CASE NO. 9/91

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

SIMON MOHAPI	FIRST APPELLANT
JOB FALATSI	SECOND APPELLANT
JOHN MAGUBANE	THIRD APPELLANT
ELIAS SEKALEDE	FOURTH APPELLANT

and

THE STATE	RESPONDENT

CORAM: VAN HEERDEN, KUMLEBEN JJA et HOWIE AJA

DATE HEARD: 25 MAY, 1992

DATE DELIVERED: 27 MAY, 1991

HOWIE AJA:

Arising out of the killing of a shebeen owner, the theft of her property and the robbery of two of her customers, the four appellants were convicted in the Transvaal Provincial Division (Weyers J and assessors) of murder (count 1), theft (count 2) and robbery with aggravating circumstances (counts 3 and 4). They were acquitted on the fifth count, which was one of robbery with aggravating circumstances in respect of a third customer. Each appellant was sentenced to an effective 13 years' imprisonment. With the leave of the trial judge this appeal is directed against their convictions.

The incidents in question occurred on a Friday evening in January 1987 at the deceased's home in Sebokeng. The deceased was attacked outside the house by a number of people who then chased her inside and further attacked her in her bedroom. She sustained various knife wounds. One of them was a stab wound of the chest, from which she died. It is not in dispute on appeal that her assailants made common cause in attacking her, that they had the necessary intent to

kill in the form of **dolus eventualis** and that they ransacked her bedroom and stole a quantity of her goods. It was also not contested that two people who were drinking in her sitting-room at the time, one Hlatswayo and one Mawela, were robbed by a man who had very shortly before been involved in the attack upon the deceased.

First and fourth appellants were represented by **Mrs Ludewig.** Fairly, she drew attention to certain inconsistencies and contradictions in the respective versions of the events given by the relevant State witnesses but accepted in the result, rightly, in my view, that these features were insufficient to cast doubt upon her clients' convictions for murder and theft, or the trial Court's finding that the person who actually robbed Hlatswayo and Mawela was second appellant. Counsel submitted, however, that first and fourth appellants had not made common cause with second appellant in so far as the robbery was concerned and that the trial Court had therefore erred in convicting them on counts 3 and 4.

Second and third appellants were represented by

Miss Syfert. The main thrust of the submissions contained in the heads of argument drawn by her predecessor in the case was that the shortcomings in the State evidence to which I have referred were such that second and third appellants had not properly been identified as having been in the shebeen at the relevant time or, alternatively, as having taken part in the commission of any of the proved crimes. Properly, **Miss Syfert** did not persist in the first line of argument. However, she pursued the second.

The trial Court was fully aware of inconsistencies and contradictions in the State evidence but concluded that they were understandable in the circumstances which prevailed and did not really detract from the credibility or reliability of the pertinent prosecution witnesses. The trial Court also found the evidence of first and second appellants, that they had been present in the shebeen but that the offences had been committed by other patrons, to be false beyond reasonable doubt. Third and fourth appellants did not testify and there were no other defence witnesses.

In the light of counsel's arguments it is

unnecessary to consider the evidence given by first and second appellants. It is also unnecessary, in my view, to discuss the prosecution evidence in any detail. In broad summary it was this. Hlatswayo, Mawela, Joyce Mphana and another woman were together drinking in the deceased's sitting-room. Two youths were also present, sitting by themselves. Third and fourth appellants entered and ordered liquor, whereafter one of them went outside and returned accompanied by first and second appellants. Appellants, who were all armed with sharp weapons, sat in a group. After a while Mawela took R80 out of his pocket and started to count it. One of the youths warned him not to do this so openly, using an idiom to the effect that there were some hungry dogs present. First appellant reacted angrily and went up to the youth and hit him. This resulted in a disturbance which woke the deceased who had been asleep in her adjoining bedroom. She entered the sitting-room and, after speaking to the two people responsible for the argument, ordered the youths to leave. She returned to her bedroom but not much later re-emerged and went outside. Almost to a man, the appellants got

up and went out after her. Several minutes later the deceased ran back inside the house, having already been stabbed. She was pursued by all the appellants. She ran into her bedroom. So did first, third and fourth appellants. She was further assaulted there and her belongings plundered. In the interim, second appellant came to Hlatswayo's group. He stabbed Hlatswayo and Mawela and ordered them to sit on the floor in a corner with their eyes closed. He then proceeded to take money from Hlatswayo and Mawela. Having done so, he joined the other appellants, some of whom had been involved in the meanwhile in taking cigarettes and liquor from the stocks which the deceased kept in her bedroom. The appellants then departed.

The aforegoing summary is in essence the version given by Hlatswayo, supported on all material aspects by Mawela.

Joyce gave evidence differing from Hlatswayo in some measure. The trial Court considered her evidence sufficiently unreliable to justify the appellants' acquittal on the fifth count in which it was alleged that they had robbed her. Nonetheless it is clear that

Joyce, who by all accounts did not comply with the second appellant's instruction to sit on the floor, was in the vicinity of the door leading out of the sitting-room intent on escaping. This was at a point which was also close to the deceased's bedroom door. Whether Joyce was at some stage pushed into the bedroom by the other appellants or not does not seem to matter. There is no reason to doubt her allegation that the other appellants declared that they were after money and that they demanded money from her. Their having done so is in keeping with the evidence of Hlatswayo and Mawela.

Evidence contradicting the other State witnesses in various respects was given by the deceased's daughter. There can be little doubt that where she thus differed she was clearly wrong.

Having reconsidered the evidence in the light of the arguments tendered on the appellants' behalf I am satisfied that the discrepancies drawn to our attention in no way served to weaken the testimony of the main State witnesses upon whose evidence the convictions rest.

On the question of common purpose in relation to the robbery, it is obvious that the other appellants were linked to second appellant by common purpose in so far as the latter assisted them by taking steps to prevent the potential eye witnesses from leaving or from seeing what was going on in relation to the deceased. His stabbing two of them was merely one of such steps. And in so far as he also took money from them, this was entirely in keeping with the actions of all of them throughout the piece. They arrived together, all armed. They all followed the deceased outside. They were all involved in the attack on her before she re-entered the house. While second appellant took charge of the people in the sitting-room, the other appellants carried out the major task of eliminating the deceased and looting her possessions. Where the others demanded money from Joyce, second appellant took money from Hlatswayo and Mawela. The only reasonable inference is that it was the appellants' intention from the start to take whatever money they could lay their hands on and that they were associated by common purpose in all the

offences that were committed.

The trial Court has not been shown to have erred in the respects contended for by appellants' counsel and their appeals cannot succeed.

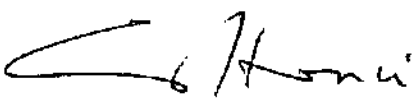
It remains to deal with the trial Judge's direction, when giving leave to appeal, that the appeal be heard by this Court. His judgment in this connection reads as follows:

> "Die advokate namens die beskuldigdes bring nou 'n aansoek vir verlof om te appelleer na die Appêl-afdeling van die Hooggeregshof. Die aansoek word geopponeer deur mej. Adams namens die staat, maar alhoewel ek die mening toegedaan is dat daar geen redelike moontlikheid van sukses op appêl is nie, omdat die hof nie mej. Adams se submissie wat betref beskuldigdes 3 en 4 aanvaar het nie, om daardie rede word verlof om te appelleer na die Appêlhof toegestaan."

The relevance of the reference to third and fourth appellants is that in argument on the issue of guilt, counsel for the prosecution had told the Court that she was not asking for a conviction against them seeing that, in her submission, they had not been adequately identified or linked to any proved common purpose. For the reasons given in the trial Court's judgment and this judgment, that attitude on the part of State

counsel was entirely ill-considered. It therefore affords no warrant for the trial Judge's granting leave when, as he himself saw the situation, there were no reasonable prospects of success. Having concluded that he would give leave, there were more than adequate grounds to satisfy him, had he considered the issue of leave as he was required to do by the terms of s 315(2)(a) of the Criminal Procedure Act, that no question of law or fact, or any other consideration, made it appropriate that this appeal be heard by the Appellate Division. It was plainly an instance in which, if leave was granted at all, the appeal should have been directed for hearing by the full Court. It is the responsibility of counsel when applying for leave, and ultimately the responsibility of the Judge considering such application, to give proper consideration to the matter of the appropriate forum.

The appeals of all the appellants are dismissed.



C T HOWIE AJA

VAN HEERDEN JA)
) CONCUR
KUMLEBEN JA)