessary brutal attack on the victims. None of the valuables stolen were recovered.

[63] In imposing sentences the idea is not to appease the victims or the community at large, but to serve. In general, the community that courts serve expect that serious crimes should attract appropriate sentences.

[64] In this matter, the accused expressed no remorse. I hold a view that his personal circumstances as described above pails in comparison to the nature and gravity of the offences committed. I do not find any substantial and compelling circumstances that justify the imposition of lesser sentences than those prescribed.

[65] For these reasons, the accused is sentenced as follows:

Count 1, 3, 4, and 5 the accused will serve in respect of each count 15 years imprisonment.

Count 6 the accused will effectively serve a life term of imprisonment.

The sentences imposed in respect of counts 1, 3, 4, and 5 are to be served concurrently with the sentence imposed in count 6.

Finally, in terms of section 103(1) Act 60 of 2000 accused is unfit to possess a firearm.

MUDAU AJ

7<sup>TH</sup> FEBRUARY 2013

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ADV J STEYN

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