HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

Case No: **K/S 30/ 16**

Heard: **20-02-2017 - 03/03/ 2017**

Delivered: **20-03-2017**

In the ma tter between:

THE STATE

v

MOTLHOLO MOSHOLODI Accused 1

FREDDIE BAOBUSI MOLEME Accused 2

JUDGMENT

Lever AJ

1. In this matter accused 1, Motlholo Mosholodi and accused 2 Freddie Gaobusi Moleme, both face two charges. The first charge faced by them is a charge of robbery with aggravating circumstances to which the provisions of the Minimum Sentence Act [1] were referred to as being applicable. The second charge they face is for the murder of Freddie Kgositsile Lebona, again the provisions of the Minimum Sentence Act and more particularly the provisions of s51(1) were referred to as being applicable.

2. Accused 1pleaded not guilty to charge 1, the robbery charge . On this charge, he did

not make a statement explaining his plea. Through the interpreter, it was established that the provisions of the Minimum Sentence Act and its consequences should a conviction follow was explained to him.

3. Accused 1 pleaded guilty to charge 2, the charge of murder. A written plea explanation under the provisions of s 112(2) of the Criminal Procedure Act[2] (CPA) was handed up. Accused 1 identified and confirmed his signature on the relevant statement.

4. He also confirmed that the facts set out in such statement were correct. However, through the interpreter he stated that he did not intend to kill the deceased. The court asked him to explain that statement. He replied that his intention was to injure the deceased. The court then asked him if that was his intention at a particular time and did his intention change at any stage. To which accused 1 replied that when he hit deceased with the two beer bottles his intention was just to injure the deceased, but that later that evening at a place called Marikana his intention changed and from there on he intended to kill the deceased.

5. The said plea explanation was read into the record. The State did not accept this plea and indicated that by way of the evidence available to it, it intended to prove that the murder was pre-meditated or pre planned and that it intended to show that the provisions of s 51(1) of the Minimum Sentence Act were applicable.

6. Accused 1's counsel, Mr Sethotho and accused 1, were asked if the statement made by him under the provisions of s 112(2) of the CPA could be regarded as formal admissions in terms of s 220 of the CPA. Accused 1 agreed to the contents of his statement made under s 112(2) of the CPA being accepted as formal admissions under s 220 of the CPA. The said statement was marked exhibit "A".

7. Accused 2 pleaded not guilty to both charges and indicated that he would not

provide a plea explanation at that stage.

8. At the outset, Ms Van Heerden, who appeared for the State asked the court to place on record that the State intended to rely on the doctrine of common purpose on both charges. The court enquired whether the doctrine of common purpose was explained to both accused and whether they understood its significance. Both accused indicated that they understood .

9. The admissions made by accused 1 are relevant to the case against him and circumstances dictate that I quote the substance of such statement verbatim. It reads:

> "1. I am a 27 year old male person, a South African citizen residing at no [....] M, V. in Jan Kempdorp.
>
> 2. I am the accused person in this matter and I understand the charges against me. I also confirm that the provisions of the Minimum Sentence Act were explained to me by my legal representation. I make this statement freely and voluntarily in my sound and sober senses without being unduly influenced thereto.
>
> 3. I plead guilty to the charge of murder as put to me by the state.
>
> 4. The following is a brief explanation of my plea :
>
> 4.1 On the night in question I was at Chesanyama drinking liquor in the company of accused 2. While enjoying myself one Nzimeni quarrelled with me he had a bottle of beer bottle (sic) and a knife and he wanted to attack me. Iran away, him and the deceased in this matter chased me. The deceased stabbed me on my left thigh with a knife.
>
> 4.2 Iran away and then returned to the tavern after some time. Then I bought myself 2 beers (750ml). I wanted to assault the deceased with the beer bottles;

however accused no 2 said I should not fight him inside the tavern. Then we went outside and drank our beer outside.

4.3 The tavern closed past 2 in the morning. I saw the deceased coming out of the tavern. I then approached him and assaulted him with the two beer bottles on his head. My aim at that moment was only to injure the deceased and not to kill him. Accused no 2 then intervened and said I should not assault him there, but instead we should go and kill him.

4.4 We then dragged him to a place called Marikana, which is in Jan Kempdorp. When we got to Marikana we started stabbing him. After stabbing the deceased we dragged him to the quarry. We threw him inside the water and we used scrap metal and stones to conceal his body.

4.5 I was under the influence of alcohol, but I was still in a position to distinguish between right and wrong.

5. The identity of the deceased is hereby admitted.

6. The post-mortem results and the cause of death are also admitted.

7. I knew my actions were unlawful and punishable before a Court of Law. I also knew that my actions were wrongful.

8. I had the direct intent to kill the deceased due to the number of stab wounds that we (myself and accused no 2) inflicted on the deceased.

9. I am sorry for what I did to the deceased and I ask for forgiveness from the deceased's family and the Honourable Court."

10. During the course of the trial, both accused made certain other formal admissions in terms of s 220 of the CPA, which were signed and handed up as exhibits "E" and "F". Both

accused confirmed their signatures and confirmed the admissions made in the respective documents. The content of each of these documents is identical and the substance of such admissions reads as follows:

> "1. I admit that the deceased in this matter is Freddie Kgositsile Lebona, also known as and referred to as Diego.
>
> 2. I admit that the deceased died on the 21 November 2015 at M, V., in the district of Jan Kempdorp.
>
> 3. I admit that the deceased sustained no more injuries from the time his body was removed from the water hole, known as the 'gwarry', at Masakeng on 21 November 2015 up until the time that a post-mortem was performed by Dr Fouche on 24 November 2015.
>
> 4. I admit that the post mortem performed on the body, marked as Hartswater 113/2015, is that of the deceased, Freddie Kgositsile Lebona.
>
> 5. I admit that the statement by Constable Goitseone Matlawe, as well as the photos and key to the photos (which form part of the photo-album), is correct and that it portrays the scene and items, depicted in the photos, as found by the witnesses. This photo-album which had been provisionally admitted by the Court as Exhibit "C" can therefore be formally admitted into evidence."

11. The State called 12 witnesses, namely: Steven Tebogo Mosholodi (referred to as Steven in the evidence); Tumelo Andries Mali; Titus Thabo Ditaukise Dube (referred to as Dube in the evidence); Joseph Nzimeni Nyakama (referred to as Nzimeni in the evidence); Stella Mali; Dr Lamaine Fouche (the pathologist); Constable Thamsanqa Berry Molo; Constable Iltumeleng Michal Makgaoane; Warrant Officer Willem Kok; Captain

Gaerediwe Annah Makame; Lerato Lebone; and Constable Mothlaba Afrika Futha.

12. The accused, in their defence, both took to the stand to give evidence. The strengths and weaknesses of all of the witnesses as well as the inherent improbabilities or probabilities in their evidence will be considered in due course. It is important to note that a number of issues are not in dispute, which include the following: Both accused place themselves on the scene at the relevant time in the company of the deceased; both accused admit that they hid the body of the deceased in a quarry, which was referred to in the evidence as a "gwarry"; both accused state that the blood stained clothes that they wore on the night in question were found in the shanty of accused number 1; both accused admitted the correctness of the post-mortem report; neither of the accused placed in issue that the knife placed before the court as exhibit 3 was used in the attack on the deceased; and both accused admit that the cell phone taken from the deceased was found and recovered by the police on the roof of accused number 1's shanty.

13. Accused number 1admits to: stabbing the deceased multiple times; walking with the deceased for some considerable distance whilst holding onto the belt of the deceased on the right hand side of the deceased at the hip; and that he and accused number 2 are friends.

14. Accused number 1, in his evidence, and despite what he said in his plea explanation and in clarification of his plea explanation, denied having the intention to kill the deceased and claimed he only intended to handicap or maim the deceased. Accused number 1 denies participating in robbing the deceased of the cell phone he was using and denies participating in robbing the deceased of any property of any description.

15. Accused number 2 denies: holding onto the deceased's belt whilst walking with him;

stabbing the deceased; being friends with accused 1; and robbing the deceased.

16. Accused number 2 admits to cutting the deceased's throat but claims he only did so whilst acting on the instructions of accused 1and whilst under duress from accused 1.

17. The manner in which evidence is to be assessed and evaluated was discussed by the Supreme Court of Appeal in the matter of S v Hadebe and Others[3] where the SCA adopted the approach set out in Moshepi and Others v R and quoted the following passage:

> "The question for determination is whether, in the light of all the evidence adduced at the trial, the guilt of the appellants was established beyond reasonable doubt. The breaking down of a body of evidence into its component parts is obviously a useful aid to a proper understanding and evaluation of it. But, in doing so, one must guard against a tendency to focus too intently upon the separate and individual part of what is after all, a mosaic of proof. Doubts about one aspect of the evidence led in a trial may arise when that aspect is viewed in isolation. Those doubts may be set at rest when it is evaluated again together with all the other available evidence. That is not to say that a broad and indulgent approach is appropriate when evaluating evidence. Far from it. There is no substitute for a detailed and critical examination of each and every component of a body of evidence. But, once that has been done, it is necessary to step back a pace and consider the mosaic as a whole. f that is not done, one may fail to see the wood for the trees. "[4]

18.The SCA in the matter of S v Chabalala[5] expressed itself on the correct method to assess evidence in a criminal trial as follows:

> "The trial court's approach to the case was, however, holistic and in this it was

undoubtedly right: ... The correct approach is to weigh up all the elements which point towards the guilt of the accused against all those that are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and, having done so, to decide whether the balance weighs so heavily in favour of the State as to exclude any reasonable doubt about the accused's guilt. The result may prove that one scrap of evidence or one defect in the case for either party (such as the failure to call a material witness concerning an identity parade) was decisive but that can only be an *ex post facto* determination and a trial court (and counsel) should avoid the temptation to latch onto one (apparently) obvious aspect without assessing it in the context of the full picture presented in evidence. ..."[6] (references omitted)

19. As the State indicated that in respect of both the robbery and the murder charges, it intended to rely on the doctrine of common purpose. The requirements to establish common purpose to rob and murder on the part of both accused 1 and accused 2 need to be established. These requirements must be established beyond a reasonable doubt. These requirements have been restated by the Appellate Division, as it then was, in the case of S v Mgedezi and Others[7], as follows:

" In the absence of proof of a prior agreement..., (an accused) can be held liable for those events, on the basis of the decision in *S v Safatsa and Others* 1988 (1) SA 868 (A), only if certain prerequisites are satisfied. In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of room 12. Thirdly, he must have intended to make common purpose with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a

common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea;* so, in respect of the killing of the deceased, he must have intended them to be killed, or he must have foreseen the possibility of their being killed and performed his own act of association with recklessness as to whether or not death was to ensue. ..."[8]

20. Turning now to the evidence of the first State witness, Steven Tebogo Mosholodi (Steven). Steven is related to accused number 1 and from the evidence appears to be his nephew, although in the evidence he is at times referred to as his brother by some of the other witnesses .

21. Steven's evidence is that he witnessed most of the attack on the deceased and certain other events relevant to this case. He reported the death of the deceased to the deceased's family the morning after the attack. A person by the name of Boetie arrived who called the police. The police came and a knife, which Steven claimed was handed to him by accused number 2 was given to the police. The police were informed of the bag with the bloodied clothing belonging to accused 1 and 2. Steven maintained that the bloodied clothes were concealed in his grandmother's home. According to accused number 1the clothes in the bag were placed behind his bed in his own shanty.

22.Steven gave evidence to the effect that he witnessed accused number 1 throwing the cell phone taken from the deceased onto the roof of his (accused number 1's) shanty. This on the evidence of the police was where the relevant cell phone was recovered.

23. Steven gave evidence that his family was not happy with him giving evidence against his uncle, accused number 1, and in particular an aunt by the name of Molly Mosholodi had put pressure on him not to testify. It was also the evidence of the Investigating

Officer that every time he tried to get hold of Steven to make a statement he was told that Steven was not available and that this was the reason why Steven first made a statement a significant time alter the incident.

24. Turning now to Steven's evidence on the assault leading to the deceased's death. At the time in question Steven admits to being moderately drunk. The incident starts at a tavern referred to as the Cheesanyama Tavern. Steven had been drinking in the Cheesanyama Tavern. At some point the deceased joined him and they drank together . At some point Nzimeni and deceased left his company and went outside. On the deceased's return deceased said that accused 1 and 2 had been fighting with his friend Nzimeni and that he deceased was going to leave with both their heads that night. Steven was under the impression from the changed facial expression of both accused, who were sitting at another table in the tavern, that they had overheard the deceased and that they had become angry.

25.Steven then testified that the tavern closed at some time after 2am. He and the deceased left in a group of people which included his girlfriend and younger brother. His evidence was that they noticed that the two accused were walking behind them and that accused number 2 swore at the deceased and deceased in turn swore at accused number 2. The accused then chased the deceased and after some distance caught him. The accused then disarmed the deceased and threw his knife into somebody else's premises.

26.Steven also testified that the two accused then boxed the deceased in by walking on either side of him. They walked with him in this manner to Nzimeni's parental home. They forced deceased to knock and call for Nzimeni. Nzimeni's younger brother answered but did not open the door and informed them Nzimeni was not there.

27.Then, on Steven's evidence, the two accused still walking on either side of the

deceased walked the deceased to the area of accused number 1's shanty. Each of the accused had a knife and each of the accused stabbed the deceased several times on various parts of his body, including on both sides of the deceased's body. The accused are friends with each other and they cooperated with each other in stabbing the deceased.

28.Steven testified that they ended up in the vicinity of 'Tiger's shanty' where the deceased collapsed. Steven saw the accused bend down and go through the pockets of the deceased and put certain items into their own pockets. He identified the cell phone being removed from the deceased's pocket because the screen lit up when it was removed from the deceased's pocket.

29.Steven assumed the deceased's money was also removed by accused, because he believed that accused had no money at the time and he knew that deceased had money. Furthermore, the accused went drinking the day after the incident. From this Steven inferred that the accused took deceased 's money . Steven also witnessed each of the accused grabbing hold of a leg of the deceased and dragging the deceased in the direction of the quarry.

30.Steven also witnessed accused number 1 throwing the cell phone onto the roof of his shanty. The said cell phone was later recovered from the roof of such shanty.

31.Steven made mistakes in his evidence that are important enough to be noted. He identified one of two exhibits being white all star takkies as being worn by accused number 1 on the night in question. Steven later conceded that accused number 1 was in fact wearing a formal shoe on the night in question, described as black Cavelas.

32.Despite these mistakes, Steven made a favourable impression as a witness. With one or two minor exceptions, he answered questions directly. He conceded when he made a mistake. He was under obvious pressure not to testify. The family member who had asked

him not to testify was in court for the first day of his evidence. His version followed a logical chronological sequence. His version was not materially shaken in cross examination. Material aspects of his version were corroborated by independent witnesses and his version was easily reconcilable with the objective facts that were established during the course of the trial.

33. The next witness called by the State was Tumelo Andries Mali (Mr Mali). Mr Mali testified that he lives in an area of Jan Kemdorp called Marikana. That his nick-name is 'Tiger'. That on the night in question his wife woke him up at around 3 am as she had heard screaming. He, his wife and his brother-in-law went outside. At their fence, they observed two people on the road standing over another person who was lying down. Mr Mali estimated the distance between him and the group on the road to be approximately 4 meters.

34.Mr Mali testified that on the night in question he was unable to identify any of the three persons referred to. His evidence was that he knew accused number 1 because he lived three houses from him, but on the night in question he was not able to recognise him.

35.Mr Mali testified that on the night in question one of the two men searched the pockets of the person lying on the ground. On both the versions of accused 1 and accused 2 they do not dispute that on the night in question and at the said time and place that it was them standing over deceased. It is therefore not in dispute that Mr Mali observed them at the relevant date and time even though he could not identify them at the time.

36.Mr Mali's evidence is that the first thing that was removed was the cell phone from the pocket of the deceased. That when it was removed from the pocket the screen of the cell phone lit up giving some light to the scene. That the light from the cell phone was

used to search the other pocket of the deceased. He believed that money was removed from the other pocket of the deceased.

37. Mr Mali got the impression that both accused were cooperating and taking their time. Further that he believed both accused were aware that they were being watched but that they did not care or have a concern about being observed. He heard the one accused say to the other after the pockets of the deceased were searched "Vat so" and "Vat so" in Afrikaans. The person who took the cell phone out of the pocket of the deceased handed it to the other person.

38. The next witness called by the State was Titus Thabo Ditaukise Dube (Dube). Dube testified that he knew both of the accused because accused number 1 had had an affair with his brother's daughter. Accused number 2 he knew by the name Fifi and he knew accused 2 because he lived in the same area as he did in Masakeng.

39. Dube testified that on the night in question he had been playing pool at the Cheesanyama Tavern with a friend of his named Lesedi. That Lesedi is now deceased. That on the night in question he had not consumed alcohol.

40.That whilst he did not know the deceased he knew the deceased's father. That on the night in question when he left the tavern he saw three people chasing two people. He then came across the two accused, holding the deceased. Dube testified that accused number 2 said the deceased had stabbed him in the thigh.

41.Dube testified that the accused held the deceased, one on the left hand side and one on the right-hand side on his belt, and began to walk with him like that. He tried to intervene by saying to accused number 2 that they should leave the deceased and go to the deceased's parents the next day and inform them what the deceased had done.

42. Accused number 2 then called Dube a 'Frans'. It was explained that a Frans is a person that does not want to become involved in gangs and gangsterism. According to Dube they then walked the deceased away holding onto his belt as described. Dube then testified that as the accused departed with the deceased they said that the deceased was going to take the punishment for the injuries caused by the other boy they were chasing. He testified that they used the term 'gwala' which he understood to mean take the punch for somebody else. This meaning ascribed to the word 'gwala' was challenged and placed in dispute.

43.Dube then said to the accused as they departed with the deceased that if something happens that tomorrow he will tell the police it is the accused that are responsible.

44.Dube in his first statement given to the police did not mention the names of either accused 1 or accused 2 despite knowing their names. The reason given for this was that at the time the statement was made he was afraid.

45. The next witness called by the state was Joseph Nzimeni Nyakama (Nzimeni).

46.The evidence of Nzimeni was to the effect that he was at the Cheesanyama tavern on the night of the 20 November 2015. That at some point he went to the toilet and Steven approached him in the toilet and warned him that accused 1 and 2 intended to kill him and that he should take care of himself. He then left the Chesanyama tavern with the deceased and one Mugabe and went to a different tavern.

47.After some time, the deceased and Nzimeni returned to the Cheesanyama tavern. Nzimeni went outside to urinate and accused number 1 approached him and took out a knife. Accused number 1 referred to an incident that had occurred between them the previous week. Nzimeni broke the beer bottle he had in his possession and was about to use it as a weapon. Accused number 1 ran into the darkness chased by

Nzimeni. Nzimeni was unable to catch or find accused number 1 after that.

48.Returning to the Cheesanyama tavern Nzimeni ran into accused number 2. Shortly thereafter accused number 1 returned and it was Nzimeni's turn to be chased into the darkness and he managed to escape the two accused and reached the safety of his parental home.

49.Nzimeni then slept on the sofa for some time and was awakened by someone knocking on the window. His younger brother answered without opening the door. He heard the deceased's voice asking for him. His younger brother said he was not home.

50. The State then called Mrs Stella Mali, Mr Mali's wife. She testified that during the evening in question she could not sleep. She heard a person scream in pain. She woke her husband, they opened their door quietly and went outside. It was very dark that evening. They could not see very well. She observed three people. The one of them was lying on the ground two people were standing next to him.

51. She saw both who were standing bend down. Although she only saw one persons' hand come out of the deceased's pocket with the cell phone, which lit up, she was under the impression that both persons who bent down had searched the deceased. She also testified that a second item was removed from the deceased's pockets but she could not identify whether it was money or what it was.

52. She then testified that she saw each of the accused drag the deceased by his feet in the direction of the quarry. She could not identify any of the three people at the time because it was dark. They then returned to their home and closed the door.

53. The State then called the pathologist, Dr Lemaine Fouche. After placing her qualifications on the record, she identified her report, read out the main findings and

confirmed them. The post mortem report was not placed in issue by any of the accused and was in fact formally accepted by both accused.

54. Dr Fouche's main findings were that essentially the deceased died from loss of blood caused by the cumulative effect of all of his wounds. Some of the stab wounds were superficial and those wounds were dealt with in groups. Accordingly, Dr Fouche did not give an exact number of the stab wounds suffered by the deceased. She estimated that in all the deceased suffered 49 stab wounds.

55. In the context of the facts in issue in this trial the following findings and opinions of Dr Fouche are significant: The deceased suffered multiple stab wounds; some of the stab wounds particularly the stab wounds on both lateral sides of the deceased are consistent with the State's case that both accused each walked on one side of the deceased whilst holding onto the deceased's belt, and that both accused stabbed the deceased multiple times whilst walking in that way; that whilst some of the wounds were superficial, many were not, such as those that penetrated through the spaces between the deceased 's ribs into his lungs; one of the stab wounds penetrated into the aorta, the major blood vessel responsible for transporting blood from the heart back to the body, just above the heart; it was probable that the deceased suffered over a long period while he was able to walk and function over that period until the blood loss became too severe; and the lack of oxygenated blood flowing to the deceased's brain caused the brain to herniate between the lobes of the brain.

56. The next witness called by the State was Constable Thamsanqu Berry Molo. His evidence was to the effect that he was on duty during the early hours of the 21 November 2015. After receiving a call from the charge office, he went out to the quarry in question where he met Mr Mali. Mr Mali pointed out a place where blood stains were

covered with soil. Mr Mali also pointed out the drag marks that led to the quarry. They followed the drag marks to where the body of the deceased was hidden in the quarry.

57. The photographer and pathologist were contacted. He remained on the scene and was present when the photographer and pathologist arrived. He was also present whilst they went about their business on the scene.

58. The next witness called by the State was Constable IItumeleng Michal Makgaoane. He testified that on his arrival on the scene he found Constable Mola present. He testified that later that day he recovered a cell phone from the roof of a shanty that he identified by way of a photograph. It was later established that this was a photograph of the shanty that belongs to accused number 1.

59. Constable Makgaoane testified that the cell phone was placed in an exhibit bag and handed to Warrant Officer Kok. He also identified the cell phone he recovered by way of a photograph. He was present later in the day when both accused were arrested.

60. The State then called Warrant Officer Kok to give evidence. His evidence was to the effect that he and Constable Makgaoane were on the scene at the quarry. Constable Makgaoane handed him a cell phone which he booked into the SAP13. It was explained that the SAP13 was both a place and a register. He recorded the item in the register himself. He identified the relevant extract of the register and copies were handed in without objection as exhibit "H". He handled other pieces of evidence which he also recorded in the SAP13 register, which included a knife and certain items of clothing that were covered in bloodstains.

61.Further, he took a warning statement from accused number 2. He identified the warning statement. He identified the place where accused number 2 signed the warning statement and he identified his signature on the warning statement. Neither accused

objected to the warning statement being admitted as an exhibit. It was admitted as exhibit "G".

62.Warrant Officer Kok recorded in the warning statement that accused number 2 had shown him certain injuries on both of his arms, being the top of the right arm which was recorded as swollen and on the left arm near the wrist which was also recorded as swollen.

63.Warrant Officer Kok asked accused number 2 how these injuries came about. Accused number two answered that he was injured in that manner whilst fighting with "Lucky" at the Cheesanyama Tavern.In cross-examination W/0 Kok was asked if it was possible he had made a mistake in recording this answer and W/O Kok replied no he wrote down what accused number 2 told him.

64.The State then called Captain Gaerediwe Annah Makame. Her evidence was that on the 21 November 2015 she went to a scene near the shanties in Masakeng. On the scene, she found Constable Makgaoane and W/O Kok. They informed her that that a person had been killed there.

65. A young man approached her on the scene and told her that a cell phone had been thrown on the roof of a shanty . Constable Makgaoane recovered the cell phone from the roof of such shanty.

66. They then went to the shanty of the mother of accused number 1. After tracing the mother of accused number 1, the said shanty was unlocked. In the said shanty, a plastic bag was recovered behind the bed. The plastic bag contained bloodstained clothing. The plastic bag was handed to W/O Kok.

67.The next witness called by the State was Ms Lerato Lebona, the deceased's sister. She identified the cell phone recovered as being her own that the deceased was using on

the night of his death.

68. She also testified that Steven came to their family home on the 21 November 2015 and reported to them that the deceased had been killed and he also informed them of the identity of the killers. He showed the family a knife and according to Ms Lebona Steven informed the family that the knife had been handed to him by accused number 1.

69.The next witness called by the State was Constable Motlhaba Afrika Futha. His evidence was to the effect that he was the Investigating Officer in the matter. He had dealt with the cell phone which was identified by the deceased's sister, Lerato Lebona...

70. Constable Futha also testified that he had great difficulty in contacting Steven to take a statement from him. He testified that an aunt or sister, Molly Mosholodi, indicated that Steven was not living there. Constable Futha contacted the deceased's family and Lerato Lebona informed him that Steven was in fact living there. With the help of Lerato Lebona he managed to contact Steven. Constable Futha was under the impression that Steven's family had influenced him so that he was reluctant to speak to the police.

71. The State then closed its case and accused number 1took the stand in his defence.

72.The evidence of accused number 1 was very close to the version presented by the State. The material differences were that: in his evidence before the court he denied having the intention to kill the deceased, despite having admitted it in his plea as well as in the questioning to explain his plea; he denied taking the deceased to Nzimeni's parental home to have deceased help them get hold of Nzimeni; and he denied having anything to do with robbing the deceased. Accused number 1 denied the contention that Steven had been present and witnessed the assault on the deceased.

73. After giving his evidence, accused number 1 closed his case. Thereafter,

accused number 2 took the stand in his own defence.

74.The evidence of accused number 2 was to the effect that although he knew accused number 1 he was not a friend. The version of accused number 2 was that: that a person by the name of Silasi had taken Steven home earlier in the evening as he was drunk and that he had not been present nor had he witnessed the deceased being walked away and stabbed and assaulted; that Steven had been told what had happened by other witnesses; that Steven's evidence was simply hearsay; he had accompanied accused number 1 and the deceased simply to see what happened to him so that he could give evidence to the police; he did not stab or assault the deceased; he denied holding the deceased on his belt; it was only under duress and under the direct instruction of accused number 1 that he slit the deceased's throat ; he only slit the deceased's throat after checking that deceased was no longer breathing; he denied robbing the deceased and sought to implicate accused number 1 in the robbery of the deceased; after helping accused number 1to drag the body to the quarry and conceal it with various articles he accompanied accused number 1 to his shanty; at the shanty of accused number 1 they bathed and changed out of their bloodstained clothing; they then proceeded to a shebeen and thereafter a tavern where they were arrested later in the morning; despite his evidence that he stayed with accused number 1 and deceased so he could inform the police what had happened, at first he said he did not tell the police what he knew about the deceased's murder because he testified that he was afraid of accused number 1; he then changed this version and said whilst travelling alone with the investigating officer and another policeman he told them everything and despite indicating they would take another statement from him the investigat ing officer failed to do so.

75. Accused number 2 through his Counsel indicated that he intended calling Silasi as

a witness to verify his version that Steven was not present and had been taken home early in the evening because he was drunk . It was placed on record that Silasi was available and that he had been at court. It was also placed on record that after consulting with Silasi a decision was made not to call him to give evidence on behalf of accused number 2.

76.Turning to the version of both accused to explain away Steven's evidence, being that he had been informed by Silasi and Oupa of what happened after he had been taken home because he was drunk. This explanation proffered by the accused does not stand up to scrutiny.

77. There are elements of Steven's evidence that could only have been given by Steven if he was an eyewitness, because Oupa and Silasi even on the version of the accused were not present at the material times. In this regard, I refer to the evidence of the robbery of the deceased and the evidence that the accused took the deceased to Nzimeni's parental home.

78.Furthermore, in the most material of aspects the evidence of Steven was corroborated by Mr and Mrs Mali in so far as the robbery was concerned. Even accused number 2 conceded that Mr and Mrs Mali were telling the truth. Also, insofar as the accused took the deceased to the parental home of Nzimeni, the evidence of Nzimeni corroborates the evidence given by Steven.

79. Further corroboration for Steven's evidence is to be found in the objective facts. In this regard, I refer to the injuries described in the post mortem report and in the evidence of Dr Fouche. The most material aspects of the medical evidence were not placed in dispute and were even admitted by the accused. Specifically, I refer to the evidence relating to the wounds being found on the lateral sides of the deceased's body, which supports the version

given by Steven that each accused held the deceased on one side by the belt and that both accused stabbed deceased repeatedly. In this regard, I also refer to the injuries sustained by the deceased to his back and upper arms, which is consistent with the deceased being dragged away by his feet. Further corroboration of this is to be found in the version of accused number 1 on this aspect. In these circumstances, the explanation tendered by accused number 2 as to how deceased suffered the relevant lateral wounds could not be reasonably possibly true.

80.Furthermore, the cell phone used by the deceased was found on the roof of the shanty of accused number 1. Exactly where Steven said he saw accused number 1 throw it. This is corroborated by the evidence of Constable Magaoane.

81.The cell phone was also identified by the deceased's sister whose evidence was that the cell phone belonged to her and that the deceased was using it on the night concerned.

82. Further, the evidence of Steven is also corroborated by the evidence of Dube. Even though Dube clearly made a mistake in respect of who the deceased had stabbed. His evidence fits in with the other evidence tendered by the State. This is clearly a case of a fluid scene where witnesses observe events at different times in the sequence of the events and from different perspectives and are asked to recall the detail in evidence long after the relevant events.

83.As a witness, Steven answered questions directly. He acknowledged when he made a mistake. He gave evidence against his uncle despite a great deal of pressure from some in his family not to do so. Steven has nothing to gain from implicating the accused without any basis in fact. Steven admitted to being moderately drunk on the evening in question. In the context of his evidence viewed holistically, the mistakes he made and acknowledged,

are not material.

84.There is independent evidence that corroborates the material aspects of Steven's evidence. His evidence is supported by the objective facts and fits comfortably into the chronology of events. In this context, the court accepts the evidence of Steven in respect of: the manner in which accused 1 and 2 escorted the deceased to Nzimeni's house; one of them on each side of the deceased holding the deceased by the belt; getting the deceased to try and help them get their hands on Nzimeni; each of the accused stabbing the deceased repeatedly; taking the deceased to a place outside the house of Mr Mali, who was referred to as Tiger in the evidence; the robbing of the deceased; and the deceased being dragged away by his feet in the direction of the quarry.

85. The version of accused 1is very close to that tendered by the State. He admitted that he and accused number 2 had accosted the deceased shortly after they had left the Cheesanyama Tavern on the night in question. Accused number 1 admitted stabbing the deceased repeatedly. Accused number 1 admitted that the assault terminated outside of the house of Mr and Mrs Mali on the relevant night and that they disposed of the deceased's body in the nearby quarry.

86.In his plea explanation and in the formal admissions made by accused number 1 he conceded that he had the direct intention to kill the deceased. In his oral testimony before this court he denied intending to kill the deceased and maintained that he only intended to maim or handicap the deceased.

87. Having regard to the number of wounds, the position of such wounds on the body of the deceased, the facts that such stab wounds pierced the lungs and the aorta in the vicinity of the heart, the evidence is overwhelming that accused number 1 intended

to kill the deceased and had the direct intention to kill him. Having regard to all of the available evidence in this regard, the State has proved this aspect beyond a reasonable doubt. I reach this conclusion independent of the fact that accused number 1 had already formally admitted that he had the direct intention to kill the deceased and despite the fact that I am entitled to rely on this admission.

88. Insofar as the evidence of accused number 1 corroborates the evidence adduced on behalf of the State, such evidence is accepted.

89.Turning now to the evidence of accused number 2.In short, his version was that he remained with accused number 1 and the deceased to see what happened so that he could give evidence of what happened to the deceased. He denied holding deceased by the belt and also denied stabbing the deceased. At the place where the deceased collapsed, outside the house of Mr and Mrs Mali accused number 2 says accused 1threatened to kill him if he did not slit the throat of the deceased.

90.Accused number 2 made a very poor impression as a witness. On many occasions, he did not answer questions directly. He tried to deflect questions by giving answers that were not directly relevant. He was arrogant and aggressive in responding to questions put by Counsel. On more than one occasion he said that Counsel 'should not think for him'.

91. The version put forward by accused number 2 was littered with inherent improbabilities. Accused number 2 testified that he was not a friend of accused number 1. He tried to create the impression that he somehow landed up with accused number 1 when leaving the Cheesanyama Tavern at closing time even though this did not correspond with evidence he had given earlier. Accused number 2 testified that he stayed with the deceased and accused 1to be able to give evidence against accused 1. Yet when

he made his statement to police he decided to exercise his right to silence explaining that he was in the same cell as accused 1and his life would be in danger if he gave a statement to police.

92.Later in his evidence accused 2 states that whilst travelling in a police van he told the investigating officer the whole story and he was supposed to come and take another statement from him, which never happened. This is an example how accused number 2 embroiled and changed his version during the course of his evidence. This is also an example of one of the inherent improbabilities in his version. If he didn't put it in his earlier statement because he was afraid of accused number 1 and lived in the same cell as accused 1, why would this change at a later stage? Accused number 2 did not give a reasonable explanation to explain this. Furthermore, he could not explain why this was not put to the investigating officer whilst his Counsel cross examined him.

93. There are many other aspects of accused number 2's evidence that are inherently improbable or problematic. Accused number 2 said that accused number 1was handed a sledger. A sledger was described as a long metal instrument with a handle and a curved blade which was used to cut grass or small trees and bushes. That accused 1 attacked the deceased with this sledger and hit the deceased several times with it. The medical evidence showed that there were no wounds on the deceased that would have matched an injury from this type of instrument. When accused 2 was confronted with this he said that he does not know whether accused 1struck deceased with the sharp part or blunt part of the sledger. This is inherently improbable in the light of accused number 2's evidence that accused 1 stabbed the deceased repeatedly. If accused 1 did not hesitate to stab deceased repeatedly with a knife why would he hit deceased with the blunt side of a dangerous instrument which includes a sharp blade.

94.A further aspect of accused 2's version that is improbable is his evidence on how they were searched at the entrance to the Cheesanyama tavern and patrons handed their knives to security. Accused number 2 claimed he did not have a knife. He also claimed that when he left accused 1 retrieved his knife from the tavern security. Later accused number 2 claimed that accused number 1 had a second knife which accused number 1 handed to him to cut the deceased's throat. On the version of accused number 2 and in the light of his evidence how patrons were searched, no reasonable explanation can be given for how accused number 1 came to be in possession of two knives.

95. Accused 2 also related a version where they, on their way came across Oupa, Silesi and Tebogo and that they also assaulted the deceased. This was never put to any of the State witnesses and accused 2 conceded that he had not informed his legal representative of this fact.

96. The whole picture accused number 2 paints is inherently improbable. On his version, he stayed with accused 1and deceased in order to bear witness. He testified that he tried to intervene on various occasions. If accused 2 wanted to assist deceased, he and deceased could have acted together in order to escape accused number 1. The evidence shows that he did not do this. Further, accused number 2 could not give a reasonable explanation for not doing so. This, despite his further evidence that on several occasions he tried to intervene verbally to assist the deceased.

97.The court had the opportunity of observing both of the accused and even though accused number 2 tried to create the impression he was scared of accused number 1, from their behaviour in court and the manner in which they gave evidence it clear that accused number 2 is the dominant personality between the two accused.

98.On looking at the version of accused 2 holistically it stands to be rejected. There is

simply no basis to find that his version is reasonably possibly true. This is particularly so when one considers his claim that he acted under duress. In the light of all of the evidence viewed holistically one can only find that there is no basis to find that the version of accused 2 on his claim of acting under duress could reasonably possibly be true.

99. The evidence shows overwhelmingly that accused number 2 acted in concert with accused number 1, both in respect of the murder of the deceased and in respect of robbing the deceased of his possessions. The evidence establishes the requirements of accused acting in common purpose in respect of both bringing about the death of deceased and robbing him of his possessions. The evidence shows overwhelmingly that both accused 1 and 2 performed various acts of association with both the robbery and the murder. In these circumstances, I find that the State has established, both in respect of the murder and the robbery, that both accused acted with a common purpose.

100. In respect of the robbery charge the evidence of Mr and Mrs Mali corroborates that of Steven in all material respects. They all gained the impression that the accused co-operated with each other in depriving the deceased of his possessions. They could only identify the cell phone with any certainty because the screen lit up when it was removed from the deceased's pocket. Mr Mali testified that the one gave it to the other. Who put it in his own pocket. Steven then gives evidence he saw accused 1 throw the said cell phone onto the roof of his shanty. The said cell phone is recovered from the roof of such shanty which emerges from the evidence of Constable Magaoane. Then Lerato Lebona the deceased's sister identified the said cell phone as belonging to her and that deceased was in possession of it on the night in question. The evidence shows that both accused co-operated in robbing the deceased of the said cell phone which was in his possession at the time.

101. Turning now to the question of whether the State has on the evidence established beyond a reasonable doubt that the accused had pre-planned the murder of the deceased or whether such evidence established that the murder was pre-meditated.

102. In order to examine this question, it is necessary to divide the events of the evening in question into two stages: Firstly, the walk to Nzimeni's parental home to use the deceased to help the accused lay their hands on Nzimeni; and Secondly, when they failed to get hold of Nzimeni the walk to the place where deceased eventually collapsed and met his death. In the first stage the operative motive in injuring the deceased was to motivate him to assist the accused to get hold of Nzimeni.In the second stage when the deceased's *efforts* did not help secure Nzimeni the intention of the accused changed and clearly from their actions the accused wanted to kill the deceased.

103. Analysed in this way it cannot be established beyond a reasonable doubt that the accused had pre-planned or pre-meditated the death of the deceased . The accused are entitled to the benefit of the doubt on this aspect and accordingly this court cannot find that the murder of the deceased was pre-planned or per-meditated.

In the circumstances and for the reasons set out above, both accused are found guilty on both the robbery charge and the murder charge.

L G LEVER

ACTING JU DGE

Northern Cape High Court, Kimberley

Counsel:

For the State: **Adv. A.H Van Heerden**

Instructed by: DIRECTOR PUBLIC PROSECUTIONS

For the Accused 1: **Adv. L. Setouto**

Instructed by: LEGAL AID SA

For the Accused 2: **Adv K. Pretorius**

Instructed by: LEGAL AID SA

[1] S 51of the Crimina l Law Amendment Act 105 of 1997.

[2] Act 51of 1977.

[3] S v HADEBE & OTHERS 1998 (1) SACR 422 (SCA).

[4] S v HADEBE & OTHERS .above at 426 e-h.

[5] S v Chaba lala 2003 (1) SACR 134 (SCA}.

[6] S v Chabalala .,above at pp 139 I to 140 b.

[7] S v Mgedezi and Others 1989 (1) SA 687 (A).

[8] S v Mgedezi and Others., above at 705 i to 706 c.