

**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION – GRAHAMSTOWN)**

**CASE NO: CC86/2009**

**DATES HEARD: 2/11/09-13/11/09;**

**30/11/09-1/12/09;**

**15/2/10-18/2/10;**

**31/5/10-9/6/10**

**DATE DELIVERED: 10/6/10**

**NOT REPORTABLE**

In the matter between:

**THE STATE**

**and**

**MANDLA THOMAS**

**ACCUSED NO. 1**

**MELIKHAYA NCAPAYI**

**ACCUSED NO. 2**

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**JUDGMENT**

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**PLASKET J**

[1] The accused are charged with four counts of murder and one count of robbery with aggravating circumstances. The State alleges that, on or about 25 September 2008, the accused gained entry into the shop and living quarters of the deceased, robbed them of a number of their possessions and killed all four of them.

[2] The deceased – all Somali nationals – were Sahra Omar Farah, a 46 year old woman, her 19 year old son M I O, her 12 year old daughter, Is C O and her 14 year old son, Ibrahim I O. They lived in and owned a shop called Moha's Shop in Tambo Village between Whittlesea and Queenstown.

[3] Dr Mzukisi Kolosa performed the post mortem examinations on the bodies of all four of the deceased. From his reports and the evidence he gave it is clear that the deceased were attacked with great ferocity and a great deal of force was used against them. Sahra Omar Farah, for instance, had multiple incised wounds on her scalp, 21 deep incised wounds on her left upper neck, three incised wounds on the right side of the neck, multiple deep incised wounds on the posterior neck and shoulders, a great many incised wounds on other parts of her body (such as 15 'deeply incised wounds' to the chest) and a fractured skull caused by the application of sharp force. Apart from the seven instances where Dr Kolosa noted multiple incised wounds to various parts of her body he recorded in addition a further 51 individual stab wounds.

[4] The post mortem examination reports of Ms Farah's children are similar. All suffered a large number of stab wounds, particularly into the neck. The 12 year old I C O, for instance, was stabbed 23 times in her neck and multiple incised wounds 'dispersed throughout the scalp ranging from 5mm to 26mm' were recorded by Dr Kolosa. He testified that all four of the deceased's bodies smelled of paraffin and he noticed that skin, on large parts of their bodies, was peeling off. This, he said, was the result of paraffin having been poured over their bodies. One can but speculate that it was the intention of their killers to set their bodies alight.

[5] Both accused pleaded not guilty and in their explanations of their pleas both raised alibis as their defences.

[6] During the course of dealing with the evidence against each of the accused, I intend to give my reasons for admitting, after trials within trials, a pointing out made by accused no. 1 and a confession made by accused no. 2.

I commence with the case against accused no. 1. He alleged that the pointing out made by him was not made freely and voluntarily as he had been assaulted by two policemen, Constable Mxunyelwa, the investigating officer, and Inspector Toto, the day before the pointing out and that they had also assaulted him during the pointing out.

[7] Captain F.L. Dyantyi conducted the pointing out. He testified that, on the morning of 27 September 2008, accused no. 1 was brought to him by a Constable Bekker. He interviewed accused no. 1 and recorded his answers. It was conceded that this preliminary interview was conducted and that, with one exception, accused no. 1 gave the answers that Dyantyi recorded. The one answer that was disputed was to a question that read: 'Now that you have been given the above information and warnings, do you wish to point out anything to me?' To this, according to Dyantyi, accused no. 1 responded: 'Yes, I want to show you the place and my breadknife.'

[8] For the rest, according to the answers recorded in the form, he denied that he had been assaulted or threatened by anyone to point out any scenes or points; stated that the only 'injuries, bruises, wounds or scars on his body' was an old wound on the left side of his nose when he was assaulted by someone in Tarkastad; that the incident regarding which he wished to make a pointing out occurred on Thursday 25 September 2008 'at night'; and that he was going to point out something that had to do with what he and two others had done.

[9] Accused no. 1 was then photographed with his shirt off from the front, back, right side and left side. A close-up photograph was taken of his face to show the scar on the left side of his nose. Similar photographs were taken of him after the pointing out.

[10] Dyantyi testified that he, accused no. 1 and Constable Bantam, his driver, left the Whittlesea Police Station in one vehicle and Inspector Beneke, the photographer, followed them in his own vehicle. No one else accompanied

them. He denied emphatically that Mxunyelwa and Toto accompanied them as was alleged by accused no. 1.

[11] It is not necessary to deal with what transpired at the pointing out save to say that there was a difference in the evidence of Dyantyi and Beneke on one aspect. After leaving accused no. 1's home, he led Dyantyi to Moha's Shop. Dyantyi said that a photograph was taken of accused no. 1 outside the shop's perimeter fence, that the party then entered the premises and found the door to the shop to be locked. He then telephoned Mxunyelwa to ask for the key. Mxunyelwa told him to meet him at the junction of the road into Tambo Village and the Whittelsea Queenstown road. Dyantyi, accused no.1 and Bantam drove to the junction, got the key from Mxunyelwa and returned to Moha's Shop where the pointing out continued. This sequence of events was impossible if the times recorded by Dyantyi in the pointing out form were correct.

[12] Beneke said, however, that the group had entered the grounds of the shop and discovered that the building was locked. Dyantyi had then made arrangements to obtain the key and had gone with accused no. 1 and Bantam to collect it and only on his return was the photograph taken of accused no. 1 outside the perimeter fence.

[13] Although I was impressed with Dyantyi as a witness, he was clearly mistaken on this aspect. His evidence of the times when photographs were taken tally to a great extent with the evidence of Beneke who took the time from his camera which displayed it digitally whenever he took a photograph. Beneke's evidence of the sequence of events is consistent with the evidence of when the photograph was taken of accused no. 1 outside the fence surrounding the shop and is to be preferred to that of Dyantyi.

[14] It was put to both Dyantyi and Beneke that after they and accused no. 1 had entered the living quarters of the shop building they left the room and Mxunyelwa and Toto had then assaulted accused no. 1. Both denied that this had happened. Toto and Mxunyelwa testified that they had, together with

Inspector Fanele, interrogated accused no. 1 on the afternoon of 26 September 2008. They denied having assaulted him. During the course of their cross-examination it was put to them that Fanele had also assaulted accused no. 1. As a result, Fanele was called by the State. He denied the allegation.

[15] Accused no.1 testified that on the afternoon of 26 September 2008, he was taken to an office in the Queenstown Police Station in which he was interrogated by Mxunyelwa, Toto and Fanele. Toto, he said, took an iron bar about 750mm long and 50mm thick and struck him repeatedly with it on his torso from his chest to his waist. He also punched him repeatedly in the face. Mxunyelwa placed what he described as a tube over his head to suffocate him and Fanele had stood on his handcuffs which were behind his back so that the handcuffs bit into the skin of his wrist breaking the skin and causing bleeding. He was told that he would be taken somewhere the following day but he said that he was not going to cooperate. He was then placed in a cell for the night. He stated that he had marks on his body from the assault.

[16] The next morning he was taken by Mxunyelwa and Toto to Whittlesea. He was handed over to Dyantyi. He went on the pointing out but only pointed out what he was told to point out. He denied that he had pointed out a knife in a rondaval in his home. The knife, he said, had been on a table in his grandmother's house on the same property and had been taken from there. His version of the opening of the shop differs from Dyantyi and Beneke. He said that as Mxunyelwa and Toto were present there was no need for Dyantyi to fetch the key. Mxunyelwa had the key and opened the shop. Once he was in the living quarters, Dyantyi and Beneke left the room and Mxunyelwa and Toto pushed him onto the ground and kicked him repeatedly. They told him to point out a crowbar when Dyantyi and Beneke returned. A photograph shows that accused no. 1 did indeed point out a crowbar.

[17] When he was cross-examined, accused no. 1's evidence changed in some important respects. Perhaps the most telling is that he added in another assault: he claimed for the first time that he was also assaulted by Mxunyelwa

and Toto on the morning of the pointing out at the Queenstown Police Station before leaving for Whittlesea. Obviously, this was never put to either of them.

[18] He had, at one stage, said that he had been struck with the iron rod on his back. The difficulty he faced with this version was that he had earlier said that Fanele had stood on his handcuffs when his hands were cuffed behind his back. This would have meant that it would have been impossible for him to have been assaulted on the back as he claimed. The problem he then faced was that he had earlier said that when he was taken into the office to be interrogated, his hands were handcuffed in front of him. When he was asked how his hands came to be behind his back, he said that the police had simply pushed his hands, still handcuffed, over his head until they were behind him and below his waist. He was asked to demonstrate how this was done. Not surprisingly, he was not able to do so.

[19] Most importantly, however, the photographs taken before and after the pointing out show no signs of injuries. He tried vainly to point to supposed injuries on the photographs. In doing so, the best he could do was to mark two shadows on one of the photographs but it was clear when one looked at the photograph that these were, indeed, shadows and not injuries. In any event, he claimed to have been struck with great force on the chest on a number of occasions with the iron bar, and if he had been, bruises and welts would have been clear on the photographs. He claimed to have been punched repeatedly in the face but not a mark is to be seen (apart from the old scar) in the close up photograph of his face.

[20] I was favourably impressed with the evidence of every witness called by the State in the trial within a trial. It is true that there were contradictions here and there but none of them impact on the credibility of the witnesses concerned as none of them bear directly on the alleged assaults. Accused no. 1, on the other hand, was an extremely poor witness. I have highlighted some of the problems with his evidence. There were many more. Suffice it to say that I am satisfied that his version is a pack of lies. I reject it. On the other hand, I accept the version of the State witnesses and accordingly am of the

view that the State had discharged the onus resting on it to prove that the pointing out was freely and voluntarily made. I accordingly admitted this evidence.

[21] The pointing out contains statements made by accused no. 1 that amount to a confession. As alluded to earlier, he told Dyantyi before the pointing out that he wanted to show him 'the place and my breadknife'. He took Dyantyi to his home and, in a rondaval, rummaged through piles of bags and clothes and pulled out a large knife. When he had told Dyantyi to stop at his house he had said: 'Stop here at house number 84 where my knife is.' When he produced the knife he said that he had 'washed it the same night and hid it here'.

[22] He then directed Dyantyi to Moha's Shop. When the photograph was taken of him at the perimeter fence he said: 'Stop here at Moha's Shop where we robbed and killed the people.' At the door to the living quarters he said: 'We forced this door with a tommy-bar of Melikhaya.' Once inside, and when pointing out a blood-stained mattress, he said: 'We found money under this mattress'. He pointed out the crowbar which was lent against the wall, saying: 'There is the tommy-bar which Melikhaya used.' Inside the shop itself he said: 'Here in the shop we found other money.' He then said that they had left the 'female one and one young one' in the shop and 'the other two we left where they sleep in the room'.

[23] This evidence, which is damning enough on its own, is strengthened by the evidence of Bongani Matyobeni – who was referred to in the trial by his nickname, Bhutise -- that on the afternoon of 25 September 2008, both accused had invited him to join them in robbing the deceased that night. He had not wanted to accompany them and had told his grandmother to forbid him to go out when they arrived for him. She duly did so. His grandmother, Ms Julia Matyobeni, confirmed that he had asked her to forbid him to go out with the accused and that she had done so when they arrived to collect him.

[24] More importantly, the knife was sent to the forensic science laboratory of the South African Police Service for testing. It was found to have a limited

quantity of human DNA as well as the blood of a non-primate animal such as a sheep, goat, buck, pig or cow. The human DNA was found with more than a 95 percent possibility to be that of one of the deceased, Mohammed Issa Osman.

[25] Accused no.1 testified in his own defence. He had, he said, been in the company of Bhutise Matyobeni, accused no. 2 and various other men on 25 September 2008 on three occasions. It was agreed that a number of them would go, that evening, to the farm where Matyobeni worked to steal a sheep. It was decided that they would meet at the house of Matyobeni's grandmother. He and accused no. 2 went there during the afternoon. At no stage, once they were there, was the plan to steal sheep mentioned expressly but, after Matyobeni's grandmother had forbidden him to go out with the accused, the plan was abandoned. The two accused left together and went to their respective homes. Accused no. 1 remained at his home all night, sleeping on his own in a house separate from, but in the same yard as, the house in which his grandmother lived.

[26] I turn now to the case against accused no. 2. The State led evidence that members of the Tambo Village community found a large amount of groceries and other items, as well as two suitcases and a backpack in an empty house in Tambo Village. The suitcase and the backpack were identified by Mr Abdi Kani Abdikarim, who stated that he was a member of the same clan as Ms Farah, as the property of the deceased. Twelve photographs were found in one of the suitcases. Eleven of them were of Mohammed Issa Osman. The groceries were of the type that was sold from Moha's Shop.

[27] There is no doubt that these items were stolen from Moha's Shop when the deceased were robbed and killed. It was common cause that the house in which these items were found was the empty house of accused no. 2's sister who was, at the time, living in Cape Town. When he testified, accused no. 2 said that he looked after the house for his sister.



[28] The key, which he had access to, was kept by a neighbour, Ms Vuyelwa Homba. Although she did not testify as she is now deceased, the contents of her affidavit was admitted by accused no. 2. She stated that at about 9h00 on 26 September 2008, he had asked for the key, gone to the house (which was next door to her house) and had returned the key a short while later. He had with him a number of saucers in a plastic bag. She stated that he was the last person to get the keys from her before she opened the house for the police on 14 October 2008 when the groceries, suitcases and other articles were found. On 15 October 2008, accused no. 2 had demonstrated to Mxunyelwa and Fanele how he was able to open a window to the house and close it again without any damage or sign of entry. He confirmed that he had done so when he testified.

[29] It will be recalled that accused no. 2's defence was an alibi. When he testified, he stated that he had been at his home from about 19h00 on 25 September 2008 until after he woke up at about 7h00 on 26 September 2008. A neighbour of accused no. 2, Ms Nosango Dunjwa, testified that at about 3h00 on 26 September 2008 she was woken by her dogs barking. Fearing that her sheep were being stolen she got up and peered out the window. She saw accused no. 2 walking past, entering his yard and knocking on the door of his house. The door was opened and she heard his mother scream and his father say the words: 'In the name of Jesus.' About an hour later she was woken again. When she looked out, she saw accused no. 2 pushing a wheelbarrow with two 20 litre water containers in it. He was going in the direction of the place where water is collected. She found this to be unusual as accused no. 2 never went to fetch water for his household: his father always did this.

[30] Accuse no. 2 disputed the voluntariness of the statement made by him to Superintendent Thozamile Lange on the basis that he had been assaulted prior to making the statement on various occasions and had been told by the police, in part at least, what to say. The rest, he would say, he had made up himself.

[31] Inspector Lange testified that when accused no. 2 was brought to his office, he went over the standard form with the accused that is completed when a person wishes to make a statement. The answers that were filled in were those of accused no 2, who appeared throughout to be at ease, calm and in his sound and sober senses. Accused 2 was informed of his rights, including his right to refuse to make a statement. He said that he had not been assaulted or in any other way induced to make a statement. Although Inspector Lange did not examine accused no. 2's body for signs of assaults, he said that he noticed that accused no. 2 did not show any indications of being injured.

[32] It was put to Inspector Lange by Mr Schuring, who appeared for accused no. 2, that he had never informed accused no. 2 of his rights and that he had told him not to waste time and to repeat what he had already told the police. Inspector Lange denied both of these allegations.

[33] Constable Mzoxolo Mazaza transported accused no. 2 from the Queenstown Police Station to the Whittlesea Police Station to make the statement. Although he did not speak to accused no. 2, he said that he saw no indication in how accused no. 2 moved and in how he got into the police van that he may have been in an injured state. Accused no. 2 did not complain to him of any injuries.

[34] Inspector Toto, it will be recalled, had helped the investigating officer in his investigation of the case. When he testified, he denied that he had assaulted accused no. 2 on the occasions on which he had had contact with him. He also denied that accused no. 2 was told what to say in his statement. He had, however, taken a warning statement from accused no. 2 on 28 September 2008 in which accused no. 2 had denied involvement in the murders and robbery and had said that he would make a statement in court. On 20 October 2008, however, accused no. 2 had asked to speak to Toto in private. He had then begun to make admissions. Toto stopped him and contacted his commander who said that he would make arrangements for a statement to be taken. That statement was made two days later.

[35] Inspector Fanele testified that he had limited contact with accused no. 2 as he, like his colleague Toto, was merely assisting the investigating officer, Mxunyelwa.

[36] On the day of accused no. 2's arrest – 26 September 2008 – he saw him in passing when Mxunyelwa brought him in to the office that they shared. He did not interrogate him on that day.

[37] He testified that he only had contact with accused no. 2 on four occasions. These were on 2 October 2008, 15 October 2008, 20 October 2008 and 22 October 2008.

[38] Although Fanele took part in an interrogation of accused no. 1, accused no. 2 and a third suspect, Masithini Dyasi, on 2 October 2008, he did not remain present until the end. At a point, he left to fetch children from school. He never saw accused no. 2 again on that day.

[39] His next involvement with accused no. 2 was on 15 October 2008. On that day, after he and Mxunyelwa confronted accused no. 2 with the items found at his sister's house the previous day, they took accused no. 2 to a dam outside Queenstown. The purpose of this was, according to Fanele, to put accused no. 2 at his ease by taking him to a 'better environment' than the police station.

[40] Whatever the wisdom of doing so, Fanele made the point, in denying that neither he nor Mxunyelwa assaulted or threatened accused no. 2, that other people were present at the dam who would have witnessed any assault. Accused no. 2 gave the policemen the names of two people who he said had been involved in the attack on the deceased. They proceeded to Tambo Village where they first went to accused no. 2's sister's house. There accused no. 2 showed them a technique to open a closed window and close it again without doing damage to it.

[41] Then they proceeded to a house where a number of men were working. Accused no. 2 pointed out two of them as people who knew about the murders and robbery. They were taken back to the police station along with accused no. 2. They denied involvement and instead said accused no. 2 had been involved. Fanele left at this point and did not see accused no. 2 again until 20 October 2008.

[42] On 20 October 2008 Fanele was also involved in the interrogation of accused no. 2, along with accused no. 1 and Masithini Dyasi. Finally on 22 October 2008 he was summoned to the office of a Colonel Kritzinger, his commanding officer. On arrival, he found accused no. 2 in Colonel Kritzinger's office. He was asked to interpret when Colonel Kritzinger wanted to know whether accused no. 2 was still prepared to make a statement. Accused no. 2 said that he was. Colonel Kritzinger asked him if he had been assaulted or threatened to induce him to make a statement and he said that he had not been. Fanele then left the office.

[43] Constable Mxunyelwa's evidence was consistent with the evidence of Toto and Fanele. He had contact with accused no. 2 on every occasion he was booked out of the cells for further investigation. In addition, accused no. 2 went to court on three occasions, namely on 29 September 2008, 7 October 2008, 14 October 2008 and 21 October 2008. While Mxunyelwa was present at court he had nothing to do with accused no. 2 on those days. He, like Toto and Fanele, denied having assaulted or threatened accused no. 2.

[44] In addition, the State called Captain Lungisani Nolangeni who testified that when he was on duty as the officer in command of the cells he inspected the cells and asked for complaints. Although he recorded various complaints in the occurrence book, there was no record of accused no. 2 having complained to him about being assaulted. If he had so complained, Nolangeni would have recorded it and taken action to address the complaint. It was put to him that accused no. 2 did complain to him about being assaulted. He denied this.

[45] Inspector Bongile Luka was on duty in the cells for significant periods while accused no. 2 was being held there. He also inspected the cells regularly and called for complaints. Accused no. 2 never complained of being assaulted. When accused no. 2 was booked back into the cells after having been booked out, he had asked him if he had been assaulted and observed him for signs of assault. Accused no. 2 never complained of being assaulted and neither did he show signs of having been assaulted.

[46] When accused no. 2 testified he said that he was taken out of the cells by Mxunyelwa not only on the days indicated in the occurrence book but also on other days. He was, he said, assaulted every two to three days during the period from 26 September 2008 to 22 October 2008. It was these assaults, he said, that induced him to make a statement.

[47] The assaults started on the day of his arrest from about 11h00 or 12h00 until about 18h00. Toto, Fanele and Mxunyelwa took it in turns to assault him. One would assault him for a while and then leave the office. The second policeman would enter and continue with the assault. When he stopped, he would leave and the third would enter and continue the assault. The assaults were perpetrated by him being slapped, punched and hit all over his body with a stick which was about 80cm to 100cm long. In addition, a plastic bag was pulled over his head, suffocating him.

[48] He was also, he says, assaulted on the following day. This was a day on which, according to the occurrence book, he was not booked out of the cells. He claims to have been assaulted by both Fanele and Toto. They slapped him and punched him. He was assaulted on the next day too when he made a warning statement saying that he would give his version in court. He claimed that Fanele took the warning statement. Toto, Fanele and Mxunyelwa were adamant that Fanele was not on duty that weekend and Fanele says that he was not even in Queenstown. It is apparent from the warning statement that Toto took it and not Fanele.

[49] During the next week, accused no. 2 says, he was taken out of the cells every two to three days. On each occasion he was slapped and hit with the stick.

[50] When he was taken to the dam on 15 October 2008, he was assaulted once again. He was slapped, beaten on the shoulders and legs with a stick and punched. He says that as a result he confessed to having committed the crimes but said he had done so with three others who he agreed to point out to the police. He pointed out three people in Tambo Village who were taken to the police station with him.

[51] On 20 October 2008, he was again booked out of the cells. Once again he was assaulted. He was suffocated with the plastic bag, punched all over his body and slapped. He decided to make a false confession. He claims that when he made the statement Lange never asked him the questions on pages two and three of the standard form which are designed to ensure that a statement is made freely and voluntarily.

[52] To a large extent the admissibility of the statement is dependant on findings of credibility. I found all of the police witnesses, without exception, to be good witnesses. Lange impressed me as a policeman who took his task seriously and completed the preliminaries meticulously – with one exception that does not bear on his credibility. In my view, his evidence must be accepted that accused no. 2 was informed of his rights, told him that he had not been assaulted or threatened and said that he was making the statement freely and voluntarily.

[53] Toto, Fanele and Mxunyelwa gave evidence that was internally consistent and consistent with each other's evidence. No criticism of any worth can be directed at their evidence. Nolangeni and Luka were similarly solid in the witness box and they too could not justifiably be criticized.

[54] The same cannot be said about accused no. 2. His version may best be described as a moving target. His version of a single event seemed to change

whenever he was asked about it. He testified to matters that had never been put to the State witnesses and found himself blaming his counsel every time he got himself into difficulties.

[55] The probabilities are also stacked against him. If he had been assaulted as viciously and as often as he said, it is impossible that no one would have noticed. He appeared in court on four occasions during the period in question and was represented in at least the last three appearances. He lamely claimed that he told his legal representative about the assaults on one occasion but she appears to have done nothing. That is unlikely in the extreme.

[56] For the reasons given above I admitted the statement made by accused no. 2. I turn now to its contents. He told Lange that on an evening in September 2008 in Tambo Village he and a number of others were smoking dagga together when accused no. 1 suggested that they rob 'a Somalian shop' which was in Tambo Village.

[57] They waited until the time decided upon whereupon they forced open the door to the shop. All of them were armed with knives. When they entered they came across what he described as 'three Somalian males and a Somalian female'. They started to stab them. They took two suitcases and two black plastic bags which they loaded with groceries. They also took money which they found in a tin under the counter and under the mattress of one of the beds. They took the spoils to the flat of one of the robbers. They all went their separate ways.

[58] Accused no. 2 testified in his own defence. As with accused no. 1, his defence was an alibi. He met accused no. 1 for the first time on 25 September 2008 at the house of one Siyanda Ncapayi. Accused no. 2 was already there when, between 13h00 and 14h00, accused no. 1, Matyobeni and two others arrived. They proposed an expedition that evening to steal sheep from the farm where Matyobeni worked. It was agreed that they would meet at Matyobeni's house. They did so at about 16h00. The plan was abandoned

because Matyobeni's grandmother would not let him leave the house with the accused.

[59] Accused no. 2 says that he and accused no. 1 left and went to their respective homes. He arrived home at 18h55. He watched television, ate and went to bed. He remained in his house until some time after 07h00. He says that Ms Dunjwa's evidence that he was outside on two occasions in the early hours of the morning is untrue. She may be implicating him falsely because he once had a fight with one of her sons.

[60] I have summarized the evidence of all of the material witnesses. I shall now assess it.

[61] Matyobeni is a self-confessed criminal. Indeed, he admitted to having broken into the shop of the deceased a week before their deaths. It is true that his evidence is not free of blemish but it is corroborated in important respects by his grandmother and by the accused themselves. In essence, the only point of difference is whether they planned to rob the deceased or steal sheep. It is clear that a plan was hatched and that he spoke to his grandmother about it and asked her to forbid him to leave with the accused. In my view, Matyobeni's evidence was satisfactory, despite its blemishes, and I accept his version that the accused were planning to rob the deceased on the afternoon of 25 September 2008. I find that his grandmother was a good witness and I accept her evidence.

[62] I was invited to reconsider my ruling on the admissibility of accused no. 1's pointing out. In my view there is no basis for doing so. When the statements he made during the course of the pointing out are considered, along with the evidence of Superintendent Otto that the blood of one of the deceased was found on the knife he pointed out, the State's case against accused no. 1 is overwhelming.

[63] His alibi must be considered in the light of the totality of the evidence. Accused no. 1 was not a good witness at all. His version chopped and



changed. For instance, he had said in chief that he and accused no. 2 went to Matyobeni's home at a time between 15h00 and 16h00 and that another person -- Marge -- arrived at 17h00. They left the house at 17h30. When he was cross-examined, however, he first said that he and accused no. 2 arrived at Matyobeni's house at 15h00 and that they left five minutes later, leaving Marge behind. Later he changed his version to say that they had left Matyobeni's house at 17h00, having stayed there for two hours. There were also instances in which his evidence contradicted what had been put to Matyobeni. All in all, I found his evidence to be confused and inconsistent. He was, as I have said, a poor witness and in the light of the overwhelming evidence against him, his alibi falls to be rejected as false beyond reasonable doubt.

[64] As for the evidence against accused no. 2, it is not in dispute that he looked after his sister's empty house and had unfettered access to it, being able to enter through the front door if he got the key from Ms Homba or through the window if he did not have the key. I can find no basis for criticism of the evidence of Ms Dunjwa. She struck me as an open and honest witness who had no reason to implicate accused no. 2 falsely. The suggestion that she would do so because her son had once had a fight with accused no. 2 when both of them were drunk is implausible. I accept her evidence that she saw accused no. 2 outside his home on two occasions in the early hours of 26 September 2008 – when he was arriving home and when he was going to fetch water.

[65] As far as the evidence of accused no. 2 is concerned, I am of the view that he was a poor witness. His evidence was contradictory in places and differed in places from what was put to witnesses and what he said in chief. For instance, it was his view that Ms Dunjwa had a motive to implicate him falsely because he had had a drunken fight with one of her sons. That was the version put to her and testified to by accused no. 2 in chief. In cross-examination, however, he said that he had fought with two of her sons at different times. His version of events also differed from the version of events testified to by accused no. 1.

[66] As with accused no. 1, when accused no. 2's alibi is evaluated in the light of the totality of the evidence, it cannot be reasonably possibly true. It is gainsaid by his own confession, the evidence of Matyobeni and Ms Dunjwa, the common cause evidence that accused no. 2 looked after his sister's empty house and the fact that the items stolen from the deceased were found in that house. It is extremely unlikely that someone else would have put the stolen items in the house as they would, inevitably, have been found by accused no. 2 and would have been lost to the person who put them there. All of the evidence against accused no. 2 together forms an overwhelming case against him. His alibi is therefore rejected as false.

[67] The evidence establishes that the accused planned to rob the deceased, armed themselves with knives, broke into the shop and living quarters of the deceased, attacked them with their knives, killed them in the most vicious manner and stole their property. From the fact that the accused armed themselves with knives and from the nature of the wounds sustained by the deceased, the inference is inescapable that the accused had a direct intention to kill the deceased. From the facts it is also clear that they acted with a common purpose with each other as well as with other, unknown, persons to murder and to rob.

[68] As grievous bodily harm was inflicted on the deceased by the accused and their accomplices before or during the robbery, it is a robbery with aggravating circumstances as defined in s 1 of the Criminal Procedure Act 51 of 1977.

[69] In my view, the State has proved its case against both accused beyond reasonable doubt. In the result:

- (a) accused no. 1 is convicted of four counts of murder and one count of robbery with aggravating circumstance, as charged; and
- (b) accused no. 2 is convicted of four counts of murder and one count of robbery with aggravating circumstances, as charged.

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**C. PLASKET**

**JUDGE OF THE HIGH COURT**

**APPEARANCES:**

For the State: Mr G Turner of the Office of the Director of Public Prosecutions, Grahamstown.

For Accused no. 1: Mr A De Jager of the Grahamstown Justice Centre.

For Accused no. 2: Mr C Schuring instructed by the Grahamstown Justice Centre.