

**IN THE HIGH COURT OF SOUTH AFRICA
(SOUTHERN CIRCUIT, LOCAL DIVISION)**

Case No: CC 60/2020

In the matter between:

THE STATE

And

NTABANYANE JOHN TLALI

ACCUSED NUMBER ONE (1)

THABISO NOMORO RAMOLLO

ACCUSED NUMBER TWO (2)

MOEKETSI MAX HLAUDI

ACCUSED NUMBER THREE (3)

KEKEKSO THABANG MATSABISA

ACCUSED NUMBER FOUR (4)

Coram: Wille, J

Argument: 24 October 2023

Delivered: 25 October 2023

JUDGMENT

WILLE, J:

INTRODUCTION

[1] This is a criminal trial about an alleged murder, attempted murder, robbery, the illegal possession of firearms (and ammunition), and alleged immigration

contraventions by four accused persons who stand indicted accordingly. It is alleged that on or about the 13th of May 2019, at a local farm¹, the accused unlawfully and intentionally committed the crimes as described above.

[2] As far as the allegation of murder is concerned, it is averred that the accused acted, among other things, to further a common purpose by killing a local farmer who was fifty-three (53) years old at the time. It was alleged that the provisions of section 51 (1) of the Criminal Law Amendment Act, 105 of 1997 found application in that this offence is mentioned in Part 1 (a), (c) (ii) and (d) of Schedule 2 of the said Act. It was alleged that the murder was contemplated by more than one person, where such person acted in the execution or furtherance of a common purpose or conspiracy.

[3] As far as the robbery charge was concerned, it was alleged that the accused intended to force the deceased and the complainant into submission, assaulted and killed the deceased by shooting him and did there and then and with force take his property from his lawful possession. Further, that aggravating circumstances as described in section 1 of Act 51 of 1977 found application in that the accused, while committing this offence, be it before, during or after the commission thereof, inflicted serious bodily harm to the deceased and his wife, the complainant.

[4] In addition, it was alleged that the provisions of section 51 (2) of the Criminal Law Amendment Act, Act 105 of 1997, found application because this crime is mentioned in Part II of Schedule 2 of the said Act and carried with it a minimum sentence of fifteen (15) years imprisonment. Finally, as far as the murder charge is concerned, it is alleged that the accused killed the deceased by shooting him in the face. Further, the provisions of section 51 (1) of Act 105 of 1997 found application in that this crime is mentioned in Part I (c) and (d) of Schedule 2 of the said Act, namely: - Murder when the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences (ii) Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act (Act 51 of 1977); and/or (d) the

¹ At 'Kapteinsdrift' in the district of Bonnievale.

offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy and thus carried with it a minimum sentence of life imprisonment.

OVERVIEW

[5] The prosecution's case is that the accused were previously employed as seasonal workers on the deceased's farm. Further, the accused did not report for work on that fateful day and instead hatched and planned their attack upon the deceased and his wife. The accused killed the deceased, assaulted his wife, and robbed them of their personal belongings, cash, firearms, and ammunition.² The accused pleaded not guilty to all the charges as preferred against them by the prosecution and reserved their right to remain silent. The accused offered no plea explanations, although they all tendered written formal admissions concerning certain issues and some material considering the investigation that followed against them.

THE CASE FOR THE PROSECUTION

Mr. Conradie

[6] He is an experienced policeman and has been a policeman in the local area for some thirty-six years. He was on duty on the day in question and was called to the scene that evening. The farm and the owner of the farm were known to him before the incident. He reported that the deceased's wife had fled to a nearby farm following the attack upon them at their residence on their farm. The deceased's wife was covered in blood and was in a state of shock. He proceeded to the deceased's residence. He found that some lights were burning and one of the doors to the residence was ajar. This door led to an office adjacent to the primary residence. He observed blood stains and an electric drill and an angle grinder lying on the floor.

[7] These were plugged into the electrical current socket of the wall. He also observed what he believed to be blood on the drill bit itself. He went into an adjacent

² Cash the to value of R 115000,00.

room and noticed blood near the walk-in safe. He also saw blood on the lid of a deep freeze in another room. After that, he proceeded to the primary residence and entered the same via the sliding door that was partially ajar. He was searching for the deceased and opined that it was terrifying. He noticed blood on the kitchen floor. The kitchen was in disarray. In the main bedroom, he saw clothes on the floor, and the bedding was covered with blood.

[8] He was unable to locate the deceased, and after the arrival of some local farmers, he was informed that the deceased's body had been discovered. He proceeded to where these vehicles were parked near an old pump house on the farm a short distance away. He found the deceased in the pump house. The two crime scenes were secured, and the ambulance services were summoned. He was shocked by what he had observed, and this incident resulted in sleepless nights for him. As a seasoned policeman, he remains shocked by the brutality of the attack.

Mr. Moses

[9] He is a detective in the police and was on duty on the night in question. He has been a policeman in the area for the last twenty years. He proceeded to the scene and was met by the first mentioned witness. He inspected both crime scenes. After that, the investigation was handed over to a discrete investigative crime unit. The following day, he was at the deceased's residence when he observed accused number one in the presence of a high-ranking police officer from this unique discrete unit.³ Accused number one pointed out a waste drain and indicated that this was where the deceased's rifle had been concealed. He pumped out the waste from this drain and received a rifle from this drain, which rifle was identified as having belonged to the deceased and which had been housed in the walk-in safe of the deceased's residence. Photographs of this drain, the pump and the rifle retrieved were shown to this witness. He confirmed the accuracy of these photographs which formed part of the record having been tendered into the record as exhibits.⁴

³ Accused number one was in the presence of Colonel Clark attached to this police unit.

⁴ These exhibits for part of the bundle of exhibits that were handed in my consent by the accused.

Mrs. Wessels

[10] She is the wife of the deceased and the complainant in some of the remaining charges formulated against the accused. The deceased was fifty-three years old at the time of his death. He was a farmer by profession. She was not involved full-time in the farm as she worked at a nearby cellar. Her husband possessed a valid firearm license for a rifle and a revolver.⁵ These firearms were housed in the walk-in safe on the farm.

[11] She arrived home in the late afternoon on the day in question. She passed her husband on her route as he was dropping off the seasonal workers employed on the farm. She decided to bathe before preparing dinner and attending her religious study group. She then heard a 'shuffle' in the passageway leading to the main bedroom. Her husband called out to her and entered the bathroom with several unknown men wearing balaclavas.

[12] She covered herself with a bath towel and was taken into the kitchen with her husband by the unknown assailants. They were both tied up by their assailants. These unknown assailants kept asking for money. She and her late husband were severely beaten and assaulted by these assailants. A kettle of water was brought to the boil, and these assailants poured it over their heads to torture them further.

[13] The assailants then took her and her husband to the office adjacent to their residence, where the walk-in safe was housed. They plugged in an electrical drill and an angle-grinder to torture her and her husband. Luckily for her the angle-grinder was not in working condition. They all went back to the bedroom where a large amount of cash was handed over to their assailants and they were once again taken back to the office area. A pistol was pointed against her head, and she was further brutally assaulted by these unknown assailants. She then lost consciousness.

⁵ Copies of these licenses were handed in as exhibits and marked exhibits H1 and H2.

[14] When she regained consciousness, her husband and their assailants were no longer present, and she managed to send a few emails for help for the computer housed in the office.

[15] She managed to crawl back to the primary residence and clothed herself. She was frail and had to lie down to regain some of her strength. Eventually, she regained enough strength to leave the farm in her husband's vehicle and sought assistance from a nearby farm manager. The police and the ambulance services were summoned. She remained in the hospital for a few weeks following her ordeal and suffered several serious injuries, which were highlighted in a medical report.⁶ She estimated the number of assailants present in her home to be four but could not rule out that there were more assailants. These assailants mainly communicated in a language foreign to her. She identified the rifle recovered from the waste drain as belonging to her late husband. In addition, she identified the ammunition belonging to the rifle and the revolver that belonged to her husband.⁷ Further, she identified her bath towel, which was found on a section of a wooden railing adjacent to the abandoned pump station where the local farmers eventually located the deceased's body.

[16] She described her ordeal as extraordinarily traumatic and still receives counselling today. Her life has changed dramatically. She was an outstanding athlete and cannot participate further at the level she previously attained. Her left arm is weak, and she and her family were devastated by the events that led to the death of her husband.

Mr. Baadjies

[17] He was employed by the deceased and had been so employed for the last twenty-three years. He was the 'waterman' on the farm. The accused were seasonal workers that were transported to and from the local village in the area. All the accused were well known to this witness. Accused number one had been

⁶ This medical report was handed in as an exhibit by agreement and was marked exhibit G.

⁷ This ammunition was allegedly found in the residence of accused number three.

working on the farm for several years as a seasonal worker. Accused number two had been working for a shorter period before the end of the season. Accused numbers three and four had also worked on the farm as seasonal workers. None of the accused arrived for work on the day of the incident. Accused number one reported for work the day following the incident.

[18] He was asked to assist in the search for the deceased on the night in question. He was instrumental in the location of the deceased in the abandoned pump station near the river on the farm because of his local knowledge of the farm's layout and the possible escape routes from the farm. He testified that the farm's seasonal workers were acutely aware that produce was sold for cash on the farm as some of these transactions occurred in their presence.

Ms Paulse

[19] The deceased had employed her on the farm for about nineteen years before the incident. She was a supervisor and a bookkeeper during harvest time. She knew all the accused, who had worked on the farm as seasonal workers. She confirmed that the accused did not reside on the deceased's farm but in the nearby village. She opined that the accused were good workers. Further, none of the accused reported for work on the day of the incident. Only accused number one reported for work on the day following the incident. She identified the accused and also knew them by name.

Mr. Paulse

[20] He was a permanent employee of the deceased. About two months after the incident, he was working in the vineyards a short distance from the farm residence and on the route (from the primary residence) to the old pump station when he found the deceased's mobile phone in the vineyards under some leaves.

Mr. Moeti

[21] He testified that he resided in the nearby village where all the accused lived. He also hails from Lesotho, and all the accused are well known to him. On the night in question, he was asked to transport accused numbers two, three, and four to Worcester urgently. This he did. They were also in the presence of another person named 'Bukhali' who was also known to him and who was a Lesotho national. According to the accused their new employer was to collect them in Worcester once he had delivered them to Worcester. This was late on the night of the incident.

[22] He was shown a photograph from the exhibit album and pointed out the house where accused number three resided. He confirmed that, according to his knowledge, accused number undoubtedly three resided in the informal settlement in the house he pointed out in the photograph exhibited to him.

Mr. Stemmet

[23] He is a policeman attached to issues of crime intelligence gathering and was asked to assist with the investigation. The day following the incident, he attended the scene and was informed that accused number two, number three, and number four had not reported to work. He needed to discuss this matter with accused number one. Accused number one pointed out the house where accused number two resided. This house was locked. Accused number one pointed out the house where accused number three resided. This house was not locked, and they entered. In this house, they found several rounds of ammunition.

[24] Upon enquiry, he received information about a mobile phone number allegedly belonging to one of the seasonal farm workers. When they arrived back on the deceased's farm, they called the number given to them, and it rang in their presence. The mobile phone was in the possession of accused number one. The investigation was then handed over to a unit that focused on investigating this type of crime.

Mr. Clark

[25] His is a high ranking officer in the police. He heads up the discrete crime unit that focuses on investigating this type of crime. He has more than thirty years of experience as a policeman. He arrived on the two crime scenes on the day following the murder of the deceased. He was informed that accused number one was a person of interest regarding this investigation.

[26] Accused number was advised of his rights and then arrested. Accused number one volunteered to do a pointing out of a rifle concealed in a drain near to the main residence of the deceased. They proceeded to the deceased's farm. It was already dark. Accused number one insisted that a rifle had been concealed in a waste drain.

[27] The drain was pumped clear, and the deceased's rifle was recovered from this waste drain. Initially, he did not believe that a rifle had been concealed in the drain and held the view that it was a ruse for accused number one to escape. Accused number one also confided in him that he was at all times during the farm attack stationed outside at the tree while the '*others were busy in the house*' of the deceased.

Mr. Ncacu

[28] He is a policeman employed in a unit investigating organized crime. He has been a policeman for sixteen years. He was part of the specialized team tasked with investigating this matter. He arrested and charged accused number one. Accused number one gave him specific personal details, including his name and surname and the fact that he was employed on the farm where the deceased was killed. Accused number one also volunteered his mobile phone number.⁸

Mr. Matthys

[29] He is an immigration officer who has been employed in this position for the past decade. The investigating officer contacted him in this matter. He completed

⁸ The number was 078 [...] (the 'subject' mobile phone)

an investigation and enquiry regarding the accused through the 'South African Movement Control System' portal system. According to these records, none of the accused entered this country using official documentation or a valid port of entry. Thus, according to him, the accused were in this country illegally.

Mrs. Barnardt

[30] She has known the deceased and his wife for many years, as the deceased's wife and her husband worked for the same local entity. They became friends and visited each other's homes on occasion. She is a teacher at a local school in the area. She had attended a function on that fateful day, and she returned home late on the night in question. Her husband had already retired to bed. She heard the bell ringing from her front door and thought she heard the voice of the deceased's wife. The deceased's wife informed her that she had been the subject of a farm attack, and she then attended to assist the deceased's wife.

[31] The deceased's wife was covered in blood; her body was cold and fragile. She was informed that she had been tortured and assaulted by her assailants and that she was unaware of the whereabouts of her deceased husband. She advised that both she and her husband had been tortured by boiling water being poured over them by their assailants. The ambulance services and the police were summoned, and several local farmers arrived to assist in the search for the deceased. She was later informed that her husband had died. She confirmed that this was a tragic loss to her and her family and that her late husband was a kind and gentle man. She opined that she would not have survived the ordeal had she not been physically healthy due to her participation in endurance sports.

Mr. Harvey

[32] He is a specialist in analyzing mobile phone signals and data. He was tasked to investigate this matter on the instruction of the investigating officer. He has been a policeman for thirty-three years and has gained experience in his field for at least the last twenty years. He presented to the court an affidavit with a report of his

investigation and analysis, which were entered into the court record and marked as exhibits.⁹ In summary, his report confirms that the person or persons possessing the subject mobile phone were in an area called their 'hide-out' on the farm from 14h12 to 16h12 on 13 May 2019. The person or persons possessing the subject mobile phone returned to the crime scene at 09h38 on 14 May 2019. The mobile data and records also reflect that the person or persons possessing the subject mobile phone were very near the farmhouse on 13 May 2019 from 17h00 to 19h00. The subject mobile phone was also off the grid from 18h49 on 13 May 2019 until 05h52 on 14 May 2019.

Ms Hlaudi

[33] She is the girlfriend of one of the brothers of accused number two. One of the other brothers of accused number two is the owner of a 'tavern' at the local informal settlement where she resided. She testified that on 13 May 2019, at about 10h00, four persons came to drink at the tavern. One of the persons also helped himself to something to eat was the brother of her boyfriend and his name was 'Nomoro'.

[34] The other persons were known to her as 'Ntabanyane', 'Max' and 'Kekekso'. They stayed at the tavern until about 14h00 and then left. She allowed them to drink without paying and gave them 'credit' on account. After that, she never saw them again, and they never paid their outstanding account at the tavern. Her boyfriend said that he would settle the outstanding account. She could not positively identify the accused in court as she said they may have changed somewhat, and a long time had passed since then. She testified that she clearly remembered the names of the four persons who came to drink at the tavern on that day and that they went by the names of 'Ntabanyane', 'Nomoro', 'Max' and 'Kekekso' (these are the middle names of all of the accused before court).

Mr Zephe

⁹ Exhibit 'L'.

[35] He was previously employed as a policeman. He enjoyed extensive experience as a policeman before his resignation. He is proficient in English, Afrikaans and Sesotho. The investigating officer called him in to assist with deposing an affidavit by a witness, which the prosecution sought to introduce in terms of an exception to the hearsay rule.¹⁰ This witness who deposed to this affidavit is now untraceable. He explained the procedure followed in obtaining this witness statement from the witness. He confirmed that the witness statement was read back to the witness before the witness deposed to same under oath. He was also present at a consultation with this witness held some two weeks before the trial and the witness again confirmed the correctness and accuracy of the statement and the information contained therein.

Mr. Engelbrecht

[36] This witness is a policeman with vast experience and is attached to a particular investigating unit in the police.¹¹ His expertise relates to digital forensic investigation. He was tasked to do a forensic digital investigation of the subject mobile phone that was found in possession of accused number one. He filed an extensive report that dealt with the content that was retrieved from the mobile phone in the possession of accused number one.

[37] In summary, his findings were the following: (a) that the profile picture on the mobile phone belonged to accused number one (this was conceded); (b) that several pictures were found of another person unknown to him (by naked eye, these pictures are a striking resemblance to accused number two); (c) on the mobile device a message was sent to accused number one and to a person named 'Bocale'; (d) one message recorded the words *'my sin is the same as yours, and this will pass to'*; (e) one message recorded that *'no payment had been received'*, and (f) some activity took place on the mobile phone as early as 2018

Mrs. Wissenaar

¹⁰ Mr Eketseng Ramollo.

¹¹ The 'Hawks'.

[38] She is the investigating officer in this matter. She has been employed in the police for nineteen years and has been a detective for thirteen years. She worked in the specialized investigation unit and was one of the team called in on the day following the murder of the deceased. The crime scenes had already been contained when she arrived at the crime scenes. Enquiries were made amongst the seasonal farm workers if any of these workers had yet to report for work on the day of the farm attack and the day following the attack. These workers were identified as the accused. Accused number one reported for work on the day following the farm attack.

[39] Accused number one pointed to the houses allegedly of accused number two and accused number three in the informal settlement where they resided. Accused number two was not present then, and his residence was locked. The home of accused number three was not locked, and he was absent, too. The ammunition which had belonged to the deceased was found in the home of accused number three.

[40] The investigation team obtained a mobile phone number which allegedly belonged to one of the seasonal workers who had failed to report for work following the day of the farm attack. The mobile number was called, and the phone rang in the presence of accused number one, who had the mobile phone in his possession near the crime scene.¹² Accused number one was then identified as a person of interest. He was taken in for questioning at the local police station.

[41] After that, accused number one agreed to point out the rifle that belonged to the deceased that had been hidden in the waste drain near the deceased's residence. Further investigation followed, and she traced accused number two, accused number three, and accused number four, to Lesotho and initiated extradition proceedings. This took some time, and these accused were finally extradited to stand trial about a year ago. She identified accused number one as the person whose profile picture was extracted from the mobile device by the police

¹² This was a 'Huawei' mobile phone with mobile number 078 [...] (the 'subject' phone).

expert. Also, there were numerous photographs of accused number two on the mobile device found in the possession of accused number one.

[42] She also testified extensively about the statement that she noted by the witness who she has since been unable to trace despite extensive efforts by her in this connection.¹³ She corroborated the evidence tendered by the police interpreter in this connection. Formal evidence (which was not disputed) was also tendered in connection with several exhibits collected at the scene that she dispatched for forensic analysis. No fingerprint or other forensic evidence could be gathered at the scene sufficient for forensic analysis.

[43] She also testified about and corroborated the evidence that the mobile phone expert had tendered regarding the locations where the test calls were made for triangulation analysis. She established that accused number two resided in the same cluster of homes in the informal settlement with his brother who was the witness who could not be traced by her. The witness who could not be traced by her resided in the main house in this 'cluster of homes' in the informal settlement. Accused number one, accused number two, and accused number four all resided in this cluster close to each other, and accused number three resided a short distance away. She was unable to trace and arrest the fifth suspect, who became known to her as the brother of accused number one and who also resided in Lesotho.¹⁴ She also confirmed that she was present when a consultation was held the witness who could not be traced about two weeks prior to the trial where he again confirmed the content and the accuracy of his affidavit.

Mr Ramollo

[44] This is the witness who could not be traced and is believed to have also fled to Lesotho. The prosecution piloted an application to introduce this statement made by this witness (deposed to under oath) into the record under an exception to the common law hearsay rule. This application was made in terms of specific

¹³ Mr. Eketseng Ramollo.

¹⁴ 'Bukhali'.

intervening legislation.¹⁵ The accused did not object to the prosecution introducing this statement, save to reserve the right to argue the eventual probative weight to be attached to this statement (if any). The statement was admitted into the record and marked as an exhibit.¹⁶

[45] According to his statement, made in September 2019, he was a resident at this informal settlement in question. He is from Lesotho and came to work in this country more than a decade ago. He had two brothers who also came to work with him on the farms in the local area. His one brother is accused number two. Accused number one arranged employment for accused number two on the deceased's farm.

[46] On 12 May 2019, he was at home with his brother, accused number two. Accused number two left their home later in the day to visit with his friends. During the night, he received a message from accused number two that he would not be at work the following day because he suffered a sore back. Accused number two did not sleep at his brother's home on 12 May 2019. The following day and later in the evening, accused number two and a person called 'Bukhali' arrived at his home. Both persons had 'woollen' caps in their possession. He noticed that both were very restless and anxious. Upon enquiry they requested him not to lock the door to his residence as they would come back at a later stage.

[47] The following day, he received a phone call from accused number two, who advised him that he was in 'Sterkspruit' in the Eastern Cape. He was shocked by this news and asked accused number two what he was doing in 'Sterkspruit'. Accused number two confided in him that he together with, 'Ntabayane', 'Max', 'Keketso' and 'Bukhali' had done '*a terrible thing*'.

[48] Accused number two confided in him that they had attacked a farm owner where he worked and '*they had robbed the place and took money*'. When he arrived at work on 15 May 2019, he was told that a farm attack had occurred where accused

¹⁵ Act 45 of 1988.

¹⁶ Exhibit N.

number two had been working and that the farm owner had been killed. He immediately concluded that accused number two and 'Bukhali' had been involved in this farm attack. He was also informed that accused number one had been arrested.

Admissions

[49] The accused submitted several specific formal admissions into the record. By written statement, the accused made the following specific formal admissions. In summary, the post-mortem report was admitted together with the findings made therein. The chain of evidence relating to the transportation and examination of the deceased's body was admitted. The police photograph albums and the photographs contained therein were admitted. The accused admitted that they were all Lesotho nationals.

[50] It was admitted that the deceased was correctly identified and owned and lived with his wife on the farm where the attack occurred. Further, on the said evening, the deceased and his wife were attacked at their farmhouse and the deceased was murdered, and his wife, who sustained severe injuries, survived the attack and was thereafter hospitalized.

[51] In addition, that a post-mortem examination was performed on the body of the deceased and the cause of death was determined to be a gunshot wound to the face and that the body of the deceased, from the time of the infliction of the injuries, until the post-mortem examination, did not sustain any further injuries. Moreover, it was admitted that in the early morning hours of the day following the attack a member of the police investigation team was at the crime scenes, and he photographed various parts of the crime scenes, drew up sketch plans and collected exhibits at the crime scenes. The key to the photographs, sketch plans, and his accompanying statement were accurate and were admitted as correct.¹⁷

[52] After that, the deceased's (.22) rifle with model number (CZ 4[...]) and serial number (504[...]) was found in a sewerage drain on the farm, and a member of the

¹⁷ Exhibit B.

police investigation team took photographs of this area and the recovered rifle. The key to these photographs and the statement were admitted as accurate and entered into the record.¹⁸

[53] On the day following the attack, ammunition used for the (.22) rifle and (.38) special revolver was found at the local informal settlement in the residence allegedly occupied by accused number three. A member of the police took photographs of the area where the ammunition was seized. The key to these photographs and the statement in this connection were admitted as accurate and entered into the record.¹⁹

[54] A post-mortem examination of the deceased's body was performed, and the findings about the deceased are set out in a post-mortem report. The post-mortem report's contents and findings were admitted and entered into the record.²⁰ A member of the police took photographs during the post-mortem examination, and the key to the photographs and the statement in this regard was admitted as accurate and entered into the record.²¹

[55] The deceased wife's hospital records and medical practitioners' notes were admitted as accurate and entered into the record.²² A further document was entered into the record by consent containing several additional formal admissions. The results of specific forensic tests and fingerprint evidence yielded negative results and were attached to the list of these further admissions. An inspection *in loco* was concluded and this entire process was recorded by the police. A video recording of the inspection was admitted into the record and marked as an exhibit.²³ Two important observations were recorded. The distance from the tree outside near the waste drain to the deceased's residence was 35.6 meters. The distance from the primary residence to the adjacent office was 11.8 meters. This was then the case for the prosecution.

¹⁸ Exhibit C.

¹⁹ Exhibit D.

²⁰ Exhibit E.

²¹ Exhibit F.

²² Exhibit G.

²³ Exhibit 1.

THE CASE FOR ACCUSED NUMBER ONE

[56] He elected to testify in his defence. He is now twenty-four years old. He was born in Lesotho and is a Lesotho national. He entered this country by crossing the river and does not have any documents to be in this country. He has been in this country for about four years. He did not complete his school education and left his school during the middle of his attendance in grade nine. According to him, he left school because his mother had died about two years before he left school. His father could not afford to pay the school fees to keep him in school.

[57] He has a brother in Lesotho. He came to South Africa to be with his parents in 2015. He worked on the deceased's farm as a seasonal worker. He had worked on the deceased's farm for about three years before the murder of the deceased. He lived in the local informal settlement. On 13 May 2019, he did not go to work because he slept late as he had been drinking the day before. He testified that the subject mobile phone belonged to his girlfriend, who is now deceased.²⁴ Further, according to him, an unknown person named 'Nomoro' (the same middle name as accused number two) but not accused number two asked if he could use the subject mobile phone on 13 May 2019.

[58] He confirmed that the police interviewed him on 14 May 2019 and that he pointed out the houses that, according to him, belonged to Nomoro, Max and Thabang. However, they are not any of his co-accused before the court. He denied that he pointed out to the police the firearm that was recovered from the waste drain on the deceased's farm.

[59] He could not describe the person called 'Nomoro' who worked with him on the deceased's farm (and spoke the same language that he spoke), but he averred that he was not accused number two before the court. He testified that he knew other co-workers on the farm who went by the names of 'Max' and 'Thabang' (who also came from Lesotho) but they also were not the same people as accused number three and accused number four who were present in court.

²⁴ This is the mobile phone which used the number [0].

[60] In connection with the alleged offences, as set out in the indictment, he testified as follows: (a) that he was at home with his girlfriend and her child on the day of the murder of the deceased; (b) that he gave his mobile phone to 'Nomorro' to use on 13 May 2019; (c) that 'Nomoro' returned the mobile phone to him at 17h30; (d) that he never pointed out the waste drain where the deceased's rifle was recovered; (e) that there was only one person named 'Nomoro' who worked on the deceased's farm, lived in the informal settlement and spoke Sesotho; (f) that there was only one person named 'Max' who worked on the deceased's farm, lived in the informal settlement and spoke Sesotho; (g) that there was only one person named 'Thabang' who worked on the deceased's farm, lived in the informal settlement and spoke Sesotho and, (h) he could not explain what had now happened to these three named persons, but that they were not his co-accused before court,

[61] He was cross-examined at length by counsel for the prosecution. He could not explain the objective evidence in connection with his mobile phone 'pinned' at the crime scene until about 19h00 on the day of the murder of the deceased. He could not explain the objective evidence that several photographs of accused number two appeared on his mobile phone. He could not explain why several witnesses for the prosecution testified that he was regularly in the company of his co-accused, who worked on the farm with him and that he drank with them at the local tavern.

[62] Most importantly, he could not explain in any manner at all the evidence submitted by way of an affidavit detailing exactly how these crimes were perpetrated and how he and his co-accused were implicated. This aspect was never further engaged with at all. He called no further witnesses and he closed his case in connection with the charges preferred against him in the indictment.

THE CASE FOR ACCUSED NUMBER TWO

[63] He is twenty-seven years old. He was born in and lives in Lesotho. Regrettably, he is poorly educated and only passed grade nine. He herded cattle for

his father's brother. According to him, he has never been to this country, and he has never been to the deceased's farm.

[64] He denied that the person who deposed to the affidavit that was admitted into evidence under the exception to the hearsay rule was his brother.²⁵ He denied that the pictures on the mobile phone of accused number one were of him. He denied that he knew any of his co-accused. He denied that he was correctly identified by the witnesses for the prosecution who worked on the farm and the witness who transported them away from the farm on the night in question to distance themselves from the crime scene. He could not give any details or contact numbers of anyone who could verify that he was an only child and had no siblings. He closed his case and called no further witnesses.

THE CASE FOR ACCUSED NUMBER THREE

[65] He is twenty-eight years old. He testified that his middle name is 'Edward' and not 'Max' as set out in the indictment. He is not married but is the father of a child who is now seven years old. He left school at the end of grade nine. He has never been to this country and has never been to the deceased's farm. He does not know accused one or two, but he knows accused number four as they were at the initiation school in 2019. Interestingly (as cited in the indictment), he knows accused number four through a different middle name, 'Baratholola' and not his middle name 'Thabang'. He was at the initiation school that his father ran during the incident. He denied any knowledge of the brother of accused number two, who deposed to the affidavit, which directly implicated him in the murder of the deceased. He was unable to give any details or contact numbers of anyone who could verify that he was at initiation school during the time of the murder of the deceased. He closed his case and called no further witnesses.

THE CASE FOR ACCUSED NUMBER FOUR

²⁵ Mr. Eketseng Ramollo.

[66] He is twenty-six years old. He testified that his middle name is 'Baratholoa' and not 'Thabang' as set out in the indictment. He is not married, and he has no children. He left school at the end of grade four. He has never been to this country and has never been to the deceased's farm.

[67] Similarly, he does not know any of the accused, but he knows accused number three as they were at the initiation school in 2019. He denied any knowledge of the brother of accused number two, who deposed to the affidavit, which directly implicated him in the murder of the deceased. He was unable to give any details or contact numbers of anyone who could verify that he was at initiation school during the time of the murder of the deceased. He closed his case and called no further witnesses.

CONSIDERATION

[68] The core issue in this matter is whether the prosecution has met the burden of proof concerning the murder of the deceased by the accused and if there is sufficient evidence 'beyond a reasonable doubt' demonstrating that all the accused were involved in and that they acted as a group with a common purpose on the evening in question. One of the legal issues is applying the doctrine of common purpose concerning two of the offences upon which the accused were indicted. To a certain extent, most of the remaining issues and facts were common cause between the parties save for the probative weight to be attached to the admitted hearsay evidence.

[69] The accused adopted the same shields and strategy against the offences listed in the indictment. They relied on the fact that the deceased's wife testified that she could not identify them, and they relied on the fact that the brother of accused number two did not testify. This strategy by the accused failed dismally as all the objective circumstantial evidence stacked up against them and supported in detail (and in every material respect) the version of events as set out by accused number two's brother in his statement when evaluated in the context of all the other objective evidence presented by the prosecution. The mobile phone evidence and the

pointing out evidence by accused number one remained unexplained. Thus, only one inference could be drawn from these objective facts. Further, it was significant that all the accused bemoaned the fact that the brother of accused number two did not testify. This was all part of their strategy. Also, significantly accused numbers two, three and four denied their middle names. Again, this was a failed strategy.

[70] I say this because two farm workers and one another independent witness identified them positively.²⁶ Another witness identified them by the names they used.²⁷ It was contended by the accused that they had nothing to do with these crimes and that they thus could have been perpetrated by some other unknown persons and not by them.

[71] Thus, it was asserted that another reasonable inference could not be excluded in evaluating all the evidence presented by the prosecution. The test to be applied in cases such as these has been set out in our jurisprudence as follows:

'...In reasoning by inference, there are two cardinal rules of logic which cannot be ignored:

(1) the inference sought to be drawn must be consistent with all the proven facts. If it is not, the inference cannot be drawn.

*(2) 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...'*²⁸

[72] The main difficulty with these arguments by the accused is the lack of substantiated versions given by any of them. They were extremely evasive witness, and their versions were not probable. The objective evidence against them is overwhelming. Their explanations (such as they were), must be viewed against the

²⁶ Mr Baaidjies and Ms Paulse.

²⁷ Ms Hlaudi

²⁸ *R v Blom* 1939 (AD) 188 page 202-203.

objective factual evidence read the detailed explanation in the affidavit admitted in the record (as an exception to the rule against the hearsay rule). Further, the accused number one could not distance himself from the pointing out evidence regarding the the recovery of the deceased's rifle read with objective mobile phone evidence. This evidence was left unexplained, and none of the accused were unable to meaningfully engage with his evidence at all.

[73] The argument that little or no probative weight may be attached to the version of what occurred on that fateful day, as set out in the affidavit by the brother of accused number two, is also unsustainable. I say this because all the other objective evidence tendered by the prosecution neatly supports this version regarding the canvass of all the evidence viewed holistically. What is recorded in this affidavit explains everything in detail, and the deponent to this affidavit would only have had independent knowledge of this detail deposed to in this affidavit if it was conveyed to him by his brother (accused number two).

[74] The reasonable inferences (such as they were) contended by the accused are not sustainable law because of all the other objective evidence stacked against them. As highlighted, they cannot explain at all the pointing-out and mobile phone evidence, let alone the evidence tendered by the other witnesses regarding their relationship with one another. This must be evaluated and read with what is contained in the affidavit by the brother of accused number two.

[75] Circumstantial evidence indirectly supplies proof. Of significance and relevance to the facts and circumstances of this case is precisely what was indicated in *Sauls*²⁹, as follows:

‘...The [prosecution] is, however, not obliged to indulge in conjecture and find an answer to every possible inference which ingenuity may suggest any more than the court is called on to seek speculative explanations for conduct which on the face of it, is incriminating...’

²⁹ *S v Sauls and Others* 1981 (3) SA 172 (A) at 182 G – H.

[76] This does not mean, as has sometimes been suggested, that the trier of fact is entitled to speculate as to the possible existence of facts which, together with the proven facts, would justify a conclusion that an accused person may be innocent. In *Mlambo*³⁰, Malan JA set out, in my view, the actual test to be applied in the circumstances of this case, namely:

‘...In my opinion, there is no obligation upon the [prosecution] to close every avenue of escape which may be said to be open to an accused. It is sufficient for the [prosecution] to produce evidence using which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, concludes that there exists no reasonable doubt that an accused has committed the crime charged...’

[77] These features of logical reasoning, like the legal reasoning required in this case, were echoed in *Boesak*³¹, as follows:

‘...It is clear law that a cross-examiner should put his defense on each and every aspect which he wishes to place in issue a criminal trial is not a game of catch-as-catch-can...’

[78] The factual issues for consideration are these: (a) that the accused all knew each other; (b) they all worked on the deceased’s farm together; (c) they all lived in close proximity in the local informal settlement; (d) they all socialized together; (e) they were all not at work on the day that the deceased was murdered; (f) accused numbers two, three and four all escaped together on the night after the murder of the deceased; (g) they were all Sesotho speaking; (h) they were all Lesotho nationals; (i) accused number one was found in possession of a mobile phone with very incriminating evidence recorded and imbedded in this device; (j) accused number one pointed out the stolen rifle; (k) accused number one incriminated himself and ‘others’ in the farm attack; (l) stolen ammunition from the deceased’s farm was found in the residence of accused number three; (m) accused number two, three and four

³⁰ *R v Mlambo* 1957 (4) SA 727 (A) at 738 B.

³¹ *S v Boesak* 2000 (1) SACR 633 (SCA) at 647-C.

all hastily left the scene of the crime late at night while leaving their belongings at the homes in the informal settlement and, (n) all the accused were identified as farm workers on the deceased's farm by at least three independent witnesses with nothing to gain.

[79] The testimony by all the accused was of a very poor quality. They were all extremely evasive and argumentative witnesses and made an extremely bad impression when they testified. They were not even prepared to admit or concede common cause facts. I say this because it became evident that they had all hatched a plan. They all were of the view that they could not be identified because they were wearing balaclavas when they attacked the deceased and his wife.

[80] They had formed the view that the brother of accused number two would not dare to testify to implicate them in these crimes. They were so determined in their resolve that they denied they knew each other, and accused number two denied his brother's very existence. They also adopted the same *modus operandi* in denying the existence of their middle names as they appeared in the indictment. They did this because these were the names used for them when they worked as farm workers on the deceased's farm. They failed to appreciate the independent objective evidence presented by the prosecution that corroborated the evidence under oath deposed to by the brother of accused number two in every material respect. The evidence tendered by the accused may be safely rejected as false and of no probative weight.

[81] By contrast, the evidence tendered by the witnesses on behalf of the prosecution cannot be faulted. There is no reason to doubt the evidence concerning the pointing out of the concealed rifle in the drain. There is no reason to doubt the evidence regarding the identification of the accused by the farm workers. The independent evidence about how they fled the scene at night after the crime cannot be faulted. Also, the evidence tendered by the girlfriend of one of the brothers of accused number two must be accepted. She did not identify the accused in court but named them by their names. Accused number two helped himself to food as any

brother would in similar circumstances. This is also precisely why credit was extended to them to drink in the tavern.

[82] Added to this is the expert mobile phone evidence, which is unchallenged and not engaged with by the accused. The pictures, contacts and messages retrieved from the mobile phone on their own tell a story that the accused are unable to deal with in any significant manner other than by way of silence and bald denials. The statement deposed to under oath by the brother of accused number two cannot be gainsaid or explained at all by the accused. It sets out exactly what happened on the day that the farm was attacked, and the deceased was killed and his wife brutally assaulted. It is this very '*terrible thing*' which is referenced in the statement. It explains the hasty escape by accused number two, three and four and explains the role played by the fifth member of the group, namely 'Bukhali'.

[83] The evidence viewed holistically against the accused is overwhelming, and the only reasonable inference to be cautiously drawn is that the accused murdered the deceased, assaulted his wife, and robbed and stole their firearms and money. Further, the accused were not lawfully in this country, and they fell foul of our immigration laws in this country. They undoubtedly had a common purpose and acted as a syndicate or group when they murdered the deceased and viciously assaulted his wife,

[84] Most significantly, considering what was stated by the accused, it is highly improbable that yet unidentified unknown persons with the same names as the accused, all speaking Sesotho, all working on the same farm and all living in the same informal settlement, were the persons who perpetrated the crimes as set out in the indictment.

[85] Considering the tapestry of evidence presented by the prosecution, all this evidence was sufficiently reliable to conclude, beyond a reasonable doubt, that the accused committed the crimes as set out in the indictment. Thus, as indicated, the accused are to be convicted of the charges in the indictment read with the provisions of the legislative minimum sentencing regime. The evidence submitted by the

prosecution, read together with all the other evidential material, overwhelmingly and manifestly supports the only reasonable conclusion (and no other conclusion) that the accused killed the deceased, assaulted his wife, and robbed them of their firearms and cash. The accused acted with a common purpose. Thus, the legislative minimum sentencing regime finds application as set out in the indictment.

CONCLUSION

[86] I need to deal with some outstanding legal issues. I found that the statement by the brother of accused number two and the pointing-out in this matter was crucial. I say this because pointing-out evidence is essentially circumstantial evidence used in criminal trials to link an accused to an offence. Courts are invited to draw an inference that the pointing out of places or things by an accused stems from his or her knowledge of the crime and that his or her knowledge implicates him or her with the commission of the offence.³²

[87] As a matter of pure logic, the pointing-out of anything by a person under trial carries an implied admission that he or she has some knowledge of the thing pointed out or the facts connected to it. It is beyond reasonable doubt that the only inference that can be drawn is that accused number one knew the precise location where the deceased's rifle was found because he and the remaining accused took part in committing the offences upon which they were indicted.³³

[88] The question of how common purpose should be understood is now well established in our jurisprudence. The terms 'accomplice' and 'common purpose' must be given one consistent and precise meaning.³⁴ The facts are that: (a) the accused were workers on the deceased's farm; (b) they had knowledge of the cash taken in on the farm from sales; (c) they did not go to work on the day of the murder of the deceased and, (d) three of them left the farm together on the night that the deceased was murdered. Thus, the accused were actively associated with each other when they murdered the deceased, assaulted his wife, and robbed them of

³² *S v Moumbaris and Others* 1973 (3) 190 (T).

³³ *S v Gwevu and Another* 1961 (4) 536 (E).

³⁴ *S v Kimberely* 2005 (2) SACR 663 (SCA) at para 11.

their money and belongings.³⁵ Undoubtedly, the accused shared a common goal and acted in concert with each other when they perpetrated these crimes, save for the immigration violations.

[89] I say this because all the accused knowingly associated themselves with the commission of the crimes by accused number one and furthered the commission of them by accused number one. In this case, the common purpose was established by the active association of all the accused in committing these crimes as set out in the indictment. In addition, accused number one was always present at the scene of the crimes when they were committed.

[90] The accused in this matter also planned the attack on the farm, which also factors in with the common purpose doctrine to a limited extent. They gathered at the tavern before they committed these crimes. The accused then made their way to the farm and were all disguised by way of balaclavas.

[91] Even after robbing the deceased and his wife of their money and other possessions, they captured the deceased, led him away and killed him at a secluded location. They only left the deceased's wife because she was unconscious.

[92] Finally, I need to deal with why I allowed the introduction of the hearsay evidence of the brother of accused number two. I made a ruling that his affidavit be allowed to be admitted into the record as evidence for the following reasons: (a) the interests of justice dictated its reception into evidence, and (b) there was no risk to any of the accused that their fair trial rights would be infringed if the affidavit was admitted into the record.

[93] As a matter of procedure, I allowed the accused an opportunity to address the court further about why this affidavit made to the police under oath shortly after the incident should not be finally admitted into the record as evidence in support of the case for the prosecution. No further engagement in this connection was presented

³⁵ *S v Mgedezi* 1989(1) SA 687 (A).

on behalf of the accused save for the issue of the probative weight to be attached to it.

[94] I considered the seven factors listed in section 3 (1) (c) of the Law of Evidence Amendment Act³⁶. I held that this affidavit should be admitted in the interests of justice. This is primarily because this evidence was corroborated by the other evidence tendered by the prosecution and did not 'stand-alone' in any manner. Further, the detail described in this affidavit could only have been obtained through discussion with accused number two as set out in his affidavit.

[95] In addition, the content of the affidavit was confirmed twice by the deponent with the help of an interpreter who also confirmed the content of the statement made under oath by the brother of accused number two. This was not subject to challenge, and all the necessary safeguards were present to receive the content of this affidavit into evidence. Thus, this evidence was both admissible and reliable. The potential prejudice in the admission of this evidence by way of an affidavit is absent in this case because there existed a host of other independent and objective evidence which supported the evidence by the brother of accused number two as set out in his affidavit.

[96] In conclusion, on this aspect, it is my finding that there was no risk that the accused's fair trial rights were infringed by the admission of this evidence in the interests of justice.³⁷ This is the ultimate test and is now settled jurisprudence as recently again confirmed in the Supreme Court of Appeal.³⁸

[97] In all the circumstances, the following orders are granted, and the following convictions are returned, namely:

1. That **all the accused** (NTABANYANE JOHN TLALI, THABISO NOMORO RAMOLLO, MOEKETSI MAX HLAUDI and KEKEKSO THABANG MATSABISA, are hereby convicted of the crimes of:

³⁶ Act 45 of 1988.

³⁷ *Parkins v S* (A113/16) [2016] ZAWCHC 144; 2017 (1) SACR (WCC) 27 October 2016.

³⁸ *Makhala v S* (438/20) [2022] ZASCA 19 : 2022 (1) SACR 485 (SCA).

(a) **Count One (1)**: - Murder read with the provisions of sections 256, 257 and 258 of the Criminal Procedure Act 51 of 1977, read with the provisions of section 51(1) of Act 105 of 1997, in that this crime is mentioned in Part I of Schedule 2 of the said Act, namely that the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences: (c) (ii) Robbery with aggravating circumstances as defined in section 1 of the Criminal Procedure Act (Act 51 of 1977); and/or (d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy and carries with it a minimum sentence of life imprisonment.

(b) **Count Two (2)**: Attempted murder of the complainant (Mrs. Wessels).

(c) **Count Three (3)**: Robbery with aggravating circumstances as described in Section 1 of Act 51 of 1977, as the accused, while committing this offence, be it before, during or after the commission thereof, inflicted serious bodily harm to the deceased and the complainant, read with the provisions of section 51 (2) of the Criminal Law Amendment Act, Act 105 of 1997, in that this crime is mentioned in Part II of Schedule 2 of the said Act which carries with it a minimum sentence of fifteen (15) years imprisonment.

(d) **Counts Four (4), Five (5) and Six (6)** in that that the accused were in contravention of two counts of section 3, read with sections 1, 103, 117, 120 (1) (a) and section 121 of the Firearms Control Act 60 of 2000, and read with section 250 of the Criminal Procedure Act, 51 of 1977 (the unlawful possession of two firearms) and one count of the unlawful possession of ammunition).

(e) **Count Seven (7)** in that the accused were in contravention of section 49 (1) (a) read with sections 1 and 9 of the Immigration Act 13 of 2002, in that the accused entered and/or departed from the Republic of South Africa in contravention of the Immigration Act 13 of 2002 without the necessary statutory documentation.

E D WILLE
(Swellendam)

APPEARANCES

For the State : Advocate M Blows (NPA, Western Cape)

For Accused 1 : Advocate O Arend (Judicare briefed by Legal Aid)

For Accused 2 : Advocate M Sebueng (Legal Aid)

For Accused 3 & 4 : Advocate I Salie (Judicare briefed by Legal Aid)